

State Vs. Sindhi Dalwai

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Court : Mumbai

Decided On : Jan-14-1970

Reported in : (1970)72BOMLR396

Judge : Palekar and ; Gatne, JJ.

Appeal No. : Confirmation Case No. 20 of 1960

Appellant : State

Respondent : Sindhi Dalwai

Disposition : Appeal allowed

Judgement :

Palekar, J.

1. When the above confirmation case was called on for hearing before us, Mr. Mengde, senior advocate, appearing on behalf of the accused, made an application to the Court requesting that the accused, Raman, be medically examined by a competent Board of Psychiatrists in order to determine the present state of his mind.

2. It will be necessary to state a few facts to understand the background of this application. In the months of July and August 1968, there was a spate of murders in the Western Suburbs of Greater Bombay. Offences were duly registered in the

respective Police Stations but the murderer was never found. However, having regard to certain common peculiarities in these murders, superior police authorities suspected, on the basis of the records, the present accused as the murderer. The police were put on his trail, but since the accused had no fixed place of residence and his movements and operations were restricted to nights, the police were unable to catch him. On August 25, 1968, one Manjulabai Dalvi of Kandivli was contacted at about 11 a.m. She was able to give the police information about the dress that he was wearing at the time. This information was flashed to all the Police Stations in Greater Bombay and the whole police force was alerted to be on the look-out for a person of that description. On the night of the same day, i. e., August 25, 1968, there were two more murders in the area. The murdered persons were Lalchand and Dular who were the employees of Dr. Mandlik and were sleeping in a hut close to Dr. Mandlik's stables in Chinchavli, Malad. These murders also bore the same characteristics seen in the previous murders. The situation was utterly baffling. However, on August 27, 1968, when P. S. I. Fialho (P. W. 9) was patrolling along Imamwada Road at about 8 a.m., he saw the accused coming from the opposite direction. Photographs of the accused had been seen by him earlier, and he had also known from the flash received on the evening of August 25, 1968 what were the clothes and the footwear of the accused. He, therefore, recognized him and took him to the Police Station at Dongri. That is how the accused was caught.

3. It appears that in all about 10 cases had been registered against the accused. After the arrest of the accused, investigation in the same was speeded up. One of those cases was 'Malad P. S.C.R. No. 234 of 1968' relating to the murders of Lalchand and Dular. In November, 1968, the accused offered to make a confession. His confession was recorded by Mr. Deware, Presidency Magistrate. The recording of the confession went on for three days before the learned Magistrate. In this confession, which the accused claims to have made voluntarily, he gave the details of all the murders committed by him including the murders of Lalchand and Dular on the night of August 25, 1968. Charge-sheets were filed in all the cases, but the accused was put up for trial for the murders of Lalchand and Dular. In the Committing Court, the accused admitted that he had murdered them. When he was asked whether he wanted the Government to engage a lawyer for

him in the Sessions Court, he replied in the negative. After committal, under the rules of practice, an advocate was appointed at the cost of the State Government since the accused did not engage a lawyer of his own choice. The case came on board for trial before the learned Additional Sessions Judge, Greater Bombay. Mr. Pawar, who was appointed advocate to defend the accused, contacted the accused in the prison on two occasions, and it appeared to him that the accused was of unsound mind and in consequence thereof, he was incapable of making his defence. So on May 80, 1969 he made an application to the Court giving reasons for his opinion and requesting the Court to try the fact of such unsoundness and incapacity as required by Section 465 of the Code of Criminal Procedure. On June 2, 1969, which was the day on which the trial was fixed, the application made by Mr. Pawar was taken up for consideration. The learned Judge also recorded a short statement of the accused in question and answer form. By an order of the same date, the accused was referred to the Police Surgeon, Bombay for conducting an enquiry into the state of his mind. He was asked to certify whether the accused was of unsound mind and whether he was incapable of making his defence. Accordingly, Dr. Franklin, the Police Surgeon, kept the accused under observation from June 3, 1969 till June 23, 1969. He made his notes and gave his conclusions to the following effect :

He is not suffering from any psychosis.

He is not mentally retarded.

His memory is sound.

He possesses average intelligence.

He has sufficient intelligence to understand the nature and object of proceedings against him. He has faced several court proceedings in the past.

He is aware of his own position in respect of the proceedings and has sufficient mind to conduct his proper defence in a rational and reasonable manner.

He has stated to us that he is aware of the nature and purpose of his acts which are the basis of the present proceedings against him.

He is not certifiably insane.

He will be able to stand his trial...

Dr. Franklin was examined and cross-examined in Court on his opinion, and then on July 24, 1969, the learned Judge recorded a detailed order (exh.-II) in which he held that though the accused disclosed some traits of abnormality, he was not incapable of making his defence. In the last part of the order he stated as follows:

I think, the accused has sufficient orientation and memory and insight so that he ought to be able to talk to his counsel, though possibly he displayed certain traits, one about excitability, the other about being violent and may perhaps be having certain strange ideas regarding his standing, his status and his notions about certain things. I am, however, unable to gather that here is a person who is suffering from such unsoundness of mind which prevents him from undergoing the trial...

So the trial proceeded, and when the accused was read over and explained the charge, he made the following statement :

I plead guilty to the charge. I have killed two persons at Chinchavli, Malad. But I do not know their names. I do not know the date when I killed them. I want to cross-examine. I want to know the position of those two persons whom I killed as to how they were lying on the cot.

The suggestion in the last sentence of the above statement may, perhaps, be that the two of them were on the cot in an attitude of gross indecency. It further appears from the record that when his plea was being recorded, the accused also made a statement the substance of which has been recorded by the learned Judge. It is as follows :

Government has provided me with a defence counsel, but Government has not provided me any money for purchasing soap for washing my clothes, etc. Government is giving me food, but Government is not giving me a woman. One year before I had enjoyed a woman, but after my arrest by the police I have not been given any woman, I ask Government to make a bandanas of a woman for

me early.

4. After that the prosecution led its evidence, and the time came for the examination of the accused under Section 842, Criminal Procedure Code. That examination went on for two days. It is a detailed examination. In this statement also the accused admitted having murdered the two persons, and it would appear from the answers given by the accused to the questions put to him that he gave substantially rational answers. Only at the end of his examination, he made some irrelevant and irrational statements. After his examination was over, Mr. Pawar put him in the witness-box for his evidence on behalf of the defence. In his examination-in-chief when asked why he had killed the two persons at Chinchavli, he replied that 'he had killed them because there was a war between the 3 Governments. The British Government, The English Government and third. He also killed them for greed of money. He could not give more details about war.' In cross-examination by the Public Prosecutor he admitted that 'he had known that the stable-owner's man was keeping the income from the stables in a cupboard.' He had gone there for the purpose of committing theft and had to kill the two of them as they were on his way to the place. On the same day, Mr. Pawar made an application to the Court to examine Dr. A. P. Patkar, the Hon. Assistant Psychiatrist, Nair Hospital, Bombay. He also requested that before Dr. Patkar was examined in Court, Dr. Patkar may be given an opportunity to carry out an investigation to determine the accused's state of mind. This application was opposed by the Public Prosecutor. The learned Judge, however, allowed the application, and accordingly Dr. Patkar interviewed the accused at the Arthur Road Prison on August 5, 1969 for about one hour and 20 minutes. After the interview, Dr. Patkar came to the conclusion that the accused must have suffered for a fairly long time from a disease which he described as 'chronic paranoid schizophrenia or Paraphrania.' The object of examining Dr. Patkar as a witness for the accused was to show that the accused, suffering as he did from that disease, was a man of unsound mind, who within the contemplation of Section 84 of the Indian Penal Code, was incapable of knowing the nature of the act, or that what he was doing was either wrong or contrary to law.

5. The learned Judge was not impressed by the evidence of Dr. Patkar, and on the evidence before him he convicted the accused under Section 302, Indian Penal Code and sentenced him to death. The trial before the Additional Sessions Judge thus concluded on August 13, 1969. The accused was duly informed that he could appeal to this Court from his conviction and sentence, but it would appear from his statement made to the Jailor that he did not wish to file an appeal to the High Court. That statement is partly in the handwriting of some jail authority and partly in the handwriting of the accused himself. That part which is in his handwriting is the concluding part of that statement, and in this part he has stated that the 'inquiry made by the Bombay Government was not proper and he did not want to appeal.' But in the previous part of the statement recorded by the jail-authorities, he allowed himself to say that he was the enemy of the world, that he was the enemy of the Government also, and that the 'inquiry' made by the Government and the C. I. D. men in respect of the 'murder' committed by him was not proper. He, however, added that he had committed the murder and was, therefore, prepared to be hanged and did not want anybody's help in the world.

6. Consequently, there is no appeal by the accused before us against his conviction and sentence.

7. The learned Judge has, however, as required by Section 374, Criminal Procedure Code, submitted to this Court the proceedings in which he had passed the sentence of death, and that reference is placed before us for consideration and bears the number of the present confirmation-case.

8. Since the accused was not represented before this Court by a lawyer of his choice, advocate Mr, D. M. Rane was appointed to represent the accused at the cost of the Government, It has been the practice for some years past in this Court for a senior advocate of this Court to appear in confirmation-cases on behalf of the accused assisted by the advocate who is appointed at State expense. Such senior advocates are just *amicus curiae*. They assist the Court in the decision of the case having regard to the seriousness of the proceedings. Mr. Mengde is the senior advocate in the case.

9. The case was fixed for hearing on January 12, 1970. The accused who had been lodged in the Yerawda Central Prison was brought to Arthur Road Prison in Bombay as he expressed a desire to be present at the time of the hearing. Taking advantage of his presence in Bombay, advocate Mr. Rane went to interview him on January 8, 1970. His interview with the accused was not satisfactory and he reported this to his senior, Mr. Mengde. So Mr. Mengde himself went to interview the accused on January 9, 1970. He also made some notes of the interview. Mr. Mengde and Mr. Rane felt that the accused was not in a proper state of mind. They were of the opinion that the accused was not in a position to comprehend the nature of the proceedings against him. They also felt that the accused was not able to communicate intelligently and rationally with them. They thought that his mind was deranged. In the above circumstances, Mr. Mengde has made the application referred to above requesting that this Court should direct a thorough medical examination of the accused by a competent Board of Psychiatrists in order to determine the present state of mind of the accused. The application, however, is opposed by Mr. Dalvi on behalf of the State.

9. Mr. Mengde has informed the Court, apart from the notes which have been also filed, that he got the following impressions after his interview with the accused :-

- (1) That the accused had not filed an appeal because he was prepared to go to the gallows ;
- (2) That the accused was labouring under the impression that an offence of theft was investigated and tried, but the conviction is for murder;
- (3) That the accused gave him the impression that the accused used to receive telephone messages at any time of the day ;
- (4) That the accused had been commanded by God under some law (Kanun) to commit murders ;
- (5) That the accused regarded killing persons as his profession from birth, and that he was committing offences under his own Kanun or law ;

(6) That the accused thought that he was under an agreement with God to commit theft and murder;

(7) That the accused thought that he had the power to transform males into females or other objects ;

(8) That the accused had grudge against every body including his relations and Bhaibands.

Mr. Mengde further informed this Court that the thoughts of the accused were completely disjunctive. He further stated to the Court that he could not have any purposeful communication with the accused.

10. The question for determination is whether, under the law, it is open at this stage of the proceedings to ask for a postponement of the proceedings on the ground that the accused, on account of his unsoundness of mind, is incapable of making his defence. That point had been raised by Mr. Pawar in the trial Court, and was negatived. The result was that the learned Judge proceeded with the trial and ultimately sentenced the accused to death.

11. It is contended by Mr. Dalvi, on behalf of the State, that the postponement of the proceedings under the Code of Criminal Procedure is authorized only by Section 465 of that Code, which says :

(1) If any person committed for trial before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence the jury, or the Court, shall, in the first instance, try the fact of such unsoundness and incapacity, and if the jury or Court, as the case may be, is satisfied of the fact, the Judge shall record a finding to that effect and shall postpone further proceedings in the case and the jury, if any, shall be discharged.

(2) ...

The contention of Mr. Dalvi is that Section 465, Criminal Procedure Code applies only to a trial before a Court of Session or High Court. It does not apply to any proceedings after the trial. The proceeding before us according to him is a

proceeding known as a confirmation-proceeding under Chapter XXVII of the Code of Criminal Procedure and cannot be regarded as a trial. In this connection, he invited our attention to Part 'II' of Chapter XXIII of the Criminal Procedure Code which deals with the trials before High Courts and Courts of Session. Section 809 comes under this Part 'H' which deals with the subject 'Conclusion of trial in cases tried by the Judge himself.' It is as follows :

(1) When, in a case tried by the Judge himself, the case for the defence and the prosecutor's reply (if any) are concluded, the Judge shall give a judgment in the case.

(2) If the accused is convicted, the Judge shall, ... pass sentence on him according to law.

And when this is done, according to Mr. Dalvi, the trial is concluded. The sentence, even of death, has got to be passed by the Sessions Judge at the conclusion of his judgment, and, therefore, so far as the Sessions Court is concerned, the trial must be regarded as concluded. According to Mr. Dalvi, Chapter XXVII of the Code contains a series of sections which directly deal with the question of confirmation of death sentences by the High Court, and such a proceeding in the High Court is neither a trial nor an appeal. The object of making this application for the medical examination of the accused is to seek a postponement of the confirmation proceeding in the event of the results of the medical examination being in favour of the accused. And since a postponement is possible only under the provisions of Section 465, Criminal Procedure Code and no other provision of the Code, the medical examination would be of no relevance. No provision in Chapter XXVII dealing with the confirmation of sentences permits the postponement of the proceeding on the ground that the accused is of unsound mind and in consequence thereof is unable to defend himself. It was, hence, contended by Mr. Dalvi that there was no point in a medical examination.

12. On the other hand, it is contended by Mr. Mengde that the confirmation proceedings are in reality a continuation of the trial. A trial in a criminal case really comes to a conclusion after an executable sentence is passed. The Sessions Judge, no doubt, passes the sentence of death, but that really does not conclude

the trial. That sentence is always subject to confirmation by the High Court, and as long as that sentence is not confirmed by the High Court, the accused is still on trial. Section 309 may generally be said to provide for the conclusion of a trial before the Sessions Court, because ordinarily sentences imposed by the Sessions Judge are not required to be confirmed by the High Court. The sentences take effect immediately after the judgment is delivered and the sentence is passed. But we have to consider all the provisions of the Criminal Procedure Code together, and, when we do so, we find that though ordinarily it can be said that a trial is concluded after the Sessions Judge pronounces the sentence, there is an exception made with regard to the death sentence, which does not take effect and does not become operative till that sentence is confirmed by the High Court. Therefore, so far as the accused is concerned, he is still in the process of the trial, and, therefore, Section 465, Criminal Procedure Code will have to be given its due effect. There is no dispute that when a person is tried by a Sessions Court and it appears to the Court at any stage of the trial that the accused is of unsound mind and, therefore, incapacitated for making his defence, the Court must record a finding as to his mental condition and capacity, and if the finding is that in view of his mental condition he is unable to defend himself, the Sessions Court has no alternative but to postpone the trial. Few occasions of this nature arise. Ordinarily, sessions cases do not take more than a few days for their disposal. Generally, therefore, an application under Section 465, Criminal Procedure is made at the beginning of the trial.

13. But this cannot be the rule. It is conceivable that sessions cases may not be concluded in a short sitting. We know that cases go on for months. An accused may, in the course of the trial, show signs of unsoundness of mind and then also it will be incumbent on the Court to decide the question under Section 465, Criminal Procedure Code. For the matter of that, the question may even arise just before the learned Judge proceeds to deliver his judgment and pronounce the sentence. Even in such cases, it will be incumbent upon the Court to give a definite finding as to the mental state of the accused and his capacity to defend himself and postpone the trial. It is, therefore, clear that Section 465, Criminal Procedure Code imposes an obligation on the Sessions Court to decide the fact about the unsoundness of the mind of the accused at every stage of the trial whenever such

a question arises. Mr. Mengde, therefore, argues that if this is the position, there should be really no reason why, till the final order of the sentence is passed, it should not be brought to the notice of the Court that the accused is of unsound mind and, therefore, incapable of making his defence. In short, it is his submission that till an executable sentence is passed as a result of the trial, part of which takes place in the Sessions Court and part in the High Court, it is incumbent on the Court at any stage of the trial to find out the fact whether the accused is of unsound mind, and if the Court is satisfied about it, to postpone the hearing. In support of his contention, Mr. Mengde also invited our attention to Section 375 (1), Criminal Procedure Code which provides that when the proceedings are submitted by the Sessions Court to the High Court under Section 374, Criminal Procedure Code, the High Court, if it thinks that a further inquiry should be made, may direct that additional evidence be taken on any point bearing upon the guilt or innocence of the accused. In the context, additional evidence means further or more evidence, such evidence being read along with the evidence which has been already recorded by the Sessions Court. When such evidence is recorded, it is usual to examine the accused with regard to this additional evidence, and thus it is clear from Section 375 that before taking action in the proceedings under Section 376, Criminal Procedure Code, some part of the trial is held in the High Court. The trial not having concluded, if it appears to the High Court that the accused is of unsound mind and thus incapacitated from making his defence, it would be, in the submission of Mr. Mengde, incumbent on the High Court to come to a definite finding regarding the mental condition of the accused. To emphasize his argument, he put forward the case of an accused who became of unsound mind after hearing the sentence of death pronounced against him by the Session Judge. In such a case, in his submission, it would be obligatory upon this Court to postpone the hearing because it would be tantamount to denying the accused a reasonable opportunity to make his proper defence. The question then is not whether a particular provision in the Criminal Procedure Code permits such a procedure. It will be a matter of affording justice to the accused. And if there is no specific provision in the Code of Criminal Procedure, it is always open to the High Court, either in appeal or in a confirmation proceeding to fall back upon the inherent powers of the Court under Section 561A, Criminal Procedure Code to

secure the ends of justice.

14. We think there is considerable substance in this approach. As a matter of fact, in *Jumman v. The State of Punjab* A.I.R. [1957] S.C. 469, the observations of their Lordships are to the effect that (p.472) :

It is clear from a perusal of these provisions (in Chapter XXVII, Criminal Procedure Code) that in such circumstances the entire case is before the High Court and in fact it is a continuation of the trial of the accused on the same evidence and any additional evidence and that is why the High Court is given power to take fresh evidence if it so desires.

Indeed, the question did not arise before the Supreme Court in the form it has arisen before us. But these observations, though considered obiter, are binding on us, and since it is reasonable to hold that the trial so far as the accused is concerned is not concluded until an executable sentence is passed against him, there is really no impediment in holding that the trial continues so as to attract directly the provisions of Section 465, Criminal Procedure Code. For that matter, it is common ground that Section 465 does not directly apply to an appeal; and the question has arisen in the Calcutta High Court and the Supreme Court as to what would be the position if an accused becomes of unsound mind and is incapable of defending himself pending the appeal. In *Sundaram v. State* : AIR1960 Cal395 , the accused had been sentenced to death by the Sessions Judge of Andaman and Nicobar Islands. The appeal lay to the Calcutta High Court. There was also a reference under Section 874, Criminal Procedure Code. After the reference, the accused was reported to be of unsound mind. The question was whether the trial could be postponed when the accused was not in a position to defend himself. The learned Judges held that the Court was bound to afford the accused the same protection to which he would have been entitled had he been of unsound mind at the time of the trial. The appeal and the reference could not be disposed of without giving the appellant a hearing. The learned Judges pointed out that the High Court has the inherent power, *ex debito justitiae*, to postpone the hearing of the appeal and the reference until such time as the appellant should be found to be of sound mind again and thus capable of making his defence. This decision was approved

by the Supreme Court in *Vivian Rodrick v. State of West Bengal* (1969) Criminal Appeal No. 190 of 1968, decided on April 30, 1969 (Supreme Court). In that case Vivian Rodrick was sentenced to death by the Calcutta High Court in the IV Criminal Session of 1964. There was no reference to a Division Bench of the High Court, and such an appeal was filed by the condemned accused. The appeal was placed in the Warning List of July 1, 1967. In the meantime, reports were received from the jail where the accused was lodged that he was of unsound mind. On July 18, 1967, the Division Bench considered the question as to whether the appeal is liable to be proceeded with. It appears that the learned Counsel who were appointed at State expense for the defence of the accused, the Legal Remembrancer who appeared on behalf of the State, and even a representative of the local Bar, who was requested to assist the Court on behalf of the Bar, agreed that it was not necessary for the Division Bench to stay the proceedings, the reason apparently being that Section 465, Criminal Procedure Code had no application. The Division Bench agreed with that view and after posting the case for hearing disposed of that appeal confirming the death sentence. The case went to the Supreme Court by special leave. Their Lordships did not want to express any opinion whether Section 465, Criminal Procedure Code applied to appeals, but they were clearly of the opinion that since the Division Bench was concerned both with questions of law and fact, and since the lawyer appearing for the accused could not obtain proper instructions on account of the unsoundness of mind of the accused, it must be held that no effective opportunity in the matter of hearing the appeal had been provided to the accused. Their Lordships observed that when the report is that the accused was of unsound mind, it was reasonable to infer that he was incapable of making his defence. They further held that the Court was bound to afford him the same protection to which he would have been entitled had he been of unsound mind at the time of the trial. In the case before us, even if it is assumed that the proceedings for confirmation under Chapter XXVII is not a continuation of the trial, the proceeding under that chapter stands on no worse footing than an appeal. It provides for the recording of additional evidence, and the powers under Section 876, Criminal Procedure Code are analogous to the powers which the appellate Court has under Section 428, Criminal Procedure Code in the disposal of an appeal. Under Section 876, Criminal Procedure Code,

the High Court may confirm the sentence or pass any other sentence warranted by law, or it may annul the conviction and convict the accused of any offence of which the Sessions Court might have convicted him or order a new trial on the same or an amended charge or even acquit the accused. That being the position, we see no good reason why, because the confirmation proceeding is described neither as a trial nor an appeal, the principle of protection of the accused, which is afforded by Section 465, Criminal Procedure Code, should not be extended to an accused in confirmation-proceeding when it has been made to appear to the Court that at the time when these proceedings are before the Court, the accused has become of unsound mind and thus incapacitated to defend himself.

15. The situation which has arisen in the present case is rather peculiar. In the first place, there is no appeal by the accused, and we are merely concerned with the confirmation-proceeding under Chapter XXVII of the Code of Criminal Procedure. In the second place, the plea of unsoundness of mind of the accused had been raised before the Sessions Court, but that plea had been negatived. But that should really make no difference. It may well happen that even after a plea of unsoundness of mind is negatived, genuine indications of insanity may be observed in the course of the trial and then it would not be open to the Sessions Judge to say that since that plea had been at one stage negatived, he is no longer obliged to consider whether the accused has now become of unsound mind and is, therefore, incapable of defending himself. The same principle should apply, as we have pointed out above, whether the case is in appeal to the High Court or by way of a confirmation proceeding. The principle is that the accused cannot be condemned unless he has been given an effective opportunity to defend himself. Therefore, on general grounds also, it will be necessary for the High Court, even in confirmation proceedings, to decide, before confirming the death sentence, whether the accused is incapacitated to defend himself.

16. It was, however, argued by Mr. Dalvi that even assuming that Section 465, Criminal Procedure Code or the principle thereof applies in this case, there was really no warrant for entertaining the application made by Mr. Mengde for the medical examination of the accused. He pointed out that the notes made by Mr. Mengde and Mr. Rane after their interview with the accused do not disclose any

material which had not been noticed earlier by the learned Sessions Judge when he had negatived the plea. Under Section 465 (2) of the Code, the finding about incapacity becomes part of the trial and it was open to the counsel for the accused to challenge that finding here and obtain a postponement of the trial. But if the intention is to obtain a postponement on the basis of the present state of mind, fresh ground should be made. In his submission, there should be new and more effective material in order to persuade this Court that he is of unsound mind, because the learned Sessions Judge, after applying his mind to the same material which is now being put forward, had concluded against the accused. His fear is that such an application would be made every other day and then there would be no end to such applications. He, therefore, contends that the application should not be entertained. We are afraid that such a plea of estoppel by res judicata cannot or ought not to be advanced in such a case. It goes without saying that whenever any reliable material is placed before the Court about the incapacity of the accused, we have to satisfy ourselves about that incapacity. If irresponsible applications are made, the Courts know how to deal with them, but because such a procedure may lead to an abuse in some cases, we cannot reject the application as a matter of law on the ground that a finding had been already given against the accused. The question is, as already pointed out, whether an effective opportunity must be given or not. If, as in this case, the learned Counsel is unable to hold any purposeful communication with the accused because of his unsoundness of mind, it is reasonable to infer that by reason of unsoundness of mind the accused is not in a position to make his defence. One should guard against confusing the principle of Section 84, Indian Penal Code with the principle of Section 465, Criminal Procedure Code. Section 84 deals with a case where an act, which would have been otherwise an offence, is not an offence. An offence ceases to be an offence if a person committing that offence by reason of unsoundness of mind is incapable of knowing the nature of the act, or that what he is doing is wrong or contrary to law. For the purposes of Section 465, Criminal Procedure Code, the quality of unsoundness of mind is different. Here we have to assess the quality of unsoundness of mind with reference to his capacity to defend himself. That involves a very much narrower issue than what is involved in Section 84, Indian Penal Code. It is not as if the accused is not to be tried for the offence at all. When

he recovers, he is liable to be tried and the trial is bound to be proceeded with under Section 468, Criminal Procedure Code.

17. Nor will it be proper to expect the learned Counsel to place additional facts before the Court in order to obtain an order for medical examination. In the present case, learned Counsel are not in a position to obtain facts about the case except through the accused. The statements made by the accused in the trial Court clearly go to show that he has no near relatives or friends whom the learned Counsel could approach for more facts. And, if in these circumstances, the accused himself is uncommunicative not because he does not want to take part in the proceeding but because of his mental derangement, it would be impossible for the counsel to place additional facts before the Court, additional in the sense that they are other than those which had been already placed before the Sessions Court. It is all a question of personal impressions. The learned Counsel is entitled to come to his own conclusion with regard to the capacity of the accused, from his general behaviour, talk, conduct, etc., and, it is on these impressions that the learned Counsel tells the Court that he found the accused as being of unsound mind. It is true that the learned Judge has given a finding on facts as placed before him, but there can be no contradiction between the two. In one case, we have the impressions of a responsible senior counsel. On the other hand, there is a finding on the evidence. One cannot cancel the other. The real point is whether from what the learned Counsel tells the Court, the Court feels, *prima facie*, that this is a matter to be enquired into. Mr. Mengde fairly stated to the Court that he would not be in a position to say whether the accused is not feigning, but he cannot assume also that he is feigning unsoundness of mind. He does not claim to be infallible. That is just the reason why he says that he is requesting the Court to get the man examined properly so that the Court is in a position to come to a definite finding of fact as to whether the accused is incapacitated to defend himself. It would be only fair to observe that when a senior counsel of this Court, who appears as *amicus curiae* in order to assist the Court, tells the Court about his personal assessment of the condition of the mind of the accused, the Court should, *prima facie*, feel that here is a matter which ought to be investigated. We have already pointed out that even for the limited purpose of the confirmation proceedings, we would like to be satisfied that the accused gets an effective opportunity, and, therefore, apart from

what the learned additional Sessions Judge appears to have found, we will have to enquire further.

18. At the same time, it is necessary for us to record that Mr. Mengde does not want to give up his right to challenge the finding of the learned Judge at this stage. He says that he is in a position even on the material before the learned Additional Sessions Judge to show that the trial was vitiated or void for the reason that the accused was incapacitated to defend himself. He restricts his present plea to the current condition of mind of the accused so far as it is relevant to the confirmation of the sentence, and, in support of this restricted plea, he has referred to a number of points which are disclosed on record. He has referred to his early up-bringing, his long prison-life, prior uncontrollable behaviour, the impressions of Mr. Pawar when he was defending him in the trial Court, some of the awkward statements made by the accused during the course of the trial, and the opinion, of a practising Psychiatrist, Dr. Patkar, who has described him as suffering from 'chronic paranoid schizophrenia' or 'Paraphrania.' He has also referred to the finding of the learned Judge that the accused disclosed some abnormal traits and further in the judgment that he was a psychopath. Indeed, all these points to which reference has been made are not made with a view to challenge the finding at this stage but just to show that his present impressions during the interview with the accused are to some extent supported by the points to which reference has been made. His chief anxiety is that the accused, who is under sentence of death, should not be deprived of an effective opportunity of defending himself on the mere ground that at some stage of the trial, the learned Judge was pleased to negative the plea. We think, there is considerable force in the points made by Mr. Mengde, and ends of justice require that if a responsible lawyer of this Court feels that the accused is of unsound mind, it will be necessary for this Court to investigate into the matter. Luckily, trained psychiatrists are available in Bombay, and they would be in a better position to pronounce upon the state of mind of the accused than an ordinary medical practitioner.

19. We, therefore, consider that the application made to us must be granted, case of the accused be referred to the Surgeon-General, Bombay, to constitute a special Medical Board of three Psychiatrists on the lines contained in Rule 850 of

the Bombay Jail Manual, 1955, which should be guided by the procedure laid down therein. Two names of Consulting Psychiatrists have been suggested to us, both on behalf of the accused and the State. They are, Dr. Bagadia and Dr. Marfatia. If they are available, they may be appointed on the special Medical Board, Otherwise, the Surgeon-General may constitute that Board by appointing three recognized Psychiatrists on it with a view to determine whether the accused is of unsound mind, and, secondly whether in consequence of his unsoundness of mind, he is incapable of making his defence in the proceedings before us. The Mental Specialist selected by the Surgeon-General shall examine the accused in Arthur Road Prison where he shall be continued in detention pending further orders. The report of the Board to be submitted to this Court within 15 days.

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