IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MRS. JUSTICE C.S. SUDHA

FRIDAY, THE 18TH DAY OF AUGUST 2023 / 27TH SRAVANA, 1945

CRL.A NO. 43 OF 2023

AGAINST THE JUDGMENT IN SC 182/2015 OF COURT OF SESSION, PATHANAMTHITTA

CP 35/2015 OF JUDICIAL MAGISTRATE OF FIRST CLASS -II,PATHANAMTHITTA

APPELLANT/ACCUSED:

REJI THOMAS @ VAYALAR,

S/O THOMAS,
AGED 51 YEARS,
C.NO.3588, CENTRAL PRISON AND CORRECTIONAL HOME,
POOJAPPURA, THIRUVANANTHAPURAM AND RESIDED AT KOLAPRA VEEDU, MATHIRAMPALLI, KURIYANOOR MURI,
THOTTAPPUZHASSERI VILLAGE THROUGH THE SUPERINTENDENT,
CENTRAL PRISON & CORRECTIONAL HOME, POOJAPPURA,
THRIRUVANANTHAPURAM

BY ADV RAJESH K RAJU , STATE BRIEF

RESPONDENT/COMPLAINANT:

1. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA

2. THE INSPECTOR OF POLICE,
KOZHENCHERRY POLICE STATION-689641.

BY ADVS.
ADVOCATE GENERAL OFFICE KERALA
SMT.AMBIKA DEVI S, SPL.P.P. (ATROCITIES AGAINST WOMEN AND CHILDREN AND WELFARE OF W AND C)(GP-38)

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 9.08.2023 AND THE COURT ON 18.08.2023 DELIVERED THE FOLLOWING:

"C.R."

P.B.SURESH KUMAR & C.S.SUDHA, JJ.

Crl.Appeal No.43 of 2023

Dated this the 18th day of August, 2023

J U D G M E N T

C.S.Sudha, J.

This appeal under Section 374(2) Cr.P.C. by the accused in S.C.No.182/2015 on the file of the Court of Session, Pathanamthitta, has been filed challenging the conviction entered and sentence passed against him for the offence punishable under Section 302 IPC.

2. The prosecution case as stated in the charge sheet is as follows – the accused due to some enmity towards his 8 year old son and with the intention of murdering him, on 19/11/2014 at 03:30 p.m, hacked the child to death with MO.6 chopper and MO.5 coconut scraper / grater. The scene of occurrence is stated to be the residence of the accused and family, bearing no.IV/60, Thottappuzhassery panchayath. Hence the accused is alleged to have committed the offence punishable under the above mentioned Section.

3. Based on Ext.P1 FIS of PW1, Crime no.1091/2014 of Koipuram police station alleging commission of the offence punishable under Section

302 IPC, that is, Ext.P8 FIR, was registered by PW16, the then Sub Inspector of the aforesaid station. PW17, the then Circle Inspector, Kozhencherry is the officer who conducted the investigation and submitted the charge sheet before the court.

4. On the final report being submitted, the jurisdictional magistrate, after complying with the statutory formalities, committed the case against the accused to the Sessions Court concerned, which court took the case on file as S.C.No.182/2015. On the appearance of the accused before the Court of Session, he was furnished with copies of all the prosecution records. On 07/07/2018, the trial court framed a charge for the offence punishable under Section 302 IPC, which was read over and explained to the accused to which he pleaded not guilty. The prosecution examined PWs.1 to 18 and got marked Exts.P1 to P24 and MO.1 to MO.8. After the close of the prosecution evidence, the accused was questioned under Section 313(1)(b) Cr.P.C. regarding the incriminating circumstances appearing against him in the evidence of the prosecution. The accused denied all those circumstances and maintained his innocence.

5. As the Sessions Court did not find it a fit case to acquit the accused under Section 232 Cr.P.C., he was asked to enter on his defence and adduce

evidence in support thereof. DW1 was examined and Ext.D1 was marked on behalf of the accused.

6. On a consideration of the oral and documentary evidence and after hearing both sides, the trial court by the impugned judgment found the accused guilty of the offence punishable under Section 302 IPC and hence convicted and sentenced him to imprisonment for life and to a fine of ₹10,000/- and in default of payment of fine, to undergo rigorous imprisonment for a period of one year. Set off under Section 428 has also been allowed. It has also been directed that if the fine amount is realised, the amount shall be given to PW2 Sheela, the mother of the deceased, under Section 357(1)(b) Cr.P.C.

7. The only point that arises for consideration in this appeal is whether the conviction entered, and sentence passed against the accused by the trial court is sustainable or not.

8. Heard Sri. Rajesh K.Raju, the learned counsel appointed on State Brief for the appellant and Smt.S.Ambika Devi, the learned Special Public Prosecutor.

9. As stated earlier, the prosecution case is that the accused had murdered his child by hacking and cutting with MO.6 chopper and MO.5

Coconut scraper/grater. PW15, Assistant Professor, Medical College Hospital, Kottayam deposed that on 20/11/2014, he had conducted postmortem examination on the body of Rejin, aged about 8 year. On examination, he noted the following ante-mortem injuries.

> *"INJURIES (ANTE-MORTEM)*
>
> *1. Incised decapitating wound 16x12cm horizontally placed, involving the lower lip on the front and body of 6th cervical vertebra on the back of neck. The neck structures were severed. The larynx was cut at the level of cricoid cartilage. The lower jaw was cut fractured and fragmented with a portion on the front aspect missing. That missing portion with teeth brought separately in a polythene cover.*
>
> *2. Incised wound 3x1x0.5cm, obliquely placed on the right side of back of head with its front upper end 1cm behind the upper part of ear lobe.*
>
> *3. Incised wound 2x1x0.5cm, horizontally placed on the right side of back of head, 1cm behind the ear lobe and 1.5cm below the injury No.2.*
>
> *4. Incised wound 5x0.1x0.1cm on the right side of back of head, placed horizontally, 3cm below the injury No.3.*
>
> *5. Incised wound 4x0.1x0.1cm on the right side of back of head, placed horizontally, 1cm below injury No.4.*
>
> *6. Incised wound 5x1x0.5cm on the left side of back of head, placed horizontally, 5cm behind the root of ear.*
>
> *7. Incised wound 4x1x1cm, on the left side of back of head, horizontally placed, 0.5cm above injury No.6.*

8. Incised wound 3x1x2cm, obliquely placed on the right side of front of chest, with its lower inner end 3cm outer to midline and 1cm below the root of neck.

9. Incised wound 2x1x0.5cm, placed vertically on the top of right shoulder, 2.5cm outer to the root of neck.

10. Incised wound 1.5x1x0.5cm on the top of right shoulder 5cm outer to root of neck.

11. Incised wound 1.5x1x2cm on the right side of chest, obliquely placed, with its lower inner end 5cm outer to midline and 4cm below the top of shoulder.

12. Incised wound 5x1.5x2cm on the back of right hand, 3cm below wrist.

13. Incised wound 4x0.5x0.5cm, horizontally placed on the outer aspect of left arm, 3cm below its tip.

14. Incised wound 5x1x1cm, horizontally placed on the left side of back of neck, 6cm outer to midline and 2cm above the top of shoulder.

15. Incised wound 3x1x1cm, horizontally placed, on the left side of back of trunk, 16cm outer to midline and 1cm below injury No. 14.

16. Incised wound 2x1x0.5cm on the left side of back of trunk, 9cm outer to midline and 4cm below the top of shoulder.

17. Incised wound 2xlx1cm, horizontally placed, on the middle of back of neck. 1cm above the root of neck.

18. Incised wound 5x1x0.5cm horizontally placed on the left side of back of trunk, touching the midline and 1cm below injury No. 17.

19. Contusion 3x2x0.5cm on the top of right shoulder involving

its tip.

Lungs were pale. Stomach contained rice and other food materials having no peculiar smell. Its mucosa was pale. Urinary bladder was empty. All other internal organs were pale."

According to PW15, his opinion as to the cause of death is due to decapitating injury. Injury no.1 was fatal. All injuries, according to him, could be caused by MO.6 weapon. Ext.P7 is the postmortem certificate issued by him.

10. The aforesaid evidence would show that the death of Rejin was infact a case of homicide coming under Section 299 IPC.

11. The fact that it was the accused who committed the murder has been established by the testimony of PWs.1 to 9. No contradictions or significant omission(s) has been brought out to discredit the testimony of the aforesaid witnesses. During the course of arguments also, there was no serious objection to the finding that it was the accused who committed the murder. Therefore, the trial court was certainly right in coming to the conclusion that it was the accused who committed the act of killing his child.

12. The main argument advanced is that the accused is entitled to the benefit of Section 84 IPC. According to the defence counsel, no motive has

been established in this case. After the incident, the accused never made any attempt to escape. On the other hand, he was very much in the house even when the people of the locality gathered and the police arrived. The fact that the accused is mentally sick has been brought out through the testimony of DW1 and Ext.D1 medical records. The accused after being remanded to judicial custody showed signs of mental illness and hence had to be admitted in the Mental Health Centre, Thiruvananthapuram for treatment. In the remand application itself, it is stated by the investigating officer that the accused had undergone treatment for mental illness and hence investigation into the same is required. PW17, the investigating officer had a duty to investigate and report the fact of insanity of the accused to the court. However, PW17 has failed in his duty. This is a serious infirmity in the case put forward by the prosecution. In support of this argument, reference has been made to the dictum in **Kuttappan v. State of Kerala, 1986 KHC 96; Dhora v. State of Kerala, 1991 KHC 504; Joseph Mathai @ Jose v. State of Kerala, 2019 KHC 934** and Crl.Appeal No.449/2021.

12.1. In **Bapu v. State of Rajasthan, (2007)8 SCC 66**, it has been held that it is the duty of an honest investigator to subject the accused to medical examination immediately and place the evidence before the court and

if that is not done, it creates a serious infirmity in the prosecution case and that the benefit of doubt has to be given to the accused. In the case on hand it was pointed out that the testimony of DW1 and Ext.D1 medical records would show that immediately after the first remand itself, the accused required hospitalisation and so had to be sent for treatment to the Mental Health Centre, Thiruvananthapuram, where he was under treatment for the period from 21/11/2014 till 19/12/2014. However, PW17, the investigating officer, never investigated into this aspect and had not made available the records before the court. The final report was submitted concealing the fact of mental illness of the accused. Therefore, relying on the aforesaid decisions, the argument advanced is that the accused is entitled to the benefit of doubt as the prosecution has failed to prove the *mens rea* required on the part of the accused.

12.2. *Per contra*, it was submitted by the learned Public Prosecutor that it is true that the accused is medically insane. However he was not legally insane at the time of commission of the offence, which is clear from the deposition of the witnesses. The materials on record, though would show that the accused was suffering from some mental illness, the degree of his illness was not of such a nature as to impair his faculties, due to which he was

unable to understand the seriousness of the act done by him or whether it was right or wrong. Hence he is not entitled to the benefit of Section 84 IPC, argues the learned Public Prosecutor.

13. Section 84 IPC says that nothing is an offence which is done by a person who, at the time of doing it by reason of unsoundness of mind is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law. The settled position of law is that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved (**State of M.P. v. Ahmadulla, AIR 1961 SC 998**).

13.1. As held in **Hari Singh Gond v. State of M. P., AIR 2009 SC 31**, Section 84 IPC lays down the legal test of responsibility in cases of alleged unsoundness of mind. There is no definition of 'unsoundness of mind' in the Penal Code. The term 'insanity' has no precise definition. It is a term used to describe varying degrees of mental disorder. Every person who is mentally diseased is not ipso facto exempted from criminal responsibility. A distinction needs to be made between legal insanity and medical insanity. In dealing with cases involving a defense of insanity, distinction must be made between cases, in which insanity is more or less proved and the question is

only as to the degree of irresponsibility, and cases, in which insanity is sought to be proved in respect of a person, who for all intents and purposes, appears sane. In all cases, where previous insanity is proved or admitted, certain considerations must be borne in mind. Whether there was deliberation and preparation for the act; whether it was done in a manner which showed a desire to concealment; whether after the crime, the offender showed consciousness of guilt and made efforts to avoid detection, whether after his arrest, he offered false excuses and made false statements. It has also been pointed out that these tests are good for cases in which previous insanity is more or less established.

13.2. In **Dahyabhai Chhaganbhai Thakkar v. State of Gujarat, AIR 1964 SC 1563**, it has been held that, it is a fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and, therefore, the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. The prosecution, therefore, in a case of homicide shall prove beyond reasonable doubt that the accused caused death with the requisite intention described in S.299 of the Penal Code. This general burden never shifts, and it always rests on the prosecution. Under S.105 of the Evidence Act, read with the definition of ‘shall presume' in S.4 thereof, the

court shall regard the absence of such circumstances as proved unless, after considering the matters before it, it believes that the said circumstances existed or their existence was so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist. To put it in other words, the accused will have to rebut the presumption that such circumstances did not exist, by placing material before the court sufficient to make it consider the existence of the said circumstances so probable that a prudent man would act upon them. The accused must satisfy the standard of a 'prudent man'. If the material placed before the court, such as oral and documentary evidence, presumptions, admissions or even the prosecution evidence, satisfies the test of 'prudent man' the accused will have discharged his burden. The evidence so placed may not be sufficient to discharge the burden under S.105 of the Evidence Act, but it may raise a reasonable doubt in the mind of a Judge as regards one or other of the necessary ingredients of the offence itself. It may, for instance, raise a reasonable doubt in the mind of the Judge whether the accused had the requisite intention laid down in Section 299 of the Penal Code, 1860. If the Judge has such reasonable doubt, he must acquit the accused, for in that event the prosecution will have failed to prove conclusively the guilt of the accused.

There is no conflict between the general burden, which is always on the prosecution, and which never shifts, and the special burden that rests on the accused to make out his defence of insanity.

13.3. In **T.N. Lakshmaiah v. State of Karnataka, AIR 2001 SC 3828**, it has been held that 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 he proves his case to the hilt but because the version given by him casts a doubt on the prosecution case.

13.4. In **Bapu** (*Supra*), it has been held, Section 84 embodies the fundamental maxim of criminal law, i.e., *actus non facit reum nisi mens sit rea* (an act does not constitute guilt unless done with a guilty intention). To constitute an offence, the intent and act must concur; but in the case of insane persons, no culpability is fastened on them as they have no free will (*furiosi nulla voluntas est*). The Section itself provides that the benefit is available only after it is proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to

know the nature and quality of the act he was doing, or that even if he did not know it, it was either wrong or contrary to law then this section must be applied. The crucial point of time for deciding whether the benefit of this section should be given or not, is the material time when the offence takes place. In coming to that conclusion, the relevant circumstances are to be taken into consideration, it would be dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. It is only unsoundness of mind which naturally impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility. The law recognises nothing but incapacity to realize the nature of the act and presumes that where a man's mind or his faculties of ratiocination are sufficiently dim to comprehend what he is doing, he must always be presumed to intend the consequence of the action he takes. Mere absence of motive for a crime, howsoever atrocious it may be, cannot, in the absence of a plea and proof of legal insanity, bring the case within this section.

13.5. Further, in **Sheralli Wali Mohammed v. State of Maharashtra, (1973) 4 SCC 79 : AIR 1972 SC 2443** it has been held that the mere fact that no motive has been proved why the accused committed the murder or the fact that he made no attempt to run away, would not indicate that he was insane or

that he did not have necessary *mens rea* for the commission of the offence. Mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour of a psychopath affords no protection under Section 84. Behaviour, antecedent, attendant, and subsequent to the event, may be relevant in finding the mental condition of the accused at the time of the event, but not that remote in time. It is difficult to prove the precise state of the offender' s mind at the time of the commission of the offence, but some indication thereof is often furnished by the conduct of the offender while committing it or immediately after the commission of the offence. A lucid interval of an insane person is not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficiently to enable the person soundly to judge the act; but the expression does not necessarily mean complete or perfect restoration of the mental faculties to their original condition. So, if there is such a restoration, the person concerned can do the act with such reason, memory, and judgment as to make it a legal act; but merely a cessation of the violent symptoms of the disorder is not sufficient.

13.6. 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.

14. Having thus reminded ourselves of the law on the point, let us consider the evidence on record to see whether the accused herein is entitled to the benefit of Section 84 IPC. PW2 Sheela, the mother of the deceased child and wife of the accused, deposed that on the date of the incident she had returned home from work at about 9:30 a.m. She entrusted her child to PW3 Bindhu, a neighbour, to send her child to school. She then went to the Govt. Hospital, Kozhencherry for buying medicines. By afternoon she was informed by PW3 that the latter had seen the child being taken home by the accused. Her son's teacher also called her and told her that the accused had come to the school and had taken the child from the school saying that she was sick. When she returned home, she saw the dead body of her child.

14.1. PW3 deposed that both her son and the son of PW2 are taken to school in an autorickshaw. As requested by PW2, she had sent the latter's child along with her child in the morning to the school. In the afternoon when she went to attend her driving classes, on the way she saw the accused with the child. When she inquired the matter, the accused told her that the classes for the day was over and hence he is taking the child home. As her child had not returned, she immediately called up the school. The school authorities informed her that the classes were not over for the day and that the accused saying that his wife had to be taken to the hospital as she was sick, took the child home. She immediately informed PW2 of the matter. Thereafter she came to know that the accused had murdered the child.

14.2. PW4 and PW5, the teachers of the school in which the deceased child was studying, support the prosecution story. PW4 deposed that on 19/04/2014 at about 2:30 p.m. the accused came to the school. When she inquired the matter, the accused said that he had come to take the child home. The accused told her that his wife is sick at home and hence she has to be taken to the hospital. The child when returns from school would be alone at home and hence he needs to take the child. She along with PW5, the class teacher, went to the child's class and she directed PW5 to allow the child to

go with the accused. Thereafter, PW3 called her over the phone and asked her whether the classes were over for the day. She told PW3 that the accused had come to the school and taken away the child on the pretext that his wife had to be taken to the hospital. PW5 immediately contacted PW2 and informed the matter. Thereafter, she was informed about the incident. PW5 the class teacher also supports the version of PW4.

14.3. PW1, a near relative of PW2 who came to the scene on hearing the incident, says that the accused confessed that he had killed the child. At that time he did not see any change in the accused. (പ്രതിയിൽ ഒരു മാറ്റവും ഞാൻ കണ്ടില്ല. See page 8 of his deposition). PW2 deposed that when she reached home, the accused came out of the house and told her that he would kill her just as he had killed her child. PW6, grama panchayat member deposed that he had gone to the scene of occurrence on being informed of the same. When he reached there he saw that the people who gathered there had restrained the accused. The accused told him that he had killed Sheela's (PW2) son and whether any action is to be taken against him (ഞാൻ ഷീലയുടെ മകനെ കൊന്നു, എന്തെങ്കിലും എന്നെ ചെയ്യാൻ ഉണ്ടോ? എന്ന് പ്രതി ചോദിച്ചു. See page 4 of his deposition).

15. The aforesaid testimony of the witnesses shows the conduct of

the accused before and after the commission of the offence. According to the learned public prosecutor, the conduct of the accused in taking the child home by deceiving the teachers and lying to them, shows deliberation/premeditation and preparation. After commission of the crime, the accused did not leave MO.5 coconut scraper/grater and MO.6 chopper near the dead body of the child. But he had taken it and kept it away in a shelf in the kitchen, which indicates his attempt to conceal the weapons. The aforesaid conduct would show that the accused was perfectly sane at the time of commission of the crime. He may have been medically insane, but never legally insane, argues the learned public prosecutor.

16. The aforesaid conduct of the accused do certainly raise suspicions and doubts as to whether there was any legal insanity as contended by him. No specific plea of legal insanity is seen taken up by the accused when the prosecution witnesses were examined or in his 313 statement. The accused took up a case of complete denial of the case. In fact, during the course of the trial, in spite of specific warnings by the learned trial judge, the accused expressed his desire to confess to the crime. The accused expressed his desire to confess on 17/09/2018, on which date he was warned of the consequences. From the minutes recorded by the trial judge in the

proceedings sheet, we find that the defence counsel had also warned the accused in the open court about the consequences. On the said day the confession was not recorded and the court sent him back to ponder over his decision to confess. The next day, that is, on 18/09/2018 when he was produced before the court he confessed that he had killed his son. The confession has been recorded by the trial court which reads thus:-

> "എന്റെ മകനെ നാട്ടുകാർ പറഞ്ഞുതുസരിച്ച് അവനെ ഞാൻ സ്കൂളിൽ നിന്ന് വിളിച്ച് കൊണ്ട് വന്ന് കൊല ചെയ്തു. മകനെ സ്കൂളിൽ നിന്ന് ഞാൻ കൂട്ടി കൊണ്ട് വന്നു. വീട്ടിൽ വച്ചാണ് ചെയ്തത്. വാക്കത്തിയും, ചിരവയും ഉപയോഗിച്ച് കൊല ചെയ്തു; ആ സമയം ഞാനും കൊച്ചും മാത്രമേയുണ്ടായിരുന്നുള്ളൂ. അതിന് ശേഷം ഭാര്യ വന്നു. ജാതി spirit കൊണ്ട് മറ്റുള്ളവർ പറഞ്ഞാണ് ഞാൻ ഇക്കാര്യം ചെയ്തത്. ഒരു കുട്ടിയെ എനിക്ക് ഉണ്ടായിരുന്നുള്ളൂ.
> Q. നിങ്ങൾ നിങ്ങളുടെ ഭാര്യയെ സംശയിച്ചിരുന്നോ ?
> ഇല്ല, ഒരിക്കലും ഞാൻ സംശയിച്ചിരുന്നില്ല."

The accused has no case that there was any legal insanity or that he was not in a position to understand the consequences of what he was saying when he confessed before the learned trial judge.

17. Be that as it may, evidence has come on record that the accused was under treatment before and after the incident. Ext.D1 shows that the accused was initially admitted in the hospital on 14/02/2013 in the Mental

Health Centre, Thiruvananthapuram where he underwent treatment as an inpatient till 13/05/2013 on which date he was discharged. Thereafter, after the commission of the offence on 19/11/2014, he was again admitted in the hospital on 21/11/2014 and thereafter discharged on 19/12/2014. The accused is seen to have been initially admitted in the hospital based on the order of the magistrate concerned. In Ext.D1 it is seen that the accused was a nuisance to the people of the locality. There were instances where the accused had trespassed into the property of his neighbours and brandishing a knife had tried to extract money from them. On the basis of a mass complaint given by the people of the locality to the District Collector, the Chief Judicial Magistrate under the provisions of the Mental Healthcare Act, 2017, sent the accused to the Mental Health Centre, Thiruvananthapuram.

18. DW1, Superintendent, Govt. Mental Health Centre, Thiruvananthapuram was examined on behalf of the accused to establish his case of legal insanity. By referring to Ext.D1, the record relating to the treatment of the accused, he deposed that the accused was suffering from bipolar affective disorder. The accused had been advised to take medicines. However, after 19/12/2014 the accused had not turned up for further treatment and that there has been no follow up action. According to DW1 if

follow up action is not taken, it would not be possible to bring the disease under control. In the cross-examination DW1 admitted that he had never treated the accused and that he cannot say about the mental condition of the accused. He also cannot say what was the mental condition of the accused on 19/11/2014 by going through Ext.D1. Biploar affective disorder can recur in a patient. Such patients may go into depression or they may go into a maniac state. The patient may then have normal thinking, which would depend on mood swings. Such a person would be able to recognize his relatives and could also behave like a normal person. On 21/11/2014 when the accused was admitted in the hospital, he kept on repeating that he was hearing voices and that there was some virus in his body. The accused said - "അത് വെച്ച് കട്ട പൊട്ടിക്കുന്നപോക്കറ്റ് റേഡിയോ വെച്ച് ഒത്തിയത് കൊണ്ടാണ് ഇങ്ങനെ സംഭവിച്ചത്". In the re-examination DW1 deposed that patients with the aforesaid disorder can sometimes be normal also. If the patient does not take medicines, the ailment cannot be brought under control. To the questions by the court, DW1 answered that bipolar affective disorder is a serious and a major mental illness. Neither the memory or the brain of a person with such an ailment would be affected due to the said disease. But there can be an error of judgment and if an error of judgment happens, the person would not have the

capacity to understand the consequences of his act. Such a patient would be able to recognize his near relatives. (ഈ അസുഖം വരുമ്പോൾ മറവിക്കും ബുദ്ധിക്കും കോട്ടം വരില്ല. എന്നാൽ judgment error വരാം. Judgment error എന്നാൽ വരും. വരുന്നുകളെ കുറിച്ച് ചിന്തിക്കാൻ കഴിയാതെയാകാം. അടുത്ത relative-നെ തിരിച്ചറിയാൻ കഴിയും. See page 13 of his deposition).

19. Further, in Ext.P18, the first remand application, submitted before the jurisdictional magistrate, it is stated that the accused was earlier under treatment for mental illness and so further investigation into the same is necessary. However, PW17 the investigating officer, does not seem to have conducted any sort of investigation into the same. The final report is silent about the mental condition or the treatment undergone by the accused before and after the incident. PW17 when examined deposed that the accused was perfectly normal and that the doctor had certified that he is fit to stand trial. Dr. Anish N.R.K., the doctor who treated the accused before and after the incident has been cited as CW25 in the final report. However, he is seen given up by the prosecution. It is true that the prosecutor has the right to decide which all witnesses are to be examined on behalf of the prosecution. But as held by the Apex Court in **Bapu** (*Supra*) it is the duty of an honest investigator to subject the accused to medical examination immediately and

place the evidence before the court and if that is not done, it creates a serious infirmity in the prosecution case and that the benefit of doubt has to be given to the accused.

20. In the case on hand the accused was arrested and produced before the jurisdictional magistrate on 20/11/2014, on which day he was sent to judicial custody till 04/12/2014. Ext.D1 would show that the accused was admitted on 21/11/2014, that is, the very next day after he was sent to judicial custody to the Mental Health Centre as he showed signs of insanity while in custody. That being the position, PW17 did have a duty to bring it to the notice of the court about the treatment undergone by the accused before and after the incident, which apparently has not been done in this case.

21. The murder committed in this case is undoubtedly ghastly and spine chilling. The accused had hacked his son to death using MO.5 coconut scraper/grater and MO.6 chopper. Ext.P7 postmortem certificate shows as many as 18 incised injuries on the child. Injury no.1 is a decapitating injury by which the head of the child was severed from the body. Why did the accused kill his own son in a most brutal manner? We are unable to find a satisfactory answer or an answer for that matter, to the said question from the materials on record. In the final report, no motive is alleged. It is only stated

that the accused due to some enmity to the child, has committed the murder. It is true that motive need not always be proved. PW1, a close relative of PW2, in Ext.P1 FIS states that he is not aware of any issues between PW2 and the accused. According to PW2, the accused did not like the child as he believed that it was not his child. From the day the child was born, the accused entertained doubts about his paternity. This is spoken to by PW3 also. PW1 in the box stated that there were fights and quarrels between the couple. PW6 deposed that the accused believed that the child was not his, due to which there were frequent quarrels between the couple and that he had intervened in the matter several times. It was pointed out on behalf of the accused that none of the witnesses speak of the reasons for the motive when questioned by the police and that these facts are conspicuously absent in their 161 statements. All the witnesses have developed a new story in the box, which cannot be believed. When the attention of the counsel was drawn to the fact that no contradictions or omissions have been brought out in the cross examination of the prosecution witnesses, it was submitted that the case had not been properly conducted by the counsel appointed on State Brief before the trial court. This according to the defence counsel, has caused considerable prejudice to the accused.

22. We notice with great concern that in many cases in which the assistance of a legal aid counsel is given by the trial courts, the aforesaid argument is advanced before us. In the facts and circumstances of the case, we do not think a remand or a re-trial of the case is necessary in the light of the materials on record. As motive has not been established, the question that stares at us is, why should a father murder his one and only child for absolutely no reasons? Ext.D1 shows that the accused was under treatment before and after the incident. DW1 says that Bipolar affective disorder is a serious and major mental illness. Ext.D1 also shows that on his first admission on 14/02/2013 he had been diagnosed with schizophrenia. DW1 also says that if proper follow up action is not taken the illness would recur. Ext.D1 reveals that the accused had auditory hallucinations and strong feelings of persecution. As held in **Dahyabhai Chhaganbhai Thakkar** and **Lakshmaiah** *(Supra),* the prosecution in a case of homicide has to prove beyond reasonable doubt that the accused caused death with the requisite intention described in Section 299 IPC. This general burden never shifts, and it always rests on the prosecution. The evidence placed by the accused may not be sufficient to discharge the burden under S.105 of the Evidence Act, but it may raise a doubt in the mind of a judge as regards one or other of the

necessary ingredients of the offence. If it raises a reasonable doubt in the mind of the judge whether the accused had the requisite intention laid down in Section 299 IPC, the court must acquit the accused, for in that event the prosecution will have failed to prove conclusively the guilt of the accused. It is sufficient if the 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 he proves his case to the hilt but because the version given by him casts a doubt on the prosecution case. Here, doubts do arise in our mind as to whether the accused had the required *mens rea* to commit the offence. In such circumstances, it can only be held that the accused is entitled to the benefit of doubt.

23. The evidence on record clearly shows that the accused had committed the ghastly act of hacking his minor child to death. We do understand the anguish, deep sorrow and frustration expressed by PW2, the mother of the deceased, who had the misfortune to see the beheaded torso of her young son. But, when the law on the point gives a protection to the accused, we cannot deny the same to the accused. Hence, we find that the accused is liable to be acquitted under 334 Cr.P.C. as he is entitled to the benefit of exception contained in Section 84 IPC.

24. Section 335 Cr.P.C. gives two options to the court to deal with persons who are acquitted on the ground of mental unsoundness. As per clause (a) to sub-section (1) such person shall be ordered to be detained in safe custody in such place and manner as the court thinks fit, or as per clause (b) he may be ordered to be delivered to any relative or friend of such person. Sub-section (3) says that no order for the delivery of the accused to a relative or friend shall be made under clause (b) of sub-section (1) except upon the application of such relative or friend and on his giving security to the satisfaction of the Magistrate or Court that the person delivered shall- (a) be properly taken care of and prevented from doing injury to himself or to any other person; (b) be produced for the inspection of such officer, and at such times and places, as the State Government may direct. Sub-section (4) of S.335 provides that the court shall report to the State Government, the action taken under sub-section (1). S.336 of Cr.P.C. gives the power to the State Government to empower the officer in charge of the jail in which a person is confined under the provisions of S.330 or 335 to discharge all or any of the functions of the Inspector General of Prisons under S.337 or S.338 of the Code. S.338 deals with the procedure where the prisoner with mental illness is detained under the provisions of sub-section (2) of Section 330 or Section

335 and such Inspector General or visitors shall certify that, in his or their judgment, he may be released without danger of his doing injury to himself or to any other person, the State Government may thereupon order him to be released, or to be detained in custody, or to be transferred to a public lunatic asylum if he has not been already sent to such an asylum; and, in case it orders him to be transferred to an asylum, may appoint a commission, consisting of a judicial and two medical Officers. Sub-section (2) provides that such commission shall make a formal inquiry into the state of mind of such person, take such evidence as is necessary, and shall report to the State Government, which may order his release or detention as it thinks fit. S.339(1) of Code provides that whenever any relative or friend of any person detained under the provisions of S.330 or S.335 desires that he shall be delivered to his care and custody, the State Government may, upon the application of such relative or friend and on his giving security to the satisfaction of the State Government, that the person delivered shall be properly taken care of and prevented from doing injury to himself or any other person; be produced for the inspection of such officer, and at such times and places, as the State Government may direct.

25. We set aside the conviction and sentence entered against the

appellant under Section 302 IPC. We find that the appellant has committed the act of hacking his son to death with MO.5 coconut scraper/grater and MO.6 chopper. We, therefore, acquit the appellant under Section 334 Cr.P.C. on the ground that, at the time at which he committed the offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged, or that it was contrary to law. From Ext.D1 it can be seen that the accused is a threat to the life and property of the people of the locality and hence the reason why on the request of the police, the jurisdictional magistrate had invoked the provisions of the Mental Healthcare Act, 2017. There appears to be none to take care of him. The testimony of DW1 shows that if medicines are not taken regularly and whatever follow up action is necessary is not taken, the ailment would recur. Therefore to set such a person free, may result in incidents worse than the one on hand. We direct the appellant to be kept in safe custody as provided under S.335 Cr.P.C. Sub-section (2) of S.335 provides that the order for detention shall be in accordance with the rules framed by the State Government under the Indian Lunacy Act, 1912. As the Indian Lunacy Act, 1912 has been repealed and the relevant Act in force is the Mental Healthcare Act, 2017, we find that the latter Act is applicable in this case. We, therefore, direct that the appellant

shall be detained in one of the mental health establishments in the State in accordance with the rules, if any, framed by the State Government. A copy of this judgment shall be sent to the Director General of Prisons and the Secretary, Home Department, Government of Kerala in terms of S.335(4) for taking further action in terms of S.338 Cr.P.C.

In the result, the Criminal Appeal is allowed. The conviction and sentence imposed against the appellant by the trial court for the offence punishable under Section 302 IPC is set aside. As stated in paragraphs 24 and 25 of the judgment, the accused stands acquitted subject to S.335(1)(a) Cr.P.C.

Interlocutory applications, if any pending, shall stand closed.

Sd/-
P.B. SURESH KUMAR
JUDGE

Sd/-
C.S.SUDHA
JUDGE

ami/ak/Jms