IN THE HIGH COURT OF SIKKIM AT GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 06-09-2010

CORAM

HON'BLE MR. JUSTICE P. D. DINAKARAN, CHIEF JUSTICE

AND

HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE

Crl. A. No.02 of 2010

Shri Tshering Lepcha,
S/o Late Nimtook Lepcha,
R/o Dong Busty,
South Sikkim.
At present Sikkim State Jail,
Rongey, East Sikkim. ... **Appellant**

versus

The State of Sikkim ... **Respondent**

For Appellant : Mr. B. Sharma, Senior Counsel with Mr. J. K. Kharka, Legal Aid Counsel.

For Respondent : Mr. J. B. Pradhan, Public Prosecutor with Mr. Karma Thinlay Namgyal, Additional Public Prosecutor and Mr. S. K. Chetri, Assistant Public Prosecutor.

JUDGMENT

Wangdi, J.

By this appeal, the appellant seeks to assail the judgment of the learned Sessions Judge, South & West Sikkim at Namchi, dated 30-03-2002 passed in Criminal Case no. 17 of 2000, by which the accused/appellant was convicted for offence under Section 302 of the Indian Penal Code (in short "IPC") and sentenced to undergo imprisonment for life with fine of Rs.10,000/- and in default of payment of fine to undergo further imprisonment for 6 months.

2. The facts of the prosecution case stated in brief are as under:-

In the morning of 06-08-2000 at 0615 hrs., the Officer-in-Charge, Temi Police Station, received a written complaint from one Pentok Lepcha, resident of Dong Busty under Niz Ramyang Gram Panchayat, South Sikkim, stating that in the afternoon of 05-08-2000 at about 3/4 p.m., his brother Tshering Lepcha of the same place, killed his wife Phurmit Lepcha and youngest daughter Sonamit Lepcha with an iron knife. Based on this, Temi Police Station Case no.4(8)2000 dated 06-08-2000 under Section 302 IPC was registered against the accused for the murder of his wife Phurmit Lepcha and daughter Sonamit Lepcha and the case taken up for investigation.

3. As per the prosecution, investigation revealed that in the afternoon of 05-08-2000 at about 3/4 p.m., the accused Tshering Lepcha was at home at Dong Busty along with his wife Phurmit Lepcha and three daughters, namely, (1) Markit Lepcha aged about 8 years, (2) Santimit Lepcha aged about 4 years and (3) Sonamit Lepcha aged about 1½ years. In the house, the deceased persons Phurmit Lepcha and Sonamit Lepcha were lying on a bed, the accused person on another and the other two daughters playing outside in the verandah. Suddenly, without any provocation, the accused person pulled out his knife from underneath his pillow and struck his wife Phurmit Lepcha from behind upon which she shouted in pain and ran out of the room in panic lifting her child with the accused Tshering Lepcha hotly in her pursuit. As she ran out, Phurmit Lepcha slipped on the steps and fell by which time the accused had caught up with her and struck

her repeatedly with the knife inflicting multiple fatal injuries on her head and body. After having finished with her, the accused then struck his youngest daughter with the same knife inflicting grievous wounds on the head and below the shoulder resulting in the death of the victims instantly.

4. Seeing the gruesome scene that was being enacted, the eldest daughter Markit Lepcha took her younger sister Santimit Lepcha and ran to the house of their grandmother Gonam Lepcha situated about 100 fts. above the house of the accused person and narrated the entire story to her. On hearing of the incident, Gonam Lepcha, the grandmother, sent her daughter Sukmit Lepcha aged about 22 years, to inform her youngest son Pentok Lepcha, the complainant, who at that time was working in the ginger field nearby the house. On hearing of the incident, Pentok Lepcha rushed to the place of occurrence and saw the dead bodies of the victims that lay in front of the house of the accused in a pool of blood. He then raised an alarm crying out as to where the killer was. As he searched for the accused person, he found him about 50/60 fts. below the place of occurrence whereupon he called out the accused person, and ran towards him and caught hold of him. During this time, the complainant noticed the knife (weapon of offence) smeared with fresh blood on the ground near the accused person. The commotion alerted his uncle Mingma Lepcha living about 100 fts. away from the place of occurrence on its Southern side where he arrived and, with his help bound the accused person with a rope and held him in captivity in the house of one Passang Lepcha about 100 fts. below the house of the accused. By this

time, rest of the villagers and the Panchayat President of the area had also arrived at the place.

5. Later in the evening, the complainant, Pentok Lepcha reported of the incident to the In-Charge, Bermiok Police Out Post and returned to his village. The In-Charge Bermiok Out Post ASI, Sangey Bhutia, reported of the matter to the Officer-in-Charge Temi Police Station by wireless who directed him to proceed to Dong Busty immediately for verification and to take suitable measures. The police personnel reached Dong Busty late in the night, where they spent the night accompanied by other villagers guarding the place of occurrence, the accused person and the dead bodies of the victims. The complainant went to the Temi Police Station early in the morning of the following day and submitted a written complaint regarding the incident based on which case under Section 302 IPC was registered and investigation carried out.

6. On completion of the investigation, the Investigating Officer having found that a *prima facie* case under Section 302 IPC had been made out against the accused Tshering Lepcha for committing the murder of his wife Phurmit Lepcha and daughter Sonamit Lepcha, submitted a charge sheet against him for trial. The learned Sessions Judge upon consideration of the materials on record framed charge against the accused person for having committed the offence and directed that he tried accordingly. The accused person pleaded not guilty to the charge and claimed to be tried.

7. On conclusion of the trial, the accused was found guilty of the offence and by the impugned judgment convicted him

accordingly. We find from the records that the fact of the offence having been committed by the appellant, was not seriously contested before the trial Court, there being overwhelming evidence against the accused person to bring home the charge against him. The only substantial point that was raised was that the appellant was entitled to the protection under Section 84 IPC as there were evidence on the record to suggest that he was insane at the time of commission of the offence.

8. The learned trial Court held that the accused attempting to flee from the place of occurrence established that he was aware of the result of his act and tried to get rid himself of the consequences that would follow and, that such conduct was not consistent with that of a person with unsound mind and, therefore, not entitled to the benefit available under Section 84 IPC.

9. In the appeal before us, the very same ground has been raised on behalf of the appellant in challenging the impugned judgment. It has been urged that the learned trial Court failed to consider the following aspects that were quite evident on the face of the record:-

a) That no effort was made by the learned trial Court to examine as to under what circumstances the incident had taken place and the state of mind of the accused person at the time of commission of the offence;

b) That the prosecution witnesses had made categorical statements that the accused was of unsound mind;

c) That the insanity of the accused person had been substantiated by the fact that he had left his house a number of times earlier without any reason;

d) That a normal person could not have killed his own wife and child at a time and that there was no explanation given by the prosecution as to what impelled the appellant to commit the murders;

e) That the learned trial Court completely ignored the statement of PW16, Pem Tshering Lepcha, who had stated in his cross-examination that "it is true that while in fitness of insanity he could not answer it. It is true that I did not ask the accused about the incident" which ought to have led the trial Court to have the accused person medically examined by Psychiatrist.

10. Mr. B. Sharma, learned senior counsel appearing on behalf of the accused person, submitted that there was overwhelming evidence in favour of holding that the appellant was of unsound mind and that the trial Court ought to have held that the accused committed the offence in a fit of insanity. To support this contention, Mr. B. Sharma drew our attention to the various statements of the prosecution witnesses made under Section 161 of the Code of Criminal Procedure, 1973 (in short "Cr.P.C."). It was submitted that although Section 161 statement pales into insignificance once depositions are made in the Court, it was permissible to rely upon them to demonstrate before this Court the glaring evidence indicating the unsoundness of mind of the appellant during the period when the offence was committed and that such evidence was not at all taken cognizance of by the learned trial Court when under Section 329 Cr.P.C. there was a duty cast upon it to have sent the accused person for medical examination. Mr. Sharma drew our attention to the following relevant portions of the statements of the various PWs made under Section 161 Cr.P.C.:-

Statement of accused Tshering Lepcha

"..... My wife said to me that she is not feeling well and so she urged to take lunch immediately so that she could take rest after taking lunch. I then agreed to take lunch and they my wife served lunch to me and she also started taking lunch. After taking lunch, she went towards the room while taking child with her. While she was leaning on the bed feeding milk to the child, I told her that I am also tired and want to sleep for a while. Saying this, I went playfully to another bed and slept there, after some time, I saw that a dangerous dog suddenly came towards me and attacked me and I thought that the dog might bite me. Apprehending this, I took out a knife from beneath my pillow and stabbed the dog, after which that dog went out of the room, crying. I also came outside following the dog while taking the knife. After coming out I saw that instead of dog, my wife was lying in a pool of blood. At that time only, I realised that I have stabbed my wife. ....."

Statement of PW1 Pentok Lepcha

"..... Before that, my brother had left home for 2/3 times and on searching him, he was found near Damthang and was taken back to the house. At another time, my brother had come to the house himself after 3/4 days. After that till the time of the incident he was staying well at house with his wife and children and had never engaged in quarrelling at home. ....."

Statement of PW6 Mahendra Gurung

"..... Before the incident, Tshering had left the house and when left at the first time, his younger brother had brought him back and on next occasion he had himself come back. ....."

Statement of PW8 Passang Lepcha (Jetha)

"..... Tshering Lepcha had appeared to be suffering from mental disorder about 5/6 months ago and had left house twice. On one occasion he was brought back home by his brother after about 3/4 days. Again he left home once and came back house himself. ....."

Statement of PW9 Passang Lepcha (Maila)

"..... Presently Tshering had become a good person and had not appeared as an insane person. He used to talk, walk and work well. But about 5/6 months ago he left home twice and I had heard that one time he was bound and brought back by his brothers and at another time he himself came back house. ....."

Statement of PW10 Sukmit Lepcha

"..... I was deeply surprised because brother Tshering and his wife had never engaged in

quarrelling with each other and further they never used to take alcohol, and talked and worked well. However, he had left house twice and had been missing. At one time after left house, he was found and brought back by his brothers, and at another time he was lost for two three days and at this time, he himself came back to the house. ....."

Statement of PW15 Passangkit Lepcha

"..... About 5/6 months before, the same, daughter who was killed had told me that the son-in-law had left the house without saying anything and was brought back by his younger brother. He had left the house for the second time also, but this time, he had himself came back and on being asked as to what had happened to him he told that nothing had happened. ....."

Statement of PW11 Gonam Lepcha

"..... I was caught in a deep thought, I thought that what Tshering Lepcha his done. He never used take alcohol and never engaged in quarrelling with any one in the village but how this has happened. However, about one year ago, Tshering Lepcha had left house without telling anything to anyone, and his brothers had gone to search him and after 3/4 days, they had found him near Rakam Tar and had brought him back. Again about 5/6 months ago, he had left home in a similar way but this time he had himself come back. When I had asked him as to what had happened to him and what happens to him and whether he suffers from any disease, he replied that nothing has happened to him and that he is alright. ....."

Statement of PW16 Pem Tshering Lepcha

"..... My brother Tshering had left house twice before and at one time I and my younger brother had found him at 10 mile and had brought him back. I heard that again he had left house for second time and that at this time, he had come back himself. ....."

11. Mr. B. Sharma further submitted that the statements of the witnesses under Section 161 Cr.P.C. that clearly evinced the insanity of the appellant, having been recorded during the investigation, it was incumbent upon the investigating agency also to have got the appellant medically examined by a Psychiatrist. This having not been done, the charge sheet ought to be treated as defective rendering it a nullity in the eye of law. It was the further

submission of Mr. Sharma that notwithstanding this position, even at the trial stage, the Court was statutorily obliged to exercise its powers provided under Section 329 Cr.P.C. in view of the glaring evidence before it that unequivocally indicated that the appellant was of unsound mind. The failure to do so, therefore, has resulted in a grave miscarriage of justice. In any case, as per the appellant, when at the trial sufficient evidence of glaring nature of the appellant being of unsound mind at the time of commission of the offence had emerged, he ought to have been given the benefit provided under Section 84 IPC at the end of the trial.

12. In support of his contention, the learned senior counsel referred to the following decision:-

In the case of ***Siddhapal Kamala Yadav*** vs. ***State of Maharashtra*** : ***AIR 2009 SC 97*** in paragraph 8 of which it had been held as follows:-

> **"8.** Under Section 84 IPC, a person is exonerated from liability for doing an act on the ground of unsoundness of mind if he, at the time of doing the act, is either incapable of knowing (a) the nature of the act, or (b) that he is doing what is either wrong or contrary to law. The accused is protected not only when, on account of insanity, he was incapable of knowing the nature of the act, but also when he did not know either that the act was wrong or that it was contrary to law, although he might know the nature of the act itself. He is, however, not protected if he knew that what he was doing was wrong, even if he did not know that it was contrary to law, and also if he knew that what he was doing was contrary to law even though he did not know that it was wrong. The onus of proving unsoundness of mind is on the accused. But where during the investigation previous history of insanity is revealed, it is the duty of an honest investigator to subject the accused to a medical examination and place that evidence before the Court and if this 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 onus, however, has to be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of

his mental condition and other relevant factors. Every person is presumed to know the natural consequences of his act. Similarly, every person is also presumed to know the law. The prosecution has not to establish these facts." **[emphasis supplied]**

13. Next, it was submitted that there was a failure on the part of the Public Prosecutor also in not having brought those materials to the notice of the trial Court seeking compliance of Section 329 Cr.P.C. The Public Prosecutor has failed to perform his duty of fair play in the proceedings and proceeded to merely ensure that the appellant was punished. In support of this contention, Mr. Sharma placed the decision of ***Sidhartha Vashisht @ Manu Sharma*** vs. ***State (N.C.T. of Delhi) : AIR 2010 SC 2352*** the relevant portion of which is as under:-

"**76.** A public prosecutor is appointed under Section 24 of the Code of Criminal Procedure. Thus, Public Prosecutor is a statutory office of high regard. This Court has observed the role of a prosecutor in Shiv Kumar v. Hukam Chand and Anr., : (1999) 7 SCC 467 as follows:

"13. From the scheme of the Code the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by any one other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the Court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the force and make it available to the accused. Even if the defence counsel overlooked it, Public Prosecutor has the added responsibility to bring it to the notice of the Court if it comes to his knowledge. A private counsel, if allowed free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied

a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor."

This Court has also held that the Prosecutor does not represent the investigation agencies, but the State. This Court in Hitendra Vishnu Thakur and Others v. State of Maharashtra and Others, (1994) 4 SCC 602 : *(AIR 1994 SC 2623 : 1994 AIR SCW 3699)* held:

"22. ... A public prosecutor is an important officer of the State Govt. and is appointed by the State under the Cr.P.C. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the investigating agency before submitting a report to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A Public Prosecutor may or may not agree with the reasons given by the Investigating Officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation."

Therefore, a Public Prosecutor has wider set of duties than to merely ensure that the accused is punished, the duties of ensuring fair play in the proceedings, all relevant facts are brought before the court in order for the determination of truth and justice for all the parties including the victims. It must be noted that these duties do not allow the Prosecutor to be lax in any of his duties as against the accused." **[emphasis supplied]**

14. It was submitted that in the present case where the Investigating Officer found that the appellant was pretending to be deranged (unsound) as revealed from the arrest memo and that when a large number of witnesses had made the categorical statements as extracted in the foregoing paragraph 10 of this judgment, it was essential for the Investigating Officer to have got the appellant examined by a medical officer as to the soundness of the mind of the appellant at the stage of the investigation which, obviously has not been done causing grave prejudice to the appellant. Mr. Sharma drew our attention to paragraph 8 of the decision in the case of ***Bapu alias Gujraj Singh*** vs. ***State of***

Rajasthan : ***(2007) 8 SCC 66*** in support of his contention which we may reproduce below:

> **"8.** ..... The onus of proving unsoundness of mind is on the accused. But where during the investigation previous history of insanity is revealed, it is the duty of an honest investigator to subject the accused to a medical examination and place that evidence before the court and if this 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 onus, however, has to be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition and other relevant factors. Every person is presumed to know the natural consequences of his act. Similarly every person is also presumed to know the law. The prosecution has not to establish these facts." **[emphasis supplied]**

15. Mr. J. B. Pradhan, learned Public Prosecutor, submitted that the plea of insanity or unsoundness of mind raised on behalf of the appellant cannot withstand the test of Section 84 IPC and the law laid down by the Hon'ble Supreme Court in that behalf. By referring to the latter portion of paragraph 8 in ***Bapu alias Gujraj Singh's case (supra)*** reproduced in the foregoing paragraph, it was submitted that the appellant had not led any evidence in proof of the plea of insanity during the trial. No such plea was raised by him even in his statement recorded under Section 313 Cr.P.C. As per him, in order to fall within the provisions of Section 84 IPC, it has to be considered by the Court as to whether at the time commission of offence, the accused, by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. For this the conduct of the accused during the time of commission of offence and the entire period thereafter until conclusion of his trial would be relevant for the purpose of

ascertaining as to whether plea raised was *bona fide* or an afterthought. The statements that have been referred to on behalf of the appellant would, in the submission of Mr. Pradhan, indicate only a mere abnormality of mind or partial delusion and nothing more. Such evidence would not be sufficient to discharge the onus which lies upon the accused person to prove his insanity and be entitled to the benefits under Section 84 IPC. It is further the submission of Mr. Pradhan that in the evidence there are no records of history of unsoundness of mind of the accused person and that the evidence on record rather reflects that he was leading a normal life.

16. As regards the contention of Mr. B. Sharma that there was a serious infraction alleged to have been committed by the trial Court in not acting in terms of Section 329 Cr.P.C., Mr. Pradhan submitted that the fact that the trial Court did not take resort to the said provision would imply that at the commencement and during the course of the trial, it did not find any reason to believe that the appellant was of unsound mind. As per him, even if appellant had been found to be of unsound mind he would not have been exonerated of the offence since Section 329 Cr.P.C. is applicable only at the trial and not at the time of offence. Reiterating his earlier submission, it was stated by Mr. Pradhan that the evidence produced at the trial did not at all indicate that the offence was committed as a result of the insanity of the appellant and, therefore, it was justified for the trial Court to have convicted the appellant.

17. Mr. Pradhan has placed a number of decisions of the Apex Court to support his contentions of which we may cite some of them.

(i) In the case of ***Bapu alias Gujraj Singh (supra)*** it has been held as follows:-

> **"8.** ..... The onus, however, has to be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition and other relevant factors.
>
> .....
>
> **13.** The standard to be applied is whether according to the ordinary standard, adopted by reasonable men, the act was right or wrong. The mere fact that an accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and had affected his emotions and will, or that he had committed certain unusual acts in the past, or that he was liable to recurring fits of insanity at short intervals, or that he was subject to getting epileptic fits but there was nothing abnormal in his behaviour, or that his behaviour was queer, cannot be sufficient to attract the application of this section." **[emphasis supplied]**

(ii) In the case and ***T. N. Lakshmaiah*** vs. ***State of Karnataka*** : ***(2002) 1 SCC 219*** 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 of the version given by him casts a doubt on the prosecution case.
>
> .....
>
> **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 afterthought. .....

.....

14. It is admitted that the appellant in this case, has not led any evidence in proof of the plea of insanity. There is nothing on the record to infer that the accused was of unsound mind at or about the time of occurrence. His behaviour at the time and subsequent to the commission of the crime clearly indicates that he knew and was capable of knowing the nature of the act done by him. Being annoyed with the attitude of the deceased, he appears to have taken a conscious decision of taking them away from the house and committed the crime at a secluded place. He had all faculties to safely reach home and sleep for the night. At no print of time his behaviour is shown to be abnormal. The plea, though not strictly but by implication, appears to have been taken by the accused for the first time when his statement was recorded under Section 313 of the Code of Criminal Procedure. We have found no record allegedly showing the appellant to be suffering from any mental disease when he is stated to have applied for bail. The peal raised, on the face of it, is an afterthought and bereft of any substance. ....." **[emphasis supplied]**

(iii) In ***Dahyabhai Chhaganbhai Thakkar*** v. ***State of Gujarat*** : ***AIR 1964 SC 1563*** the following has been held:-

"7. 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 S. 84 of the Indian Penal Code : 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."

(iv) In ***Dr. Jai Shanker (Lunatic) through Vijay Shanker Brother Guardian*** vs. ***State of Himachal Pradesh*** : ***(1973) 3 SCC 83*** it has been held as follows:-

> **"7.** The situation arising in this case is governed by Section 464 of the Code which lays down the procedure which a magistrate is enjoined upon to follow when an accused person alleges that he is suffering from such mental infirmity as to render him incapable of making his defence. The unsoundness of mind dealt with in this section is the one which such an accused person alleges to be suffering from at the time of the inquiry before the Magistrate and not one at the time of the incident during which he is said to have committed the offence in question. The section in plain terms provides that if the Magistrate holding the inquiry (in the present case the committal proceedings) has reason to believe that the accused at that point of time is suffering from unsoundness of mind, and consequently, is incapable of making his defence, he shall institute an inquiry into the fact of such unsoundness and shall cause the accused to be examined by a civil surgeon of the district or such other medical officer as the State Government directs. It is clear from the mandatory language of the section that the first thing that the Magistrate has to do is to decide, when an accused person is brought before him who is suspected or alleged to be a person of unsound mind and before he proceeds with the inquiry, whether such person appears to him to be of unsound mind. The words "reason to believe" indicate that when an accused person is presented before a Magistrate for inquiry, who, it is alleged, is suffering from unsoundness of mind, the magistrate has, on such materials, as are brought before him, to inquire before he proceeds with the inquiry whether there are reasons to believe that the accused before him is suffering from any such infirmity. The next step is that if he has such reasons to believe, he is to institute an inquiry into the fact of unsoundness of mind and cause him to be examined by the civil surgeon or such other medical officer as the State Government directs. Therefore, when a question is raised as to the unsoundness of mind of an accused person, the magistrate is bound to inquire before he proceeds with the inquiry before him whether the accused is or not incapacitated by the unsoundness of mind from making his defence. Such a provision clearly is in consonance with the principles of fair administration or justice."

(v) Next decision that placed was the case of ***Navi Ahmad Khan*** vs. ***Emperor*** : ***AIR 1932 Oudh 190*** the relevant portions of which reads as under:-

> "It will thus be seen that the procedure in the case of lunacy at the time of the trial and lunacy at the time of the commission of the offence are entirely separate matters leading to different consequences and these two matters must not be confused together. The first point that a Court has to decide when an accused person is brought before it who is suspected or alleged to be a lunatic, and before the Court can even proceed with the trial for the offence alleged to have been committed, is whether the accused person appears to the Court to be of unsound mind and consequently incapable of making his defence. ....."

18. We heard and considered the submission of the learned counsels for the parties. It may be noted that before us as before the trial Court, the learned senior counsel for the appellant did not question seriously the merits of the findings contained in the impugned judgment. Therefore, as the parties were proceedings on the admitted position of the appellant having committed the offence, we do not deem it necessary to discuss on the soundness of the impugned judgment on that account. However, we may briefly state that this is a case where there is an eye-witness account, i.e., by Markit Lepcha, PW2, who is the eldest daughter of the appellant that have been fully corroborated by the other witnesses, more particularly, PW1, Pentok Lepcha who is none other than younger brother of the appellant. Therefore, on the merits of the case, we find that the charge that the accused had committed the offence of murder of his wife and child, stands established conclusively. Inspite of this, we are unable to rest the case there and lay our hands off in view of the plea of insanity having been raised on behalf of the appellant that allegedly was ignored by the trial Court. We, therefore, shall proceed to examine the case on limited question as to whether the appellant would be entitled to the benefits of Section 84 IPC.

19. The decisions cited by the learned Public Prosecutor enunciate the accepted principles of law that govern the provision of Section 84 IPC and Chapter XXV Cr.P.C. and we are in agreement with him as regards the distinction between the said two provisions in as much as Section 84 would apply at the stage when the offence is committed, and Chapter XXV Cr.P.C. would be applicable at the commencement and during the course of the trial of an accused. We are, however, of the view that the proceedings under Chapter XXV Cr.P.C., more particularly, Sections 328 and 329 contained therein, would be relatable to the mental condition of an accused even at the time when the offence was committed because, if the accused is found to be of unsound mind at the commencement of the trial, the trial Court would be put on guard persuading it to examine with care his mental condition when the offence was committed.

20. Sections 328 and 329 Cr.P.C. do not contemplate filing of an application by any party seeking for examination of the accused by a Medical Board. Obligation is cast upon it to proceed even *suo moto* if on the materials found on the record that the accused person is of unsound mind. In the present case, it is noticed that at least 8 (eight) witnesses have categorically stated in their statements recorded under Section 161 Cr.P.C. that during the period when the offence was committed, the appellant was suffering from mental disorder. The statement of the appellant recorded under Section 161 Cr.P.C. also clearly reveals the unsoundness of his mind when the offence was committed. We may reproduce below the statement of the appellant:-

"I am giving this true statement that on 5/8/2000, we, husband and wife were sitting together, my elder daughter went to School and the rest two children were sitting at home with their mother. During day, my wife stayed at home with the children while preparing lunch and I went to the field to fetch grass for cow. When I returned home, I fed grass to the cow and came back to home. On reaching the house I saw that my wife was sitting, near the kitchen and was feeding milk to the child, while I was completely exhausted. My wife said to me that she is not feeling well and so she urged to take lunch immediately so that she could take rest after taking lunch. I then agreed to take lunch and they my wife served lunch to me and she also started taking lunch. After taking lunch, she went towards the room while taking child with her. While she was leaning on the bed feeding milk to the child, I told her that I am also tired and want to sleep for a while. Saying this, I went playfully to another bed and slept there, after some time, I saw that a dangerous dog suddenly came towards me and attacked me and I thought that the dog might bite me. Apprehending this, I took out a knife from beneath my pillow and stabbed the dog, after which that dog went out of the room, crying. I also came outside following the dog while taking the knife. After coming out I saw that instead of dog, my wife was lying in a pool of blood. At that time only, I realised that I have stabbed my wife. Seeing her lying in a pool of blood, I thought that she will not be alive and so I will stab her more. After that I stabbed her several times and my wife died. At the same time, my youngest child was weeping on the ground. I thought that since its mother has already died, who will feed milk to the child, this child has become helpless. So it will be better if this child also meets the same fate as its mother. Thinking this, I stabbed the child and killed the child also. I then thought that now two daughters have remained, I will stab them also and at the end, I too will cut myself with that knife. After that, I saw that those two remaining daughters had run away to the main house on seeing their mother and sister being cut be me. After that, I took that knife and went silently downwards. On reaching to some distance, I was trapped and caught by my younger brother Pemtuk Lepcha together with the villagers and on the next date this is 6/8/2000. I was arrested and brought to the thana by the police.

This is my true statement. "

21. Considering the evidence *prima facie* appearing at the commencement of trial, the trial Court ought to have been persuaded to *suo moto* initiate proceedings under Chapter XXV Cr.P.C. This having not been done, we are of the view that there

was a serious infraction of law on the part of the trial Court resulting in the failure of justice.

22. The question raised by Mr. Sharma on the trial Court in not giving the appellant the benefit of Section 84 IPC being a matter of grave importance as the liberty of a person was involved, we were persuaded to examine the evidence on record with great care and caution for the larger cause of justice. On our examination, we find that, apart from the statements of the appellant and 8 (eight) other witnesses recorded under Section 161 Cr.P.C. extracted above, and the endorsement of the Investigating Officer in the memo of arrest referred to above, we also find there are oral testimonies of various witnesses made in Court where they have made certain revealing facts that appear to been overlooked by the trial Court. We may usefully reproduce them below:-

Statement of PW 1 Pentok Lepcha

"..... The accused used to act abnormally sometimes. On two occasions he left his house. On one occasion he was detected near Damthang and brought back home by me. On the next occasion he himself came home after a period of about 5 days. He used to act quite normal at home. In the village he used to behave well with the co-villagers and he was also behaved well with his family members. ....."

Statement of PW2 Markit Lepcha

"..... ..... My father the accused used to get mad/insane and used to go out of house. ....."

Statement of PW3 Takli Raj Gurung

"..... The accused to be become insane sometimes, and he used to go to the jungle and the villagers had to search him out. When he could become insane no one could say. ....."

Statement of PW6 Mahendra Gurung

"..... The accused sometimes used to get insane prior to the incident. Once he was found in the jungle by his brother after 4 days and he was brought back to his house. Once he was found at Bermiok O.P. and his relatives residing at Bermiok came to know about the accused caught hold of the accused and handed him over to his family members. ....."

Statement of PW7 Lakpa Lepcha

"..... It is true that the accused used to suffer from temporary insanity occasionally in the past. It was not possible for us to find out as to the period when the accused used to suffer from such mental disorder. This fact is known to the villagers also. ....."

Statement of PW8 Passang Lepcha (Jetha)

"..... It is true that the accused has left his house twice and once his brother brought back him after 3/4 days and on the second time he came of his own. It is also true that he was stated to be insane. It is true that I know that the accused suffers from insanity from time to time."

Statement of PW10 Sukmit Lepcha

"..... My brother, the accused live separately. I do not know whether the accused used to have the sickness of insanity. But I know he left his house twice. Once he was brought by PW-1 Pentook Lepcha and on the second time he came of his own. ....."

Statement of PW11 Gonam Lepcha

"..... I do not know whether the accused had attack of insanity. Twice he went out of his house and he was brought by his brother and on the second time he came of his own. It is true that when I asked him what happened to him he said I do not remember what happens to me. He does not take alcohol or any intoxicated items. ....."

Statement of PW13 Katok Lepcha

"..... I know the accused from my childhood and I know that the accused was attacked with insanity twice. On both the occasions the accused was brought home as he left the house. It is

true that the accused very often used to suffer from insanity."

Statement of PW14 Mingma Tsh. Lepcha

"..... It may be that the accused is an insane person. It is true that on 2/3 occasions he was found missing from the house and he was brought to his house after search."

Statement of PW16 Pem Tshering Lepcha

"It is true that the accused occasionally had attacks of insanity. It is true that while in fitness of insanity what the accused do he cannot say. Even when we put questions he could not answer it. ....."

The above statements were neither demolished nor controverted by the prosecution.

23. When we looked for a *mens rea* for the offence, we found none. There is also no evidence of any hostility in the family of the appellant which we noticed was rather to the contrary as being harmonious. We have found it difficult to be convinced that the appellant for no reason would so brutally put to death his own wife and infant child of 1½ years so suddenly when the ambience at home was normal and harmonious moments before commission of the offence, unless he was mentally deranged. The trial Court, and the learned Public Prosecutor before us, have laid great stress on the fact that the appellant attempted to flee after the commission of the offence, but the evidence clearly reveals that the offence took place in broad day light in a village where he was surrounded by his relatives who lived about 100 yards around his house. Incongruity of such finding is also compounded by the fact that the appellant was found in his own field just about 50/60 ft. below his house after committing the act rather than taking the

route out of the village, which would have been the case if the appellant indeed intended to flee as a normal person would have done. We also find from the evidence of PW1 that the weapon of offence, a 12" long knife, was found on the ground near the accused indicating that he did not even try to conceal it.

24. The entire circumstances and the evidence appearing on the records as reproduced above clearly establish that the appellant was insane when the offence was committed. The remark of the Investigating Officer in the arrest memo already referred to further lends credibility to such conclusion. We find support in our view in the case of ***Nivrutti Dhondiba Shinde*** vs. ***State of Maharashtra*** : ***1985 Cri. L. J. 449 (Bom)*** where a Division Bench of the Bombay High Court, in the facts of that case almost *pari materia* as the present one, observed as under:-

> **"11.** In the instant case the accused did not adduce any evidence to prove his insanity. Hence as observed in the above case by the Supreme Court he can take advantage of the evidence adduced by the prosecution and may raise a reasonable doubt in the mind of the Court that at the time of committing the Act, he was insane. ..... The ferocity with which he killed the child definitely demonstrated the insanity from which the accused was suffering. Ferocity by itself may not prove insanity but in this case such ferocity assumes importance because the two month old child could not have given him any provocation to be so violent as he was at the time of committing the act. Where was the necessity for him to be so violent in killing a two month old child unless he was insane? The very fact that he almost reduced the child to pulp shows how badly he had lost his mental faculty. Then after the incident he neither tried to run away nor did he resist his arrest which demonstrated that he did not have mens rea. He did not think that what he had done was wrong or was contrary to law. Had he had even the slightest guilty mind, he would not have told the Police Patil that he had removed the devil from the world. In fact, he was thus proclaiming that what he had done was a right thing, ..." **[emphasis supplied]**

The totality and the cumulative effect of all the evidence and circumstances brought on the record and all things considered carefully, lead to an irresistible inference that at the crucial moment the accused was suffering from legal insanity. The accused thus did rebut the initial presumption against insanity and satisfactorily discharged the burden to the extent that he had to discharge under law.

25. Having come to the above conclusion, we are next faced with the question as to whether this Court in an appeal can exercise its powers and grant the appellant the benefits of Section 84 IPC at this stage. In the case of ***State of Maharashtra*** vs. ***Sindhi alias Raman*** : ***(1975) 1 SCC 647*** it has been held as follows:-

> **"11.** It will be seen that Section 465, in terms relates to unsoundness of accused's mind and his consequent incapacity to make defence, at the time of trial only. The question therefore is : Does the trial on a murder charge end with the conviction and pronouncement of death sentence on the accused by the Court of Session? Or, does it continue till the reference under Section 374, is disposed of by the High Court? Answer to this question was given by this Court, speaking through Govinda Menon, J., as far back as 1956 in *Jumman* v. *State of Punjab* in a telling passage thus :
>
> It is clear from a perusal of these provisions (Sections 374, 375, 376 and 377, Cr. P.C.) 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... but there is a difference when a reference is made under Section 374, Criminal Procedure Code, and when disposing of an appeal under Section 423, Criminal Procedure Code, and that is that the High Court has to satisfy itself as to whether a case beyond reasonable doubt has been made out against the accused persons for the infliction of the penalty of death. In fact the proceedings before the High Court are a reappraisal and the reassessment of the entire facts and law in order that the High Court should be satisfied on the materials about the guilt or innocence of the accused persons. Such being the case, it is the duty of the High Court to consider the proceedings in all their aspects and come to independent conclusion on the materials apart from the view expressed by the Sessions Judge. ....." **[emphasis supplied]**

In the case of ***Vivian Rodrick*** vs. ***The State of West Bengal*** : ***(1969) 3 SCC 176*** the following has been laid down:-

> **"34.** This Court has held that it is the duty of the High Court as a Court of appeal, in hearing a reference under Section 374, Cr. P. C., to reappraise and to reassess the entire evidence and to come to an independent conclusion as to the guilt or innocence of each of the accused persons mentioned in the reference : Vide *Surjit Singh* v. *The State of Punjab.*"
> **[emphasis supplied]**

In view of the law referred to above, we are convinced that it is permissible for this Court to consider the aforesaid aspect in this appeal.

26. The next question that next arises is as to whether in view of the law that the onus to prove insanity or unsoundness of mind lies upon the appellant and having regard to the fact no evidence was led by him, would it be permissible for the accused or this Court to rely upon the evidence available in the records? It was not required for us to travel far to search out the answer to this, as we find that the Apex Court has settled the issue in the case of ***Dahyabhai Chhaganbhai Thakkar (supra)*** in the third proposition contained in paragraph 7 which we may reproduce for convenience:-

> **"7.** .....
>
> (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."
> **[emphasis supplied]**

27. In the case of ***Nivrutti Dhondiba Shinde (supra)*** we find that the Bombay High Court, following the above law, has held in paragraph 11 of the judgment reproduced above that although the accused did not adduce any evidence to prove his insanity, he could take advantage of the evidence adduced by the prosecution and raise a reasonable doubt in the mind of the Court that at the time of committing the act he was insane. Such being the settled legal position on the question, we have considered the statements of the prosecution witnesses reproduced at paragraph 22 of this judgment, and we find that they raise reasonable doubts in our minds that at the time of committing the offence the appellant was insane.

28. For the reasons aforesaid, we hold that the appellant is entitled to the benefit of Section 84 IPC. We, however, direct the learned Sessions Judge, South & West Sikkim at Namchi as follows:-

(i) The provisions of Section 335 Cr.P.C. be followed with meticulous care and ensure detention of the appellant in safe custody in such a manner as he may deem fit, or may order the appellant to be delivered to any relative or friend of the appellant on such terms and conditions as may be considered just and prudent;

(ii) It is open for the Court to detain the appellant in a lunatic asylum in accordance with the provisions of the Rules framed under the Indian Lunacy Act, 1912.

(iii) The provisions of Section 338 Cr.P.C. be carefully followed by exercising utmost care and caution to ensure protection of the interest of the society and order for release of the appellant from the safe custody shall not be issued until the concerned Civil Surgeon or

the State Medical Board or the Commission certify that the appellant is fit to live in the society and would no longer be a hazard to the society.

(iv) The learned Sessions Judge shall report to the State Government of the action taken by him under Section 335(1) Cr.P.C.

(v) Attention of the learned Sessions Judge and the authorities is drawn to the mandatory provisions contained in Section 338 Cr.P.C. for its strict compliance.

29. Having held so, the judgment and conviction of the trial Court hereby stand set aside and the appeal is hereby allowed to the extent indicated above.

30. A copy of this judgment be transmitted to the learned Sessions Court for its due compliance.

31. Records of the learned Court below be returned forthwith.

(S. P. Wangdi)
Judge
06-09-2010

(P. D. Dinakaran)
Chief Justice
06-09-2010

Index : Yes/No

Internet : Yes/No

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