

(2021) 03 BOM CK 0031
In the Bombay High Court
Case No : Criminal Appeal No. 212 Of 2013

Janardan @ Shankar Tukaram Baing

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 31-03-2021

Acts Referred:

Indian Penal Code, 1860 — Section 84, 304, 304(II)302, 307
Code Of Criminal Procedure, 1973 — Section 313
Evidence Act, 1872 — Section 105

Citation : (2021) 03 BOM CK 0031

Hon'ble Judges : Prasanna B. Varale, J;S.M. Modak, J

Bench : Division Bench

Advocate : Payoshi Roy, Chandani Chawla, Dr. Yug Mohit Chaudhry, H.J. Dedhia

Final Decision : Partly Allowed

Judgement

Prasanna B. Varale, J

1. Being aggrieved by the judgment and order passed by the Additional Sessions Judge, Ratnagiri in Sessions Case No. 27 of 2011, dated 28th February, 2012, whereby Appellant herein was convicted for the offences punishable under Sections 302 and 307 of the Indian Penal Code (for short "IPC"), the present criminal appeal is preferred by the Appellant – Accused.

2. The case of prosecution is reflected through the first information report lodged at the instance of Jagannath Dhaku Baing (PW 1). Informant – Jagannath (PW 1) is resident of Tervan, Baingwadi, Tq. Rajapur with his family members namely, his mother Sarasvati, father Dhaku Dharmaji Baing, wife Jyotsana, and sons Suraj, Saurabh and Sahil. Jagannath (PW 1). He is serving in Mumbai and frequently visiting to his native place situated at Baingwadi. His aunt Kashibai is his next door neighbour and she resides with her daughter Shalini. Son of Kashibai namely, Prakash Bhalchandra Baing is also serving at Mumbai and stays at Mumbai with his family. The cousin brother Anant Baing is neighbour of Kashibai and his brother Janardan @ Shankar Baing whose marriage was solemnized in

the year 2008 also stays at Mumbai with his wife and he is also frequently visiting to his native place. On 04.05.2011 Janardan had visited his native place on account of vacation. Janardan is not having any issue so far and he is carrying grudge against his aunt Kashibai and cousin sister Shalini on a suspicion that both of them are indulged in the act of black magic (Devdevaski) and as such he is issue-less till date. On this count, the relations between Janardan and Kashibai are strained.

3. On 10.05.2011 at about 09.30 pm Jagannath was proceeding to attend 'Haldi function' and a ceremony of erecting pendol (ekaMo ?kky.;kpk dk;Zdze) son of Balkrishna Sonu Baing at that time cousin sister Shalini was washing utensils in the bathroom placed in the courtyard. Due to the burning electricity lamp Jagannath could see Shalini washing utensils in the courtyard. After going for some distance he heard hue and cry of Kashibai. Then he immediately rushed to the spot to see what happened and found that Janardan @ Shankar Baing was hitting Shalini on her head forcibly by bamboo stick. When his aunt Kashibai rushed to save Shalini from the attack of Janardan, Janardan gave forcible blow on the head of Kashibai. Witnessing this incident Jagannath immediately intervened and made an attempt to snatch away Janardan. He found that blood was oozing from the head of Shalini as well as his aunt Kahibai. Till that time sarpanch of village Balkrushna Sonu Baing, Police patil Gajanan Ratnu Baing, Ramchandra Punaji Baing, Santosh Devu Baing, Chandrakant Sonu Baing and some other residents gathered there. On inquiry, Kashibai told them that after finishing the dinner she and Shalini were washing utensils in the courtyard and they were chit-chatting. At that time, accused Janardan picked up the quarrel with Shalini and Kashibai asking them as to why they are indulged in the act of black magic for making him issue-less and why they were gossiping against him. Shalini replied to Janardan that they were not talking about him but they were discussing their own family issue. Janardan was not in mood to pay any heed to the explanation of Shalini and he started assaulting on Shalini by giving blows on her head with a bamboo stick. Shalini was lying unconscious. Residents in the locality namely, Balkrushna Sonu Baing, Gajanan Ratnu Baing, Ramchandra Punaji Baing, Santosh Devu Baing, Chandrakant Sonu Bain arranged for a auto rickshaw of one Dattaram Keshav Neman to shift Shalini in the hospital. Another rickshaw of one Kiran Baing was arranged to shift Kashibai in the hospital. Both of them were shifted to Rural Hospital, Rajapur.

4. At about 10.45 pm, on examination of Shalini the medical officer present there declared her dead and by providing first aid to Kashibai advised to shift her in Civil Hospital, Ratnagiri. On lodgment of the report at the instance of Jagannath (PW 1) offence was registered at Rajapur Police Station against accused. Then Jaywant Bapusaheb Khade (PW 10) took over the investigation. By completing formalities of investigation such as drawing the spot panchanama, recording statement of witnesses, effecting arrest of the accused, effecting seizure of the incriminating articles and investigation concluded in filing charge-sheet before the learned JMFC. The offences being exclusively triable by the Court of Sessions,

the same was committed to the Court of Sessions. The accused pleaded not guilty. The defence of the accused was mainly of total denial and in addition defence of insanity was raised. Accused was subjected to statement under Section 313 of the Code of Criminal Procedure. Learned Sessions Judge on hearing the learned APP as well as defence Counsel and on perusal of the evidence brought before the Court recorded the judgment and order of conviction.

5. The prosecution in support of its case examined as many as 10 witnesses and relied on other material in the form of panchanamas, postmortem report and the medical certificate. In support of the medical evidence, Dr. Umesh B. Chavan (PW 7) and Dr. Shila Takalikar (PW 9) were examined. Material seized in the process of investigation was forwarded to the forensic laboratory for chemical analysis. Chemical analyzers report was also obtained in the process of investigation. The prosecution draws support from the CA report also.

6. Learned Counsel, Ms. Payoshi Roy appearing for the Appellant invited our attention to the evidence and advanced her submissions in detail. Ms. Payoshi Roy, learned Counsel for Appellant made two folds submissions. Firstly, it was an attempt of learned Counsel, Ms. Roy appearing for Appellant that so called evidence of eye witnesses is not fully reliable and as there are certain discrepancies the same cannot be accepted as basis for conviction. Secondly, Ms. Roy vehemently submitted that the evidence on record is clear goes to show that the accused was not mentally fit person and the evidence clearly supports the defence of insanity.

7. Learned APP opposed the contentions raised by learned Counsel for Appellant and submitted that the evidence brought by the prosecution in the form of witnesses is clear and trustworthy and the medical evidence also fully supports the case of prosecution. Learned APP then submitted that though the accused – appellant raised the defence of insanity the record clearly show that except certain minor act of shouting there was absolutely no specific change in the normal behaviour of the accused prior to commission of offence or on the day of incident and so called change in behaviour of accused is only at the time when accused was an under trial prisoner.

8. On the backdrop of the above referred evidence, now we may refer to the evidence of prosecution brought on record. It may not be out of place to state here that most of the witnesses who are either in relation to each other or are the local residents carrying the surname Baing possibly as the name of village itself is Baingwadi, the residents might be carrying this surname in common.

9. Jagannath Baing (PW 1) in his examination-in-chief supports the case and proves the first information report lodged at his instance.

In his detailed cross-examination the details in respect of house of Kashibai was brought on record. This witness was subjected to detailed and searching cross-examination. A suggestion was given to this witness that on the day of incident

the accused was shouting loudly in his room since afternoon, this suggestion is denied. There is another suggestion that when Shalini was washing utensils at that place kadappa, stone, or tiles were fixed, this suggestion is also denied. Then an omission is brought on record in respect of colour and the nature of apparel worn by Shalini as well Kashibai. The omission read thus: 'I have not stated before police that Shalini had worn as colour 'Gown' and white petticoat. I have not stated before police that Kashibai had worn 'Nine wari' (Nine meter in length) Saree and Yellow colour blouse'. Then other suggestion was also given to this witness that he reached on the spot after the incident was over, this suggestion is also denied.

Considering the entire version of this witness along with his cross-examination, we found that this witness gives clear account of incident and sequence of events and the act of accused. The omissions referred above, in our opinion, are minor in nature and does not affect the version of this witness. It can safely be said that the testimony of this witness is unshaken, reliable and trustworthy.

10. Kashibai Baing (PW 2) is another important witness who is an injured eye witness to the incident. Apart from injury caused to her, she also supports the case of prosecution in so far as homicidal death of Shalini. It is stated before the Court by Kashibai (PW 2) that Shalini was her daughter, her son was residing at Mumbai on account of his services. Apart from Shalini she was having four other daughters. Shalini was unmarried. She further stated that her house is consisting of five room. Then she stated that accused is his nephew and he was serving in Mumbai. Kashibai (PW 2) then gives the account of incident. She stated that at about 09.30 pm while Shalini was cleaning utensils, she was sitting on step of her house at that time accused came there and gave a blow of bamboo stick to Shalini on her head, due to that blow blood started oozing from her head. Then accused gave a blow on the head of Kashibai (PW 2), due to which blood started oozing from her head and she became unconscious. She was taken to doctor. She further stated that Shalini died. Then she identified the stick shown to her. She also identified the clothes worn by her at the time of incident and the clothes worn by Shalini. She further stated that at that time electricity was available in the house. She further stated that accused was feeling that they have performed black magic (Devdevaski) against him. Then she further stated that the relations between the accused and family members of Kashibai were good. Then she further stated that as deceased Shalini contesting the village panchayat election on that count the relations with accused were strained.

In the cross-examination, suggestions were given to this witness as to the place of incident, accused was in his room when the incident took place, these suggestions are denied. Then one suggestion brought on record and the learned defence Counsel Ms. Payoshi Roy made strong attempt to utilize this admission to support the defence of insanity claimed by the appellant that the accused was insane at the time of incident, this suggestion is also denied. Suggestion was also given to this witness that on that day colour of apparels worn by witness

herself and Shalini was of different colour than the colour apparels as shown by the prosecution, this suggestion was also denied. Another suggestion was given to the witness that there was mud at the place where incident took place and Shalini sleep on mud and sustained head injury hitting head against the step of his house, this suggestion is also denied.

11. Santosh Baing (PW 3) is panch witness to spot panchanama and seizure of articles namely, one bamboo stick, blood mixed with soil and plain soil collected from the spot. Almost all suggestions challenge to place of incident are denied except an important suggestion that police took the bamboo lying on the spot of panchanama is admitted.

12. Dattaram Neman (PW 4) is another panch in whose presence arrest of the accused was effected on 11.05.2011. The clothes worn by accused namely, black trouser and t-shirt were seized. Dattaram is an auto rickshaw driver by profession and he also support the case of prosecution that deceased Shalini was taken to Rajapur Hospital in his rickshaw.

He stated in the cross-examination that on that day it was 'Haldi function' of his cousin (son of his father's sister's son [vkrs HkkÅ]).

13. Jyotsana Jagannath Baing (PW 5) she is neighbour of Kashibai. She stated that she is next door neighbour of Kashibai. Her house is just adjacent to Kashibai. There are five rooms in the house of Kashibai and out of these five room the accused stays in one room. Then she stated that the relations of accused were good with deceased Shalini and her mother. Then she stated that on 10.05.2011 the incident took place and at about 09.30 while she was busy in her household affairs she heard hue and cry of Kashibai. She rushed towards Kashibai. The accused gave a blow of stick on the rare part of neck of Shalini and then he gave stick blow over the left side head of Kashibai. She stated that Shalini and her mother Kashibai became unconscious.

In the cross-examination a suggestion was given to this witness that on the day of incident as there was Haldi function they took dinner early i.e. at about 08-08.15 pm, husband of this witness then went to the house of Kiran Baing and then ½ an hour this witness also followed Kiran Baing, this suggestion was admitted by this witness. Then she stated that her statement was recorded before next day of incident. Then it was suggested that she had not seen incident but as the informant is her husband she is supporting the case of prosecution, this suggestion is also denied.

14. Bhaskar Bhikaji Kuvalekar (PW 6) is the panch witness to the recovery of stick from the house of accused. He stated that the accused led the panch witness and other police personnel to courtyard of his house, then to the bathroom which was beside the courtyard and a stick was taken out from the accused which was kept under the heap of dry leaves of tree. The length of stick was 93 cm and its circumference was 20 cm. The said stick was wrapped in a brown paper and panchanama was effected in presence of this witness. On

15.05.2011 he was again called by police. This witness found another person namely, Shri Bendre who acted as second panch for seizure of saree and blouse.

In the cross-examination the defence made an attempt to show that this witness acted as a panch under the pressure of police, then he is having criminal antecedents and he was declared hostile witness in number of case, these suggestions were denied. It was also suggested to this witness that considering the location it was not possible to record (write panchanama at the place of incident) and this suggestion is denied.

15. Dr. Umesh Balkrishna Chavan (PW 7) is the medical superintendent at Rural Hospital, Rajapur. In examination-in-chief he stated that since 2004 he was attached to Rural Hospital, Rajapur as Medical Superintendent. On 11.05.2011 one patient by name Shalini Baing was brought to Rajapur Hospital. On examination, Shalini declared dead. Then her postmortem was conducted by this witness and by one Dr. R.R. Pande.

On examination they found following injures.

1. CLW over occipital region. Size of injury 5.5 cm x 2 cm 20 scalp deep with some part of brain protruding from it.
2. Fracture on occipital bone underline the CLW.
3. Fracture on right parietal bone laterally.
4. Clotted blood under the scalp over right parietal area.
5. In the brain we found huge haematoma under right parito occipital area (intra cerebral) with laceration of brain.

They further opined that all above injuries were ante-mortem. As per their opinion cause of death is hemorrhagic shock due to fracture skull bone with brain laceration with intra-cranial hemorrhage. Dr. R.R. Pande prepared the postmortem and it bears signature of this witness and signature of Dr. R.R. Pande. All above injuries are possible with thick bamboo stick. All above injuries on the dead body of deceased are possible with bamboo stick article no. 11.

In the cross-examination, this witness admitted that brain is covered with three layers of membrane then there is skull and outside the skull there is scalp and scalp with hair. He further admitted that scalp of the Shalini was covered with hair. He further admitted that as per medical science fracture is internal injury, corresponding to its external injury may be there.

16. Dr. Umesh Balkrishna Chavan (PW 8) is the same witness to which now we have discussed. This witness was recalled only on the aspect of MLC issued by Dr. Pande.

In the examination-in-chief he stated that since year 2004 he was attached to Rajapur hospital as medical superintendent. On 11.05.2011 Dr. Pande was also attached to Rural Hospital, Rajapur as medical officer. He can identify his

(signature of Dr. Pande) signature as he was worked with him as medical officer for a period of one year. He further stated that Dr. Pande has left his service. He came to know that at present Dr. Pande is attached to some hospital at Singapur and he is working there as medical officer. He further stated that medical certificate now shown to him is issued by Dr. Pande, and it is in his hand writing. It bears signature of Dr. Pande and contents are true and correct.

In the cross-examination he stated that patient was examined by Dr. Pande. The injury admeasuring 6x2x1 cm as mentioned in injury certificate exh. 49 is possible with stick article no. 11. The injury found on the left temporal region of the patient is possible due to impact of head with wooden frame of the door.

The evidence of Dr. Umesh Chavan clearly established that death of Shalini was homicidal death.

17. Dr. Shila Subhash Takalikar (PW 9) in examination-in-chief stated that since 2009 till today she was attached to Civil Hospital, Ratnagiri as medical officer. She further stated that she had brought with her original MLC case No. 426 of 2011. Dr. Sonali Paradhi has worked with her at Civil Hospital, Ratnagiri. Now zerox copy of injury certificate shown to her bears signature of Dr. Sonali Paradhi. She further stated that she knows signature of Dr. Sonali Paradhi. She proves the certificate at Exhibit 54 dated 12.08.2011. She further stated that she had brought with her all original case papers of patient Kashibai Balchandra Baing. On 11.05.2011 said patient was admitted in Civil Hospital, Ratnagiri. On 11.05.2011 said patient was medically examined by Dr. Sonali Paradhi. Dr. Paradhi prepared case papers of MLC of said patient. After patient was admitted in ward patient was medically examined by her. The patient was admitted as she had sustained head injury. Patient was conscious and well oriented.

18. Jaywant Bapusaheb Khade (PW 10) is the PI attached to Rajapur Police Station. He stated that on 11.05.2011 one Jagannath Baing came to police station and lodge FIR against accused. Then he admits in the examination-in-chief itself there are two complaints lodged about 1 incident. Then he made an inquiry with Kashibai, but she was not in a position to talk. Thereafter he went to village Tevran. Though he took search of accused he was unable to trace out the accused. He proceeded to the spot where the incident took place along with two panchas. He drew spot panchanama. Then he stated about steps taken by him in the process of investigation. Then he stated that the accused was found in Tevran village and his arrest was effected by sending police personnel including PSO Shri. P.S. Patil. Then he stated about the recording of statement of witnesses. Then he stated that a stick hidden under the heap of dry leaves was discovered and seized under the seizure panchanama. Then he stated about the seizure of the clothes of Kashibai. Then he stated about filing of charge-sheet on completion of investigation.

19. Learned Counsel, Ms. Payoshi Roy appearing for the appellant vehemently submitted that there are material discrepancies in the version of witnesses who

are claimed as eye witnesses. She submitted that though Jagannath Baing (PW 1) states that he rushed on the spot hearing hue and cry made by Kashibai Baing injured witness, Kashibai in her deposition before the Court is silent on the aspect of raising hue and cry by her. Though it was the attempt of learned Counsel, Ms. Payoshi Roy to submitted that these witnesses neither eye witness nor their evidence is reliable; we are unable to accept the submission of learned Counsel, Ms. Payoshi Roy for the simple reason that even though Kashibai (PW 2) missed to state before the Court in so far as raising shouts it is utmost natural reaction of any person who would receive a blow on his vital part of the body like head that on receiving such blow the person would raise shouts, as such we are not inclined to reject the version of these two important witnesses.

20. Ms. Roy then vehemently submitted that the accused was residing in one of the room of the house of Kashibai. Kashibai admitted that the accused was her nephew and the relations between the accused and family members of Kashibai were cordial and she admitted that on the day of incident since afternoon accused was shouting loudly in his room. Learned Counsel, Ms. Roy submitted that this above referred fact of the appellant clearly show that his mental condition on that day was not fit and stable.

21. At this stage only we may state that we have gone through the vernacular version of this witness and we found that translation of vernacular version is not in consonance that what witness stated before the Court. As per Marathi version the witness stated that vkjksih R;kP;k [kksyh e/s eksBeksB;kus vksjMr gksrk, thus, it can be said that the act of the accused shouting loudly in his room was a momentary act and it was not continuous act as tried to be suggested by the learned Counsel, Ms. Roy. Ms. Roy then in support of her submission on the backdrop of defence of insanity invited our attention to Section 84 of the IPC which read thus:

84. Act of a person of unsound mind. - 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.

22. It was submitted by learned Counsel, Ms. Roy that there are two requirements of the provision, firstly, at the time of doing the act the accused was of unsound mind and secondly, because of his unsound mind the accused did not know nature of act, or did not know the act is wrong, or did not know the act is contrary to law. It is then submitted that in the present matter even if it is assumed that on that day the accused was shouting in his room was a momentary act but the other circumstances clearly show that the accused was not a person of a sound mind or mentally fit.

23. Learned Counsel, Ms. Roy further submitted that after effecting arrest of accused the accused was lodged in prison and as his behavior in the prison was not of a normal person or a person of sound mind and he was treated in the

mental hospital. An application dated 21.02.2012 was submitted to the Trial Court and it was prayed for calling papers of treatment provided to the accused in the mental hospital and further it was prayed for calling of the report from the mental hospital as to where the accused is a fit person to proceed Trial against him. The learned Judge on application passed the order calling report from the Civil Surgeon, Ratnagiri for examination of the accused by a report of the expert be submitted.

24. In response to the directions, a report was submitted before the Court through Superintendent Special Prison, Ratnagiri along with the certificate issued by the medical superintendent Regional Mental Hospital, Ratnagiri. It was stated in the report dated 20.02.2012 issued under the signature of Medical Superintendent, Regional Mental Hospital, Ratnagiri that on medical examination of under trial prisoner Janardan Baing he was mentally fit.

Now this report forwarded to the Superintendent, Special Prison, Ratnagiri was on the basis of the report dated 20.02.2012 and same read thus:

Ref :- O.P.D. Reg. No. 2011/544

Name : Janardan Tukaram Baing

Ref: Ratnagiri Jail Superintendent,

S/b : Dr R.Y. Shirsate Medical Superintendent, Regional
Mental Hospital Ratnagiri.

Above name Mr. Janardan Tukaram Baing examined review of record File No. 2011/544

Adult male, Conscious, co-operative oriented PMA/RT hormone.

Demine delusion hallucinatory

Know conciquen to sequel of event he has done Irritable present,

Opinion- Fit for trial, he is able to defend himself. Fit mentally at present.
(Emphasis supplied)

Advised:- Continue Medication and regular monthly follow up.

Ratnagiri

sd/-

Date :- 28/02/2012

Medical Superintendent,

Regional Mental Hospital Ratnagiri.

Then an application was filed for issuance of the witness summons to the doctor who was treating the accused. The application was opposed by the prosecution on the ground that as there was already certificate placed on record showing that

the accused was fit for trial and was able to defend himself. Learned Trial Judge by order dated 20.11.2012 passed the order of issuance of witness summons as prayed. Then a pursis was submitted through the Counsel appearing for the accused that he is not willing to examine the witness i.e. Dr. Shirsath. Thus, what emerges from perusal of this document is, there was a certificate issued through the Mental Hospital, Ratnagiri on examination of the accused and in that certificate it was observed clearly and unambiguously that the accused was fit for his trial. The Counsel appearing for appellant though initially sought for examination of doctor by filing application for issuing summons and that application was allowed but the defence filed pursis and thereby declined to examine the witness.

25. Learned Counsel, Ms. Roy submitted that the application for calling the document of the treatment and certificate of an expert from mental hospital dated 21.02.2012 was filed. Ms. Roy then invited our attention to the application dated 16.05.2011 seeking police custody remand of the accused. The copy of the same finds place in the record. Perusal of the application show that it is stated in the application that the physical condition of the applicant was good till 14.05.2011 but on 14.05.2011 after 11.30 am he started behaving like an insane person. The accused started cutting the wire by his teeth and was chewing the small pieces. He also jumping started jumping over the wall and started hiding himself in the washrooms. It is further stated in the application that when either staff or the officer in the prison approached the accused he started jumping on the prison of staff and the officers and was trying to bite the staff. It is further stated in the application that probably because of the act committed by the accused he was either under depression or was carrying guilty complex. Learned Counsel, Ms. Roy then invited our attention to the statement under Section 313 of Code of Criminal Procedure. The accused submitted a written say in response to question 118. Question 118 read thus as do you want to say anything more than this. In the written say submitted by accused on 09.11.2012 he stated that since last 2 years he is suffering from mental illness and is under treatment at a mental clinic. Then he stated that on the day of incident he was sleeping for the entire day and as he was feeling uneasy he was shouting loudly. Then he further stated that on the second day of the incident he was arrested from his house by Rajapur Police Station and when he was in the custody of police his mental suffering increased and he started hitting his head on the door as such, police brought him in the mental clinic. Then he stated that he do not know anything about the incident nor he is in a position to remember what happened on that day and because of his mental illness he is unable to remind what happened and how happened. Then he stated that a false case is registered against him. He had not committed any crime and he be acquitted.

26. Ms. Roy on the basis of above referred material submitted that there was more than sufficient material to show that the appellant accused was a person of unsound mind. It is then submitted that this material was within the knowledge of learned Trial Court. It is then submitted that though application was filed

before the Court below for calling the case papers on the back drop of mental illness of the appellant – accused the case papers were not submitted before the Court and as such this very important material was suppressed by the prosecution and as such learned Trial Court failed to appreciate the defence of insanity raised by the appellant in proper perspective. Learned Counsel, Ms. Roy submitted that material in the form of applications before the Trial Court namely, the remand application, application filed at the instance of appellant calling for the papers of treatment provided to the accused would show that the accused has discharged his burden. It is also submitted by Ms. Roy that the accused's burden is much lighter than the burden placed on the prosecution of proving the guilt of accused beyond reasonable doubt, and the accused has to merely discharge the civil burden of proving his case on the balance of probabilities. Learned Counsel, Ms. Roy also invited our attention to extract from some journal and text books wherein the terms schizophrenia, hallucinations, delusions are discussed. In so far as other grounds are concerned, learned Counsel, Ms. Roy submitted that the evidence of so called recovery from the accused is rejected by learned Trial Court.

27. Lastly, learned Counsel, Ms. Roy submitted that assuming the case of prosecution as it was put up before the Trial Court it clearly reveals that the accused is nephew of Kashibai and accused was residing in a room of Kashibai and relations between the accused and family of Kashibai were good barring a solitary incident of an election contested by deceased Shalini. Accused was under impression that Shalini and Kashibai were taunting him and they were indulged in an act of black magic (Devdevaski). The accused was not armed with any sharp weapon and the alleged assault is by way of a stick thus, considering these factors it cannot be state that the appellant accused was carrying any intention to kill either Shalini or Kashibai and the reaction of the accused was on the spur of moment. Learned Counsel, Ms. Roy submitted that the offence would not fall under Section 302 of IPC but it would come under the exceptions of Section 304 and more particularly 304(II).

28. Learned Counsel, Ms. Roy in support of her submissions relied on the following judgments in the case of Siddhapal Kamala Yadav v. State of Maharashtra 2009 CRI.L.J. 372, Dahyabhai Chhaganbhai Thakkar Vs. State of Gujarat AIR 1964 SC 1563, Gopal Krishnaji Ketkar V. Mohamed Haji Latif and Others (1968) 3 SCR 862, Ratan Lal V. The State of Madhya Pradesh 4 AIR 1971 SC 778, Devidas Loka Rathod V. State of Maharashtra (2018) 7 SCC 718, State of Rajasthan V. Vidhya Devi (2011) 15 SCC 228, Shrikant Anandrao Bhosale V. State of Maharashtra AIR 2002 SC 3399, Revatinath Narayan Billewar V. State of Maharashtra 2005 ALL MR(Cri) 869, Nitai Naik V. The State AIR 1957 ORISSA 168, Ram Jattan and Others V. State of UP 1995 SCC (Cri) 169, Dayaram @ Jayaram Parshuram V. State of Maharashtra 1996 (2) Mh.L.J. 1056, Ramesh Nana Ghorpade V. State of Maharashtra 1997 (1) Mh.L.J. 16, Sheralli Wali Mohammed Vs. The State of Maharashtra (1973) 4 SCC 79, Surendra Mishra V. State of Jharkhand (2011) 11 SCC 495,

29. Per contra, learned APP opposed the submissions of learned Counsel for the Appellant. Learned APP submitted that the evidence of the Jagannath (PW 1) and Kashibai (PW 2) who are the eye witness and an injured witness respectively is most natural, reliable and trust worthy. Learned APP then submitted that the defence of insanity is clearly an afterthought theory. Learned APP submitted that as there is absolutely no material to show that on that day and particularly when the incident took place the accused was a person of unsound mind which is the prerequisite of Section 84 of IPC so as to give benefit to the appellant.

30. After having heard the learned Counsel appearing for respective parties and on going through the record with the assistance of learned Counsels, we are unable to accept the submissions of Ms. Roy to the effect that the appellant was a person of unsound mind so as give him the benefit of Section 84 of IPC. Though, the learned Counsel, Ms. Roy placed reliance on various judgments in support of her submission and though there cannot be a dispute on the proposition of law reflected in the judgments, in our opinion, the peculiar facts in the present matter which are clearly distinguishable prompt us to say that the judgments relied on by Ms. Roy are not of any help to the appellant.

31. The Hon'ble the Apex Court in the matter of Siddhapal Kamala Yadav (supra) observed thus:

7. Section 84 lays down the legal test of responsibility in cases of alleged unsoundness of mind. There, is no definition of "unsoundness of mind" in the IPC. Courts have, however, mainly treated this expression as equivalent to insanity. But the term "insanity" itself has no precise definition. It is a term used to describe varying degrees of mental disorder. So, every person, who is mentally diseased, is not ipso facto exempted from criminal responsibility. A distinction is to be made between legal insanity and medical insanity. A Court is concerned with legal insanity, and not with medical insanity. The burden of proof rests on an accused to prove his insanity, which arises by virtue of Section 105 of the Indian Evidence Act, 1972 (in short the 'Evidence Act') and is not so onerous as that upon the prosecution to prove that the accused committed the act with which he is charged. The burden on the accused is no higher than that resting upon a plaintiff or a defendant in a civil proceeding. (See Dahyabhai v. State of Gujarat AIR 1964 SC 1563). In dealing with cases involving a defence 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 have to be borne in mind. Mayne summarises them as follows:

"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 detections whether, after his arrest, he offered false excuses and made false statements. All

facts of this sort are material as bearing on the test, which Bramwall, submitted to a jury in such a case : 'Would the prisoner have committed the act if there had been a policeman at his elbow ? It is to be remembered that these tests are good for cases in which previous insanity is more or less established. These tests are not always reliable where there is, what Mayne calls, "inferential insanity".

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) what 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.

9. There are four kinds of persons who may be said to be non compos mentis (not of sound mind), i.e., (1) an idiot;

(2) one made non compos by illness (3) a lunatic or a mad man and (4.) one who is drunk. An idiot is one who is of non-sane memory from his birth, by a perpetual infirmity, without lucid intervals; and those are said to be idiots who cannot count twenty, or tell the days of the week, or who do not know their fathers or mothers, or the like, (See Archbold's Criminal Pleadings, Evidence and Practice, 35th Edn. pp.31-32; Russell on Crimes and Misdemeanors, 12th Edn. Vol., p.105; 1 Hala's Pleas of the Crown 34). A person made non compos mentis by illness is excused in criminal cases from such acts as are committed while under the influence of his disorder, (See 1 Hale PC 30). A lunatic is one who is afflicted by mental disorder only at certain periods and vicissitudes, having intervals of reason, (See Russell, 12 Edn. Vol. 1, p. 103; Hale PC 31). Madness is permanent. Lunacy and madness are spoken of as acquired insanity, and idiocy as natural insanity.

10. Section 84 embodies the fundamental maxim of criminal law, i.e., "actus non reum facit nisi mens sit rea" (an act does not constitute guilt unless done with a

guilty intention). In order to constitute an offence, the intent and act must concur; but in the case of insane persons, no culpability is fastened on them as they have no free will (*furios is nulla voluntas est*).

11. 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.

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Mere abnormality of mind or partial delusion, irresistible impulse or compulsive behaviour of a psychopath affords no protection under Section 84 as the law contained in that section is still squarely based on the outdated Naughton rules of 19th Century England.(Emphasis supplied)

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32. Thus, these observations of the Hon'ble the Apex court would make it clear the to grant benefit under Section 84 to an accused the prerequisite is the act of the accused at the time of the incident. Here in the present case, at the cost of repetition, we may state that the material on which learned Counsel for the appellant heavily relies on that the appellant was a person of unsound mind is the material after four days of arrest of the accused and then explanation in the 313 statement to which we have already referred elaborately.

33. At the cost of repetition, we may state that Kashibai (PW 2) makes a reference of shouting of the accused loudly on that day. Again, at the cost of repetition, we state that vernacular version clearly show that it was only a momentary act of shouting there is nothing on record to show that either on the earlier day or on that day when the incident took place the behavior of the accused was of an person of unsound mind. Behaviour of which the learned Counsel, Ms. Roy placed heavy reliance supports from 4th day of arrest of accused. It has also come in the evidence that the accused was serving at Mumbai since last 2-3 years prior to the incident and he was visiting his native place frequently.

Neither Jagannath (PW 1) nor Kashibai (PW 2), Jyotsana (PW 5) neighbour states that whenever the accused was visiting to his native place, on any of such visit his behavior was like a person of unsound mind.

34. The reliance is also placed on a written say submitted in response to question in 313 statement that since last 2 years he is suffering from mental illness and he is under treatment at mental clinic. On one hand the Counsel for defence heavily attacked on the prosecution for not bringing the material before the Court in respect to the medical treatment provided to the accused when he was an under trial prisoner, and on the other hand, when the accused himself has taken a stand in his written say that he was under a treatment since last 2 years nothing was placed on record by the accused himself to show that he was under treatment. Now it was the case of accused that he was under a medical treatment in a medical clinic, nothing prevented the accused to place on record his own documents showing that he was suffering from mental illness. Not placing on record such documents which certainly could have been in possession of the accused himself, after 4 days of his arrest accused started behaving like an insane person, then accused filed an application for issuance of witness summons to the doctor and then filed a pursis declining to examine the doctor are the factors on which it can safely be said that the defence of insanity raised by the appellant accused is an afterthought theory as such, we are rejecting the theory put forth by the learned Counsel for the appellant in defence.

35. In so far as the appreciation of evidence and the conclusion drawn by the trial Court for the complicity of accused in offence under Section 307 of IPC and awarding the sentence to accused – appellant for committing offence under Section 307 of IPC is concerned, we see no reason to interfere with.

36. Though, we have rejected the theory of insanity raised in the defence, we found a considerable merit in the submission of learned Counsel, Ms. Roy in so far as the submission that the offence would not fall under Section 302 of IPC but would fall under exceptions of Section 304-II. Learned Counsel, Ms. Roy was justified in making submissions that the evidence brought on record clearly show that the relations between the accused and the Kashibai were good. Accused was nephew of Kashibai and was residing in one of the room of Kashibai till the day of incident. There is also evidence to show that there was some exchange of words between the accused and Shalini and Kashibai when the accused came to the place where Shalini was washing utensils. The record also show that the accused was not carrying any dangerous or sharp weapon with him and he said that why you are indulge in the act of black magic making the accused issue less show that the accused was depressed as he was issue-less and in the spur of moment he led attack on Shalini and Kashibai as such the act of appellant – accused would fall under Section 304(II) of IPC. Hence, we deem it appropriate to sentence the appellant to rigorous imprisonment for 10 years for the offence punishable under Section 304-II of the IPC. We do not want to interfere in rest of the part of the order.

37. Considering all these facts, we pass the following order:

ORDER

A. Criminal Appeal is partly allowed.

B. Judgment and order dated 28th February, 2012 of Trial Court convicting the accused for committing offence punishable under Section 302 of IPC and awarded him sentence for rigorous imprisonment of life is altered to offence under Section 304(II) of IPC and the appellant is to suffer sentence of rigorous imprisonment for 10 years.

C. The rest of the part of the order is maintained.

D. The appellant is granted set off for the period he has already undergone.

E. The substantive sentences for the offence punishable under Section 304-II of the IPC and the offence punishable under Section 307 of IPC to run concurrently and the sentence in default to pay fine shall run consecutively (if the appellant has not paid the amount of fine).

F. The appellant be released from jail after undergoing the sentence, if not required in any other case.