

State Vs. Abdul Rahaman Mandal

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Court : Kolkata

Decided On : Aug-07-1953

Reported in : AIR1953Cal792

Judge : Guha Ray and ;Debabrata Mookerjee, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 211, 212, 215 and 537

Appeal No. : Criminal Reference No. 2 of 1953 and Appeal No. 132 of 1953

Appellant : State

Respondent : Abdul Rahaman Mandal

Advocate for Def. : Annada Majumdar, Adv.

Advocate for Pet/Ap. : N.K. Sen, Adv.

Disposition : Appeal dismissed

Judgement :

Guha Ray, J.

1. Abdul Rahaman Mandal alias Rahim Mandal was put on his trial before an Addl. Judge, 24 Parganas, sitting with, a Special Jury under Section 302, I. P. C., and convicted under that Section on the unanimous verdict of the jury and sentenced

to death. The proceedings have been submitted to this Court under Section 374, Cr. P. C., for confirmation of the death sentence and Abdul Rahaman. Mandal has also preferred an appeal so that the entire case is now before us.

2. The case for the prosecution briefly is that Abdul Rahaman Mandal used to stay in a south-facing pucca room along with his son. Fate Ali aged about 12, and Arfan Bibi, his daughter, used to stay in another hut in the same compound with her husband Miajaddin, Mondal. On 4-2-1953, in the afternoon Moslem Mondal of Bishnupur who was the husband of a sister of Miajuddin's father visited the house of Abdul Rahaman Mandal, took his meal there at night and slept on a separate bed in the-same room where the accused Abdul Rahaman Mandal slept with his son Fate Ali on a different bed. At about 1.30 a.m. that night Fate Ali woke up on hearing a groaning sound and in the light of the hurricane lantern burning inside the room he saw his father striking Moslem Mandal with a Hesho which is a kind of daq. On seeing that he started crying out and his father asked him not to cry out like-that and at the same time threatened to kill him if he went on doing so. He then caught hold of Fate Ali by the hand but Fate Ali somehow succeeded in opening the door with his left hand. His cries had meanwhile brought Arfan Bibi and Miajaddin near the room where the incident took place.

When Miajaddin saw the accused catching: hold of Fate Ali he released him from his grip and Fate Ali went outside and raised a hue and cry. The accused then struck Miajaddin with a baton and Miajaddin fell down on the court-yard while t he accused sat upon his chest and tried to throttle him. Meanwhile some neighbours of the accused came along on hearing the hue and cry raised by Fate Ali and his sister Arfan Bibi, released Miajaddin from the grip of the accused and tied him to a plantain tree with a rope. Moslem Mandal had died on his bed inside the room as a result of the injuries he had received and a bloodstained spade (Ex. I), a blood-stained Hesho (Ex. II), and a Chheni (Ex. III) were found lying close to the dead body of Moslem Mandal. To the neighbours who had assembled on hearing the cries of Fate Ali and Arfan Bibi, Fate Ali is alleged to have stated that it was his father who had killed Moslem Mandal. One of the neighbours was Narendra Krishna Halder. He sent for the Chowkidars and when the Chowkidars arrived he himself left for Rajar-hat Police Station which was about 5 miles away & reported

the occurrence at 4.30 a.m. The Sub-Inspector after having recorded the first information report arrived at the place of occurrence next morning, held an inquest on the dead body of Moslem Mandal which was lying inside the room of the accused and sent it for post mortem examination to Basirhat. The Sub-Inspector found the accused tied to a plantain tree with a rope, took him into custody, seized the blood-stained spade and the bloodstained Hesho, Exhibits I and II respectively, and the Chheni, Ex. III, and certain other Alamats. Miajaddin who had been roughly handled by the accused, and the accused himself were also sent for examination of their injuries by a Doctor of Rajarhat viz., Dr. Tara-nath Bhattacharya, and the blood-stained clothings etc., were sent to the Chemical Examiner for examination and report. The Police after investigation submitted a charge sheet against the accused.

3. The defence of the accused was that he was not guilty. In the cross-examination of the witnesses - various suggestions were thrown out viz., that the occurrence did not take place in the room of the accused as alleged by the prosecution and that Moslem Mandal was murdered elsewhere and that the accused was falsely implicated at the instance of Narendra Krishna Halder and Abdul Sattar who wanted to grab the homestead and the land of the accused. The accused, however, in a lengthy statement under Section 342, Cr. P. C., said that when Moslem Mandal was introduced to him by Miajaddin as an intending purchaser of his property and was asked to sleep in his room, the accused objected because Moslem Mandal was stout and strong but as no heed was paid to his objection and Moslem Mandal was allowed to sleep on a different bed in the same room, he himself could not sleep out of fear and sat outside the mosquito curtain under which his son Fate Ali was sleeping. At about 3 a.m. Moslem Mandal came to assault him with a knife and so for fear of life the accused aimed a blow with a Hesho at the leg of the customer but he could not definitely say on which part of the body of the customer that blow actually fell. Then his son Fate Ali woke up and either he or his son Fate Ali opened the door when Miajaddin and another ' man entered the room and started beating him, and one Budha Mandal protested but Miajaddin said that as the accused had murdered a man there was no reason why he should not be beaten. The accused further said that he became unconscious as a result of the assault and he did not recover consciousness till

the next morning when he found many other persons assembled in the house.

4. Before dealing with the facts and the evidence in the case it is necessary to dispose of the last point raised by Mr. Majumdar on behalf of the accused, because if that point succeeds, the conviction of the accused and the sentence would have to be set aside.

5. The point which Mr. Majumdar barely raised rather than fully argued is that after a charge was framed against the accused by the committing Magistrate he did not ask him as required by Section 211, Cr. P. C., to submit a list of defence witnesses, and that being so, the Magistrate did not comply with the provisions of Sections 211, 212 and 213, Cr. P. C., so that the commitment was made in disregard of the provisions of these Sections. It is the contention of Mr. Majumdar that not merely the commitment was illegal but the illegality of the commitment affected the entire trial so much so that the whole trial was vitiated by it. In support of his contention he relied on the case of -- 'Kashinath Das v. Kalipada Das', : AIR1953 Cal12 (A); -- 'Sripati Dulay v. The State', : AIR1953 Cal10 (B) and certain un-reported decisions viz., -- 'Renuka Bag v. The State', Cri Revn No. 42 of 1952 (Cal) (C);-- 'Radharani Dassey v. The State', Cri Revn. No. 1083 of 1951 (Cal) (D) and -- 'Satyahari Choudhury v. The State', Misc Case No 290 of 1951 (Cal) (E). These were cases in which petitions were filed for quashing the commitment made in disregard of the provisions of Sections 211 and 212, Cr. P. C. It was held in all these cases that Sections 211 and 212, Cr. P. C., are substantial provisions of procedure, non-compliance with which vitiates the commitment and the illegality is not curable under Section 537 Cr. P. C. In all these cases the question was raised before the accused were actually placed on their trial and the commitments were quashed with directions that the provisions disregarded should be duly complied with and the cases disposed of in accordance with law. In none of these cases the question arose as to whether the illegality involved which vitiated the commitment would go to the length of vitiating the trial also. The question, therefore, raised before us is much more fundamental than the question with which this court was confronted in the cases referred to. We have, therefore, given an anxious consideration to the point.

6. The question whether the illegality complained of which was held to vitiate the commitment would also vitiate the trial depends on the nature of the illegality and we have-therefore, to examine the question at some-length.

7. In the English Courts a distinction has always been recognised between two classes of mandatory provisions of law, one being termed absolute and the other merely directory. Provisions of law which were held to be absolute in their character involved a nullification of subsequent proceedings if they were not obeyed. Provisions, however, which were merely directory in their character do not involve any such consequence. This distinction has also been recognised in this country. We shall only refer to some of the important cases on this point in England and in this country. One of the earliest cases in England is -- 'Rose v. Londale', (1758) 1 Bunns 445, at p. 447 (F). In this case two Justices of the Peace appointed 5 overseers of a Parish while the statute provided a maximum of 4 appointed within a particular time and the question was if this could be legally done. Lord Mansfield in quashing the order observed:

'There is a known distinction between circumstances which are of the essence of a thing required to be done by an Act of Parliament and clauses merely directory. The-precise time, in many cases, is not of the essence.'

8. The next important case on the point is -- 'Pearse v. Morrice', (1834) 2 A & E 84, at p. 96 (G). In this case the relevant statute made rent payable to the Treasurer of the Trustees and unless payment was made to him according to the terms of the sections, the lease, contract or agreement would be null and void to all intents and purposes 'whatever. Taunton J., in deciding that this provision was absolute observed as follows :

'There may be many reasons why it should be desirable to make the rent payable to the treasurer only. But looking into the words of the Act, if they are not obligatory, I cannot conceive to myself any words which can have a prohibitory force. The distinction between directory and imperative statutes has long been known. * * * I understand the distinction to be, that a clause is directory where it contains a mere matter of direction and nothing more, but not so where they are followed by such words as are used here viz., that anything done contrary to such

provisions shall be null and void.'

The next important case on the point is --*Liverpool Borough Bank v. Turner*', (1861) 30 LJ Ch 379 at p 380 (H). The question here was whether there could be a mortgage of a ship without the formalities required by the Merchant Shipping Act, and in deciding that there could not, Campbell L.C., said:

'The forms of transfer and mortgage required by Sections 55 and 66 must be substantially followed although there be no negative words declaring that all transfers and mortgages in any other form shall be null and void. No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.'

In -- '*Wood-word v. Sarsons*', (1875) LR 10 CP 733, at p 746 (I), where the question was whether the rules and forms contained in the schedules of the Ballot Act were directory only or not, the Ballot Act having been divided into two parts, one containing the number of sections & the other containing two schedules of certain rules and forms, and one of the sections providing that the schedules and the notice thereto and the directions therein shall be construed to have effect as part of the Act, Lord Coleridge C. J., says:

'The general rule is that an absolute enactment must be obeyed and fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.'

9. It is clear from these cases that in England the distinction was long recognised between provisions of law held to be merely directory and those that were held to be absolute or imperative. This distinction has been recognised in India also. In -- '*Shripad Amrit v. Harsiddhbhai Divatia*', AIR 1948 Bom 20 (J) and -- '*Giridhari Dhal v. Hrishikesh Roy*', : AIR1952 Ori176 (K), some of these cases were referred to and this distinction was recognised. In these cases also it was held that where the provisions of the statute are of an imperative character, disobedience or contravention thereof results in the invalidity of the subsequent proceedings, but

where they are merely directory no such consequence is involved. It was further held there that in deciding whether a provision of law is directory or imperative, one has to look into the entire scope of the provisions in question.

10. Sections 211 and 212, Criminal P. C. have now to be examined in the light of the principles laid down in the cases cited above and the question we have to put ourselves is, 'do Sections 211 and 212, Cr. P. C., lay down one of those imperatives of law, contravention of which must mean a nullification of all subsequent proceedings?'

11. Sections 211 and 212 appear in Chapter 18 of the Code, a Chapter which bears the heading: 'Of Inquiry into cases triable by the court of Session or High Court.' Section 206 with which the Chapter opens lays down that certain Magistrates may commit any person for trial to the court of Session or the High Court for any offence triable by such court. In other words, this is the Section giving jurisdiction to the Magistrates concerned for committing for trial to the Court of Session or the High Court. Then Section 207 is as follows:

'The following procedure shall be adopted in inquiries before Magistrate where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such Court.'

The sections that follow Section 207 are the sections which lay down the procedure for an enquiry into cases triable by the Court of Session or the High Court. Section 208 says how evidence is to be taken and Section 209 empowers the Magistrate to discharge the accused, if after he has taken the evidence for the prosecution and for the defence, if any, he thinks there are not sufficient grounds for committing the accused. Section 210 entitles the Magistrate to frame a charge if he is satisfied that there are sufficient grounds for committing the accused for trial and then follows Section 211 which is as follows :

'(1) The accused shall be required at once to give in orally or in writing, a list of the persons (if any) whom he wishes to be summoned to give evidence on his trial.

(2) The Magistrate may, in his discretion, allow the accused to give in any further list of witnesses at a subsequent time; and, where the accused is committed for trial before the High Court, nothing in this Section shall be deemed to preclude the accused from giving, at any time before his trial, to the Clerk of the State a further list of the persons whom he wishes to be summoned to give evidence on such trial.'

Then Section 212 runs as follows:

'The Magistrate may, in his discretion, summon and examine any witness named in any list given in to him under Section 211,'

and Section 213 under which the Magistrates can commit an accused person provides :

'(1) When the accused, on being required to give in a list under Section 211, has declined to do so or when he has given in such list and the witnesses (if any) included therein whom the Magistrate desires to examine have been summoned and examined under Section 212, the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session (as the case may be) and (unless the Magistrate is Presidency Magistrate) shall also record briefly the reasons for such commitment.'

and Sub-section (2) of Section 213 provides that

'(2) if the Magistrate, after hearing the witnesses for the defence, is satisfied that there are not sufficient grounds for committing the accused, he may cancel the charge and discharge the accused.' Section 215 lays down that 'A commitment once made under Section 213 by a competent Magistrate or by a Civil or Revenue Court under Section 478, can be quashed by the High Court only, and only on a point of law.'

Then follow certain provisions regarding the summonses to witnesses for defence after committal, the bond of complainants and witnesses, the detention in custody of witnesses in case of refusal to attend or to execute the bond, the notification of the commitment etc. Section 219 entitles the Magistrate to summon

supplementary witnesses for the prosecution and Section 220 with which the Chapter ends provides for the custody of the accused pending the trial.

12. It is clear from an examination of the entire chapter that Sections 211 and 212 are meant to serve a two-fold purpose, the first is that the accused, if he furnishes a list of witnesses when required to do so Under Section 211, is entitled as a matter of right to have these witnesses summoned at the trial. Of course he is entitled to furnish, if the Magistrate allows him to do so, a supplementary list of witnesses also and he is entitled to have these also summoned at the trial. That is obviously the first purpose served by Section 211.

13. The next object of these sections seems to be this: that the Magistrate may in his discretion summon and examine any or all of these witnesses, and if on an examination of these witnesses he thinks that there are not sufficient grounds for committing the accused he may cancel the charge and discharge the accused. In other words this provides a safeguard against an unnecessary trial.

14. The question now is whether these provisions are to be construed as imperative or merely directory. The jurisdiction to commit an accused person to the court of Session or to the High Court, as already stated, is conferred by Section 206, and when the Magistrate frames a charge Under Section 210, he has to be satisfied that there are sufficient grounds for committing the accused for trial. In other words, even at that stage he has to apply his mind to the facts of the case and to satisfy himself that there are sufficient grounds for committing the accused for trial. It is only if he be so satisfied that he is entitled to frame a charge. In other words, even before he frames a charge, he must satisfy himself if the committal is justified. Sections 211 and 212 which, as already stated, are intended to serve a two-fold purpose, one of which is a safeguard against an unnecessary trial and the other of which confers upon the accused a right of having the witnesses cited by him when required to do so under Section 211 summoned for the trial, do not, therefore, in our opinion, go to the root of the matter or the jurisdiction of the Magistrate committing the accused for trial. The trial will be vitiated only if the commitment is totally invalid in law, for, in that case there will be no basis for the committal of the accused to the Court of Session or the High Court, as the case

may be; but if the commitment is not totally invalid in law, the trial can hardly be held to be vitiated. In the cases already referred to which, as we have already pointed out, all arose before the accused were actually tried, the question for consideration was quite different from what we have to consider here. There the question was whether the disregard of the provisions would justify the commitment being quashed, and this court decided that it would, and it was further held that Section 537 of the Code would not cure the illegality involved.

15. Section 537, Cr. P. C., runs as follows: 'Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter 27 or on appeal or revision on account --

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in an inquiry or other proceedings under this Code, or

* * *

(c) of the omission to revise any list of jurors or assessors in accordance with Section 324, or

(d) of any misdirection in any charge to a jury unless such error, omission, irregularity, or misdirection has in fact occasioned a failure of justice.

Explanation. : In determining whether any error, omission or irregularity in any proceeding under this Code 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.'

16. It is clear from a wording of this Section that the order contemplated by this section is a final order and not merely an interlocutory order such as a commitment order. If that be so, Section 537 of the Code cannot possibly apply to a commitment order and the view taken in the cases referred to, that Section 537 would not cure the illegality involved in contravention of the provisions Under Sections. 211 and 212, is a view which can hardly be objected to; but Section 537

certainly applies to the final order such as the conviction of an accused person on a trial and the sentence passed upon him. If Section 537 does apply to a final order on a trial, as we think it does, and if it does not apply to an interlocutory order such as the commitment order, it follows that it was not the intention of the Legislature to confer upon Sections 211 and 212 an imperative character. In other words, the disregard of these provisions while it will certainly entitle the aggrieved party to have a commitment quashed on the ground of such contravention, will not entitle the aggrieved person to challenge the final order of a conviction unless that has occasioned a failure of justice.

17. As regards Section 537, Cr. P. C., their Lordships of the Privy Council in -- *Abdul Rah-man v. Emperor*', AIR 1927 PC 44 (L), in which the question was whether the reading over of depositions of witnesses to them while the case was otherwise proceeding, was not a violation of Section 360 of the Code, their Lordships of the Privy Council held that the passage beginning with 'unless such error' in Section 537, Cr. P. C., does not qualify (d) only but also the other letters of the alphabet, and that such irregularities would not by itself be a ground sufficient for quashing a conviction.

18. In a later case, -- '*Pulukuri Kottaya v. Emperor*', AIR 1947 PC 67 (M), where the record of the statements of witnesses made to the Police were made available to the defence, though too late to be effective, their Lordships held that as the contents of the statements were known, this by itself was not decisive and the case was under Section 537 and the trial was held to be valid as in the circumstances of the case no prejudice was occasioned. Their Lordships in this connection overruled as too narrow a construction of Section 537, Cr. P. C., the view taken in some Indian Cases that Section 537 applies only to errors of procedure and not to cases of disregard of mandatory provisions of the Code and that failure to examine the accused Under Section 342, Cr. P. C. was fatal to the validity of the trial and could not be cured Under Section 537. Their Lordships further held that where a trial is conducted in a manner different from that prescribed by the Code, as in -- '*Subramania Iyer v. King Emperor*', 28 Ind App 257 (PC) (N), where the accused was charged with 41 different acts extending over two years, against the definite provisions of Section 234 of the Code, the trial

was bad and no question of curing an irregularity arose but if the trial conducted is substantially in the manner prescribed by the Code but some irregularity occurs in the course of such conduct, the irregularity could be cured Under Section 537 and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn between illegality and irregularity being one of degree rather than of kind.

19. That Section 215 occurs in the same Chapter which deals with inquiries into cases triable by the Court of Session or the High Court goes to suggest that the remedy for quashing a commitment is available to the aggrieved party only before a trial is over and not after the trial is over. In the nature of things it must be so, for the question of quashing a commitment cannot possibly arise after a trial is over because it is no use quashing a commitment unless the result of the trial itself is at the same time set aside and if the result is set aside, it will be unnecessary in most cases to quash the commitment. After a trial the question is, as in this case, whether the trial is vitiated by the illegal commitment and whether the final order passed in a trial held on the basis of such a commitment should be set aside. In saying this we are not unmindful of the conflicting decisions of this Court in 2 cases under this Code of 1872 -- 'Empress v. Shibo Behara', 6 Cal 584 (O) and -- 'Empress v. Sagambur', 12 Cal LR 120 (P), in the record of which it was held that a commitment could not be quashed after the accused had pleaded to the charge and after evidence had been gone into and in the first, that the commitment could be quashed at any stage. In none of the cases, however, the question arose after the trial was over. What happened in the second case was that the Judge trying the case postponed it and made a Reference-to the High Court in quashing the proceedings on the ground that the accused had been committed on evidence recorded in his absence when he was absconding. None of these cases, therefore, decided if a commitment could be quashed after the trial was over.

20. Now, if it is correct to say that the remedy of quashing a commitment is available only before the conclusion of a trial, it necessarily follows that questions which could be raised in a proceeding for quashing a commitment would be available for use after the conclusion of a trial only in the circumstances mentioned

in Section 537 of the Code, namely, if the omission, etc., occasioned a failure of justice, by which is meant the conviction of an innocent man and the acquittal of a person proved guilty. -- 'Abdul Rahim v. Emperor', . The Explanation to Section 537 makes it further clear that in deciding whether it did occasion a failure of justice, a Court has to bear in mind if the objection could be raised earlier, the obvious implication being that when it may be but is not raised earlier, the normal inference is to be that there was no failure of justice.

21. Another thing to be remembered is that if a trial is to be held null and void on such a ground, acquittals as well as convictions on such trials would be liable to reversal, so that it is bound to cause serious inconvenience to parties who have no control over the Magistrate's action. The observations of Sir Arthur Channel in -- 'Montreal Street Rly. Co. v. Narmandin', (1917) AC 170 at p 174 (R), may be recalled in this connection

'When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts-done in neglect of such duty would create serious general inconvenience or injuries to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice to hold such provisions directory only, neglect of them, though punishable, not affecting the validity of the acts done.'

22. The scheme, therefore, of Chapter 18 or of Section 537 of the Code does not, in our view, favour the conclusion that the provisions of Sections 211 and 212 are imperative.

23. In this case the accused in his examination Under Section 342, Cr. P. C., was asked whether he would cite any defence witness and his answer was in the negative. That being so, there is hardly any question of any prejudice having occurred to him as a result of the omission of the learned Magistrate to require him to furnish a list of defence witnesses as required by Section 211, Cr. P. C. In these circumstances the defect, such as it is, could not have vitiated the commitment to the extent of making it invalid in law nor could it have affected the trial in any way because if the commitment was not altogether invalid, the cognisance of the case

by the Court of Session could not be said to be bad in law in any way. In our opinion, therefore, there is no substance in this contention raised by Mr. Majumdar.

24. Having disposed of this point of law raised by Mr. Majumdar, it is necessary to look into the facts and the evidence. (After considering the evidence elaborately his Lordship concluded:) In the circumstances, we are of opinion that there is no reason whatever to doubt or disbelieve any part of the prosecution evidence and the jury were fully entitled to believe these witnesses and to base their verdict on this evidence. Their verdict, therefore, in our opinion, is fully justified on the evidence on the record. That the intention of the accused could be nothing but to cause his victim's death is clear from the nature of the injuries inflicted. It would, therefore, have to be held that he was rightly convicted under Section 302, I. P. C., if he did not really attack Moslem Mondal in self-defence as stated by him. (His Lordship then held that the defence story of an assault on the accused by Moslem Mondal with a knife was not true and that no question arose of the accused having done what he did in self-defence.)

25. The next question to be considered is the question of sentence. I have already stated that a large number of incised injuries were inflicted on the deceased by a cutting weapon which is a hesua and all these injuries were inflicted in the region of the head, the neck and the shoulder. That the assault was of a brutal nature admits of no doubt; what makes it much worse is that the deceased was a guest of the accused. At the same time the fact remains that the prosecution did not even try to prove a motive for such a murderous and brutal assault. It was further elicited in the cross-examination of Fateh Ali that he stated before the Committing Magistrate that he saw Moslem Mondal being cut by his father ('Pagal', mad man) with a hesua. Although the statement of Fateh Ali was not put in at the trial under Section 288, Criminal P. C. and only this part of the statement was put in under Section 145, Evidence Act, we are entitled to take this into consideration in order to determine the proper sentence to be passed in this case. The other fact to be considered is the assault on Fateh Ali when he shouted out on seeing the accused assaulting Moslem Mondal and the subsequent assault on Miajuddin. The question for our consideration now is whether these are facts which go to indicate

that the accused when he made this murderous assault on Moslem Mondal and when he later assaulted his own son and his son-in-law was in an abnormal state of mind. It is undoubtedly true that the very atrocity of a crime should not be made an excuse for passing a lesser sentence. The criminality, however, of an act in the last analysis depends on the state of mind of which the act is an external expression. When the act itself is almost inhuman and when there is no discernible motive for such an inhuman act, the Judge is at once put upon his enquiry as to the state of the mind which prompted such an act & the question he has got to put to himself is 'Was this man perfectly normal when he committed this act?' In our opinion the sentence to be passed depends on the answer to this question.

We are not unmindful here of the view expressed by the learned trial Judge that the act was an atrocious one and that there was no extenuating circumstance to justify a lesser sentence. The facts, however, that there was really no motive for the inhuman murder, that the accused attacked his son when he cried out, that he next attacked his son-in-law when he rescued Fateh Ali and that finally he admitted to others having done Moslem Mondal to death are, in our opinion, indications of an abnormal state of mind in the accused which, though it does not amount to such insanity as can be a complete answer to the charge, might well have produced in him an uncontrollable murderous impulse of such intensity that he hacked his unsuspecting and sleeping guest to death. The facts proved are more consistent with such an abnormal mental state of the accused than anything like a cold & calculating piece of monstrosity. In that view, the accused himself was as much a victim of this inexplicable and uncontrollable impulse as Moslem Mondal was of the act in which this impulse found its expression.

26. In our opinion, this constitutes an extenuation of an offence which at first sight strikes one as brutal beyond words and will justify the imposition of the lesser sentence in preference to the extreme penalty of the law. The sentence of death is accordingly commuted to transportation for life.

27. The result then is that the Reference under Section 374, Criminal P. C., is rejected, the appeal of Abdul Rahaman is dismissed and the conviction of the appellant under Section 302, Penal Code, is confirmed subject to the modification

that the sentence of death passed on him is commuted to transportation for life.

Debabrata Mookerjee, J.

28. I agree.

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