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JUDGMENT SHEET

LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

Criminal Appeal No.2066/2016

Iqbal Ansari

Vs.

The State

JUDGMENT

Date of hearing	27.04.2023
For the Appellant:	Ch. Muhammad Jawad Zafar, Advocate, assisted by Mian Mushtaq Pervaiz Abbasi, Advocate.
For the State:	Rana Muhammad Imran Anjum, Deputy Prosecutor General.

Tariq Saleem Sheikh, J. – On 11.6.2004, Akhtar Hussain (PW-12) (hereinafter referred to as the “Complainant”) appeared before the SHO, Police Station Civil Lines, Lahore, and stated that he was serving as a Research Officer in WAPDA. When he arrived at the WAPDA House for duties in the morning, he met Abdul Rehman (Director, C.A.D.). The latter proceeded to his office while he went to Room No.214 to see Director Abdul Jalil Ibrar. The gentleman had not yet arrived, but PW Zafar Iqbal, Assistant Director, was present. Meanwhile, another Assistant Director, Iqbal Ansari (the Appellant), came and inquired whether Abdul Jalil was on leave. PW Zafar Iqbal informed him that he was not and would be in the office shortly. The Appellant left, and after some time, Abdul Jalil arrived. Around 8:35 a.m., fire shots were heard from Abdul Rehman’s office, and the news came that the Appellant had injured him. A few minutes later, the Appellant stormed into Room No.214, holding a pistol. He yelled at Abdul Jalil that he would teach him a lesson for having him transferred and then shot him dead. According to the Complainant, the Appellant committed the offence because he

suspected that Abdul Jalil and Abdul Rehman had complained against him, upon which the WAPDA authorities had posted him away. The SHO reduced the Complainant's statement to writing and, based on that complaint (Exh. PE), FIR No. 463/2004 dated 11.6.2004 (Exh. PE/1) was registered under sections 302, 324 PPC and section 7 of the Anti-Terrorism Act, 1997 (the "ATA").

2. When the Appellant was in judicial lock-up, his relatives applied for the constitution of a medical board, stating that he had lost his mental balance and was unfit to stand trial. On 3.9.2004, without waiting for the medical evaluation, the Special Judge, Anti-Terrorism Court, Lahore, indicted him. Subsequently, when he received the board's report confirming that the Appellant was unfit, he suspended further proceedings in the case, directing it to examine him periodically and submit updates. On 28.3.2005, the Judge received the board's report stating that the Appellant had regained health. Thereupon, he resumed the proceedings without a fresh indictment. He recorded the prosecution evidence and, at the conclusion of the trial, found him guilty and sentenced him to death. The High Court dismissed the Appellant's appeal (Crl. Appeal No.1060 of 2006) and answered Capital Sentence Reference No. 32/T/2006 sent by the trial court under section 374 Cr.P.C. in the affirmative. The Appellant filed Crl. Appeal No. 703/2009 in the Supreme Court of Pakistan, which it decided vide judgment dated 16.11.2015. The Supreme Court remanded the case for a *de novo* trial because the Appellant was mentally incompetent when the Special Judge indicted him on 3.9.2004. He was required to frame the charge against him afresh when he resumed proceedings on 28.3.2005 after the board's certification that he could face the trial. Since he did not do so, he committed an incurable irregularity which vitiated the trial.

3. In the post-remand proceedings, on 22.8.2016, the Special Judge framed the charge against the Appellant afresh, to which he pleaded not guilty. The Special Judge then recorded evidence and, on the completion of the trial, convicted and sentenced him by judgment dated 25.10.2016 as under:

- (i) Convicted under section 7(a) of the ATA and sentenced to imprisonment for life with a fine of Rs.100,000/- payable to the legal heirs of Abdul Jalil Ibrar deceased and, in case of default thereof, he shall undergo further imprisonment for six months.
- (ii) Convicted under section 7(b) of the ATA and sentenced to rigorous imprisonment for ten years with a fine of Rs.50,000/- payable to Abdur Rehman (the injured person) and, in case of default thereof, he shall undergo further imprisonment for four months.
- (iii) Convicted under section 7(h) of the ATA and sentenced to rigorous imprisonment for five years with a fine of Rs.10,000/- and, in case of default thereof, he shall undergo further imprisonment for five months.

The Special Judge ordered that the Appellant's sentences shall run concurrently and extended him the benefit of section 382-B Cr.P.C.

4. The Appellant has challenged his conviction and sentence before this Court through the instant appeal.

5. When we took up this appeal, Ch. Muhammad Jawad Zafar, Advocate, informed us that the Appellant had relapsed into his mental ailment. We directed the Medical Superintendent, Punjab Institute of Mental Health, Lahore (PIMH), to form a medical board to evaluate his health. The board has reported that the Appellant suffers from schizoaffective disorder and is unfit to face legal proceedings. Consequently, the question has arisen whether we should decide this appeal in the current situation.

6. Ch. Zafar states that the Appellant is receiving therapy but is in bad shape. This Court should adjourn the hearing of this appeal until he is well enough. The Deputy Prosecutor General has, however, opposed this suggestion. He contends that section 465 Cr.P.C. applies only at the trial stage. No legal impediments prevent this Court from ruling on this appeal.

7. We have heard the counsel and examined the record. We start our discussion on the issue with sections 464 and 465 Cr.P.C., which read as follows:

464. Procedure in case of accused being lunatic.—(1) When a Magistrate holding an inquiry or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness, and shall cause such person to be examined by

the Civil Surgeon of the district or such other medical officer as the Provincial Government directs, and thereupon shall examine such surgeon or other officer as a witness, and shall reduce the examination to writing.

(1A) Pending such examination and inquiry, the Magistrate may deal with the accused in accordance with the provisions of section 466.

(2) If such Magistrate is of the opinion that the accused is of unsound mind and consequently incapable of making his defence, he shall record a finding to that effect and shall postpone further proceedings in the case.

465. Procedure in case of person sent for trial before Court of Session or High Court being lunatic.— (1) If any person before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Court is satisfied of the fact, it shall record a finding to that effect and shall postpone further proceedings in the case.

(2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court.

8. Section 464 Cr.P.C. deals with the proceedings before a Magistrate, while section 465 Cr.P.C. relates to the trials before the Court of Session and the High Court. A Larger Bench of the Supreme Court of Pakistan recently explained these provisions in *Mst. Safia Bano and another v. Home Department, Government of the Punjab, and others* (PLD 2021 SC 488). True, a bare perusal thereof indicates that they only apply to inquiries or trials. If the issue of the convict's soundness of mind and incapacity arises before the High Court at the appellate stage, since there is no specific provision dealing with that situation, it may, at its discretion, take one of the following courses: (i) it may determine the fact of such unsoundness and incapacity itself following the procedure specified in section 465 Cr.P.C. and elucidated in *Safia Bano*'s case, or (ii) it may refer the matter to the Court of Session/Special Court concerned for determination according to the same principles, or (iii) it may direct the Medical Superintendent, PIMH, to form a medical board and seek a report from it. The High Court would decide on the options considering the facts and circumstances of each case.

9. In the present case, there is credible evidence that the Appellant has been intermittently suffering from a mental condition

for the past 18 years. The question before this Court is whether he is fit at this time when his appeal is fixed for hearing. In the circumstances, the report from the medical board from PIMH suffices. There is no need for an inquiry of the sort described in section 465 Cr.P.C.

10. Should the decision on the Appellant's appeal be postponed in light of the medical board's certification of his disability?

11. In *Vivian Rodrick v. State of West Bengal*, (1969) 3 SCC 176, Vivian Rodrick was charged under sections 302 and 148 of the Indian Penal Code and section 5 of the Explosive Substances Act. His trial was delayed because medical reports showed he was of unsound mind. It commenced when his condition gradually improved and he could make his defence. Eventually, he was convicted and sentenced. He filed an appeal, but his mental illness recurred in the meantime. While he was still in that condition, the High Court heard and decided on his appeal, maintaining his conviction and sentence. The Indian Supreme Court set aside the judgment holding as under:

“28. Whatever may be the legal position regarding the applicability of section 465 Code of Criminal Procedure to appeals, we are not inclined to agree with the proposition enunciated by the learned Judges [of the High Court] that there is no bar to ‘hearing and disposing of an appeal, even if the Accused-Appellant is of unsound mind or even insane at the time when the appeal is taken up for hearing’...”

“29. In our opinion, when the report is that an Accused-Appellant is of unsound mind, it is reasonable to infer that he is incapable of making his defence, and the Court, in the circumstances, is bound to afford him the same protection to which he would have been entitled had he been of unsound mind at the time of the trial.

“30. We may refer, in this connection, to the decision of the Calcutta High Court in *Sundaram v. State* (MANU/WB/0249/1958 : ILR 1959 2 Cal 465) which lays down that even if Chapter XXXIV of the Code of Criminal Procedure may not apply to an appeal, nevertheless the Court has inherent power to postpone the hearing of the appeal until such time as the Appellant should be found to be of sound mind again and thus capable of making his defence. We are of the opinion that the distinction sought to be made of this decision, in the order of the Appellate Bench, dated July 19, 1967 in the present case, is not justified, whatever may be the position regarding the applicability or otherwise of Chapter XXXIV to appeals.”

12. In *Vivian Rodrick's* case, the Indian Supreme Court observed that if a convict's appeal is heard while he is of unsound mind, he may be prejudiced and result in a failure of justice. To illustrate this point, the Indian Supreme Court stated that during the hearing of the appeal, the court may think it necessary to take additional evidence. Or, circumstances may arise in which the convict must request permission to present additional evidence. In such situations, the convict would be unable to give appropriate instructions to his lawyer or put essential questions to the witness himself.

13. In *State of Maharashtra v. Sindhi @ Raman* (AIR 1975 SC 1665), the Additional Sessions Judge sentenced the respondent-convict to death for double murder. He did not file any appeal, but the trial judge submitted a reference to the High Court for the confirmation of the death sentence. The High Court postponed the proceedings in the reference because the convict became insane. The State filed an appeal before the Supreme Court of India *inter alia* contending that (i) section 465 of the Indian Code of Criminal Procedure (which is *pari materia* with our section 465 Cr.P.C.) is limited to the trial stage and does not apply to the proceedings before the High Court on reference since they are post-trial proceedings, (ii) the accused has no right of audience in a reference. The Supreme Court dismissed the appeal holding as under:

“... so far as an accused person sentenced to death is concerned, his trial does not conclude with the termination of the proceedings in the Court of Session. The reason is that the death sentence passed by the Court of Session is subject to confirmation by the High Court. A trial cannot be deemed to have concluded until an executable sentence is passed by the competent court. Viewed from that standpoint, the confirmation proceedings under sections 374, 375 and 376, Chapter XXVII of the Code of 1898, are, in substance, a continuation of the trial. Nor is it correct to say that in such confirmation proceedings, the High Court can arbitrarily refuse to hear the accused either in person or through counsel or another agent.”

14. The principle of law that emerges from the above-mentioned cases is that a convict may be prejudiced if the Appellate Court rules on his appeal while he is of unsound mind because doing so denies him the right to a hearing. The same thing happens when the

High Court decides a reference under section 374 Cr.P.C. regarding such a person. Therefore, the High Court/Appellate Court should postpone the hearing of the appeal and/or the reference when the convict is mentally incapacitated. However, we may qualify this statement by adding that the court may proceed if the case is such that the convict would be acquitted.

15. Applying the above principles, we adjourn this appeal until the Appellant recovers and can present his case. The Superintendent, Central Jail, Lahore, shall take the Appellant to the Medical Superintendent, PIMH, every two months. He shall have him examined by a medical board, which will submit its report to this Court through the Deputy Registrar (Judicial). This appeal shall be fixed immediately after receiving a favourable report on him.

16. The Appellant has filed Writ Petition No.37412/2020 to get his sentence suspended. We would deal with it separately. The directions in the preceding paragraph shall be subject to any orders in that petition.

(Farooq Haider)
Judge

(Tariq Saleem Sheikh)
Judge

Naeem

Announced in open Court on _____

Approved for reporting

Judge