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ORDER SHEET
IN THE LAHORE HIGH COURT,

BAHAWALPUR BENCH, BAHAWALPUR
(JUDICIAL DEPARTMENT)

Case No. Criminal Revision No.173 of 2022

Muhammad Hanif **Versus** *The State etc.*

Sr.No.of order/ Proceedings	Date of order/ Proceedings	Order with signatures of Judge, and that of parties or counsel, where necessary.

10.01.2023 Mr. Muhammad Mushtaq Warraich, Advocate for the petitioner.
Jam Muhammad Tariq, Deputy Prosecutor General with Mustafa, ASI.
Complainant in person.

Muhammad Hanif, petitioner being brother of Muhammad Ibrahim accused of case FIR No.531/2021 dated 27.11.2021 under Section 295-B PPC registered at Police Station Galey Wal, District Lodhran through this revision petition has challenged the order dated 16.09.2022 passed by the learned Additional Sessions Judge, Lodhran whereby his application filed u/s 466 of Cr.P.C. for bail of his insane bother was rejected.

2. Learned counsel for the petitioner states that despite the fact that Medical Board has declared Muhammad Ibrahim accused as insane and court while partly accepting this report though has not proceeded into the trial and order for fresh medical report yet did not release the accused on bail disregarding the provisions of section 466 Cr. P.C. On the other hand learned Deputy Prosecutor General states that as Schizophrenia is not a permanent mental disorder, therefore, learned trial court has rightly rejected the application while relying on case reported as "*Mst. SAFIA BANO Versus HOME DEPARTMENT, GOVERNMENT OF PUNJAB and others"* **(PLD 2017 Supreme Court 18).**

3. Heard. Record perused.

4. The foremost consideration by the learned trial court for declining the request for bail was the observation in judgment of

Honourable Supreme Court cited above; therefore, before proceeding further such observation is reproduced as under:-

> *"Schizophrenia, therefore, was a recoverable disease, which, in all the cases, did not fall within the definition of "mental disorder" as defined in the Mental Health Ordinance, 2001*."

But such observation was given in the case at the stage when accused after conviction has exhausted all his remedies up to apex Court; it was therefore, noted as under:-

> *"That rules relating to mental sickness could not be used to delay the execution of death sentence awarded to the convict, which had attained finality up to the level of the Supreme Court, and when mercy petition of convict had already been dismissed by the President*."

Even otherwise cited judgment has been reviewed by a larger Bench of five members through case reported as *Mst. SAFIA BANO and another Versus HOME DEPARTMENT GOVERNMENT OF PUNJAB through Secretary and others"* **(PLD 2021 Supreme Court 488).**

5. Principle of fair trial and due process having its roots in our Constitutional framework set in Article 10-A is when juxtaposed to the provisions of Code of Criminal Procedure, 1898 (the Code) for trial of an accused on a criminal charge it requires not only the physical presence of accused as per Section 353 of the Code barring some exceptional situations like under Section 205 or 540-A of the Code but his mental presence is also essential otherwise trial would be a farce. The law requires that if any person is found as of unsound mind during his trial, case shall not proceed further until he is declared fit by the court concerned after conducting a thorough inquiry. What process is to be adopted to attend such legal disability, the relevant section of the Code is reproduced for reference:-

> *"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."*

The section requires the court to try first the fact of unsoundness and incapacity of accused to make his defence which means that ‘a trial within a trial’ would be conducted in order to ensure that accused understand the proceedings of trial against him so as to make the evidence admissible at trial. Such trial obviously includes the examination of witnesses produced on behalf of accused, report of a medical board including examination of doctors/expert and cross examination by the prosecution or the complainant on such witnesses and expert, and recording of any other evidence which the court considers necessary. After recording of such evidence court shall hear the parties and either pass an order as to the fact that accused is of unsound mind and incapable to make his defence or otherwise. As per Section 465(2) of the Code such record shall be part of his main trial before the court.

6. The concept of trial within a trial is known as **“voir dire”** pronounced as **“vwa dear”** a recognized term to try a fact within the trial. The meaning of voir dire is ‘to speak the truth’. In a trial there are certain primary facts which are must to be proved as condition precedent to the admissibility of certain items of evidence. For example, (i) where the prosecution proposes to adduce evidence of a confession made by the accused and defence object to its admissibility on the grounds that it was or may have been obtained by oppression of the accused or in consequence of anything said or done which likely, in circumstances, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be admitted except in so far as the prosecution proves to the court that confession was not obtained by such means; (ii) proof of a due search for the original of a lost document on the contents of which a party seeks to rely, a condition precedent to the admissibility of a copy of that document; (iii) if a party seeks to adduce a video clip or audio recording in the evidence, the question of its being genuine or non-tempered shall be decided first before its admission to evidence; (iv) similarly, it may become necessary to show that a person is competent to give evidence as a witness or that a witness is privileged from answering a particular question. Questions of above kind are also matter

of law for the judge. The preliminary facts may be agreed or assumed, but where they are in dispute, it is for the judge to hear evidence and adjudicate upon them. The witnesses give their evidence on a special form of oath knowns as a voir dire. The hearing before the judge is called hearing on voir dire or 'a trial within a trial'.

All questions referred above are question of law in our law of evidence except confession made to a police officer or during custody of police as per Articles 38 & 39 of Qanun-e-Shahadat Order, 1984, however there is one exception for a confession made during police custody in cases triable under Anti-terrorism Act, 1997 (see section 21-H of said Act), therefore, voir dire process can be initiated in above situations. Likewise, for trying a fact of unsoundness of mind, a voir dire is to be preferred.

7. If after trying the fact of unsoundness of the accused, court comes to the conclusion that accused is of unsound mind, the court shall postpone further proceedings in the case and proceed to release the accused on bail or make an order that the accused to be detained in safe custody in such place and manner as it may think fit. Following section of the code deals with the situation:-

> *"466.* ***Release of lunatic pending investigation or trial****: (1) Whenever an accused person is found to of unsound mind and incapable of making his defence, the Magistrate or Court, as the case may be, whether the case is one in which bail may be taken or not, may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf.*
>
> *(2)* ***Custody of lunatic****: If the case is one in which, in the opinion of the Magistrate or Court, bail should not be taken, or if sufficient security is not given, the Magistrate or Court, as the case may be, shall, order the accused to be detained in safe custody in such place and manner as he or it may think fit, and shall report the action taken to the provincial Government*:"

The procedure required under sections 465 & 466 of the code is mandatory which cannot be circumvented in any circumstances; reliance in this respect is on cases reported as "*NOOR JEHAN Versus THE STATE*" **(PLD 1980 Peshawar 103)**; "*KHAN BAIG Versus THE STATE*" **(PLD 1984 Lahore 434)**; "*SALIM UDDIN Versus THE STATE*" **(PLD 1985 Karachi**

594); "*SAID RASOOL Versus MUHAMMAD FAZIL* and another" **(1990 P Cr.L J 210).**

8. There are two situations which are met in chapter XXXIV of the Code for trial of an accused of unsound mind. Law requires that if an accused is unable to defend himself during trial due to unsoundness of mind, he shall request the court to process his case u/s 465 of the Code; whereas if he is fit to face the trial but claims that at the time of commission of offence, he was unsound mind, he would be taken care of within the requirement of section 469 of the Code which runs as under:-

> *"**469. When accused appears to have been insane**: When the accused appears to be of sound mind at the time of Inquiry or trial, and the Magistrate or Court is satisfied from the evidence given before him that there is reason to believe that the accused committed the act which if he had been of sound mind, would have been an offence, and that he was. at the time when the act was committed, by reason of unsoundness of mind, incapable of knowing the nature of the fact or that it was wrong or contrary to law, the Magistrate or Court shall proceed with the case.*"

The above section requires that trial would proceed in a normal course led through prosecution evidence first including evidence of mental health of accused at the time of commission of offence and circumstantial evidence that spurs out from the mode and manner of committing such offence. Sanity is a rebuttable presumption, therefore, once the prosecution completes its evidence, the accused can lead the evidence to rebut the prosecution evidence as well as adducing anything favouring or supporting his plea. The law permits to claim such disability for diminished responsibility which is known as M'Naughton Rule, sometimes spelled McNaghten, the first legal test for criminal insanity. The rules so formulated as "***M'Naghten's Case* 1843 10 C & F 200"** have been a standard test for criminal liability in relation to mentally disordered defendants in common law jurisdictions ever since, with some minor adjustments. The test originated in 1843 in England during the case against **Daniel M'Naghten** who shot and killed the secretary to the Prime Minister, Edward Drummond, believing he was the Prime Minister of UK, Robert Peel. During his arrest, M'Naghten claimed he needed to murder the Prime Minister because "the tories" were conspiring against him and wished to murder him. At trial, M'Naghten's

counsel put forth a defence of insanity, offering expert testimony and other evidence in support of this. Following instructions from the judge, the jury's verdict was not guilty "by reason of insanity" and M'Naghten spent the rest of his life in a mental institution. After public outrage following M'Naghten's verdict, a stricter test for criminal insanity was articulated. Under this M'Naghten test, all defendants are presumed to be sane unless they can prove that at the time of committing the criminal act, the defendant's state of mind caused them to (1) not know what they were doing when they committed said act, or (2) that they knew what they were doing, but did not know that it was wrong. A common example for the second prong is if a person is acting on orders from "God."

9. The M'Naughton Rule is incorporated in section 84 of Pakistan Penal Code, 1860 (PPC) falling in chapter dealing with general exceptions; Section 84 is reflected below:-

> *"**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*."

To prove inanity the accused would adduce evidence as required by Article 121 of Qanun-e-Shahadat Order, 1984 which shall include proceedings conducted u/s 465 of the Code in earlier round of trial, and burden to prove that plea would be on the accused as per principles of evidence required for proving any other general exception referred in PPC read with Article 121 *ibid*. Reliance in this respect is on cases reported as "*KHIZAR HAYAT Versus THE STATE*" **(2006 SCMR 1755)**; "*THE STATE Versus BALAHARI DAS SUTRADHAR*" **(PLD 1962 Dacca 467)**; "*LAL KHAN Versus CROWN*" **(PLD 1952 Lahore 502);** "*GHULAM YOUSAF Versus THE CROWN*" **(PLD 1953 Lahore 213)**. The Honourable supreme court in case reported as "*Mst. SAFIA BANO and another Versus HOME DEPARTMENT GOVERNMENT OF PUNJAB through Secretary and others*" **(PLD 2021 Supreme Court 488)** in para-43 has held that onus to prove such plea is on the accused, however, while proving such plea, the accused may get benefit from any material, oral or documentary, produced/relied upon by the prosecution.

10. If the accused succeeded to prove the fact of his unsoundness of mind the trial court would proceed to acquit the accused and shall pass

judgment in the terms keeping in view the requirement of following section:-

> *"**470. Judgment of acquittal on ground of lunacy:** Whenever any person is acquitted upon the ground that, at the time at which he is alleged to have committed an offence he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.*"

Trial court is required to give specific finding as to whether accused committed the offence charged or not, and then would speak the fact about two aspects in either of the way it was found in the evidence, i.e., accused did not know that he was committing an offence, or alleged act was wrong or contrary to law. If it is concluded that accused has not committed the offence, he would be set at liberty but when an accused earns acquittal on the ground of insanity, he would still be kept or detained in safe custody as required under following section of the Code:-

> *"**471 Person acquitted on such ground to be detained in safe custody:** (1) Whenever the finding states that the accused person/committed the act alleged, the Magistrate or Court before whom, or which the trial has been held, shall, if such act would but for the incapacity, found, have constituted an offence, order such person to be detained in safe Custody in such place and manner as the Magistrate or Court thinks fit, and shall report the action taken to the Provincial Government;*
>
> *Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Provincial Government may have made under the Lunacy Act, 1912.*
>
> ***(2) Power of Provincial Government to relieve Inspector-General of certain functions:** The Provincial Government may empower the officer incharge of the jail in which a person is confined under the provisions of Section 466 or this section, to discharge all or any of the functions of the Inspector General of Prisons under Section 473 or Section 474.*"

If the accused is later declared fit to be released, the procedure laid down u/ss 474 & 475 of the Code shall follow as may be practicable.

11. The diminished criminal liability due to insanity can be adjudged while relying on legal precedents developed on different set of facts and mania determined by the medical experts; In "***R v Arnold* (1724) 16 How St. Tr. 765",** the test for insanity was expressed in the following terms:

> *Whether the accused is totally deprived of his understanding and memory and knew what he was doing "no more than a wild beast or a brute, or an infant*.

The next major advance occurred in "***Hadfield's Trial*** **1800 27 How St. Tr. 1281"** in which the court decided that a crime committed under some delusion would be excused only if it would have been excusable had the delusion been true. This would deal with the situation, for example, when the accused imagines he is cutting through a loaf of bread, whereas in fact he is cutting through a person's neck. Each jurisdiction may have its own standards of the insanity defence. More than one standard can be applied to any case based on multiple jurisdictions.

Whether a particular condition amounts to a disease of the mind within the Rules is not a medical but a legal question to be decided in accordance with the ordinary rules of interpretation. It seems that any disease which produces a malfunctioning of the mind is a disease of the mind and need not be a disease of the brain itself. The term has been held to cover numerous conditions:

- *In **"R v Kemp [1957] 1 QB 399"** arteriosclerosis or a hardening of the arteries caused loss of control during which the defendant attacked his wife with a hammer. This was an internal condition and a disease of the mind.*

- *In **"R v Sullivan [1984] AC 156"** during an epileptic episode, the defendant caused grievous bodily harm: epilepsy was an internal condition and a disease of the mind, and the fact that the state was transitory was irrelevant.*

- *In **"R v Quick; R v Paddison [1973] QB 910**" the defendant committed an assault while in a state of hypoglycemia caused by the insulin he had taken, the alcohol he had consumed and not eating properly. It was ruled that the judge should have left the defence of automatism open to him, so his conviction was quashed (he had pleaded guilty rather than not guilty by reason of insanity). This was where the internal/external divide doctrine was first expressed, probably due to judicial reluctance to hospitalize someone for a condition that could be cured by a sugar lump. It is doubtful that a jury would have accepted a defence of automatism, but nonetheless the issue should have been left to them.*

- *In **"R v Hennessy [1989] 1 WLR 287"** a diabetic stole a car and drove it while suffering from a mild attack of hyperglycemia caused by stress and a failure to take his insulin**. Lane LCJ** said at 294*

> *In our judgment, stress, anxiety and depression can no doubt be the result of the operation of external factors, but they are not, it seems to us, in themselves separately or together external factors*

> *of the kind capable in law of causing or contributing to a state of automatism. They constitute a state of mind which is prone to recur. They lack the feature of novelty or accident, which is the basis of the distinction drawn by Lord Diplock in R v Sullivan 1984 AC 156, 172. It is contrary to the observations of Devlin J., to which we have just referred in Hill v Baxter (1958) 1 QB 277, 285. It does not, in our judgment, come within the scope of the exception of some external physical factor such as a blow on the head or the administration of an anesthetic.*

- *In **"Bratty v Attorney-General for Northern Ireland [1963] AC 386"** Lord Denning observed obiter that a crime committed while sleepwalking would appear to him to be one committed as an automaton. However, the ruling in R v Sullivan that diseases of the mind need have no permanence led many academics to suggest that sleepwalkers might well be found to be suffering from a disease of the mind with internal causes unless there was clear evidence of an external causal factor.*

- *In **"R v Burgess [1991] 2 QB 92"** the Court of Appeal ruled that the defendant, who wounded a woman by hitting her with a video recorder while sleepwalking, was insane under the M'Naghten Rules. Lord Lane said, "We accept that sleep is a normal condition, but the evidence in the instant case indicates that sleepwalking, and particularly violence in sleep, is not normal."*

12. Coming back to the case in hand; report of medical board obtained by the order of learned trial court about condition of accused speaks as under:-

> "The standing medical board assembled and revealed the Psychiatric opinion vide No. Psy/24 dated 11-03-2022 of accused Muhammad Ibrahim S/O Abdul Hameed, his remarks of identification are:-
>
> 1). Mole of left side of neck 2. Mole on right side of neck.
>
> Prisoner Muhammad Ibrahim S/O Abdul Hameed, was admitted through OPD with registration No.1206028-144-13 from 08-03-2022 to 10-03-2022.
>
> During his stay in our ward he was kept under observation and his mental state examination was performed. He is a known psychiatric patient for the last many years. On mental state examination patient has poor personal hygiene, irrelevant talk, loosening of association, disorganized behavior and lack of insight. He is diagnosed as a case Schizophrenia. Hence, he is insane.
>
> Therefore, the medical board unanimously agreed with the above opinion."

Corresponding to such report it was incumbent upon the learned trial court to advert to the statutory provision cited above which cater to the requirement of situation so as to give effect to the law of land enacted to protect the rights of individuals and court should have first tried the fact of unsoundness before passing of impugned order which has not been done in this case. Law requires that after completing the process, finding the accused as of unsound mind, the court if does not think proper to grant

bail to the accused under section 466(1) of the Code, it shall pass order for safe custody of accused as per section 466(2) of the Code; reliance is on cases reported as *"MUHAMMAD NASEEM versus THE STATE"* **(1982 SCMR 754);** *"MUHAMMAD SAEED WASEER Versus D.F.C., SIALKOT and others"***(1998 P Cr. L J 1441); "***SHAHBAZ AHMAD Versus The STATE and others"* **(2021 P Cr. L J 1100).** The Honourable Supreme court in an unequivocal term has explained the whole process in a case reported as *Mst. SAFIA BANO and another Versus HOME DEPARTMENT GOVERNMENT OF PUNJAB through Secretary and others"* **(PLD 2021 Supreme Court 488),** as under:-

> *"54. Once the Court has formed a prima facie tentative opinion that the accused may be incapable of understanding the proceedings of trial or make his/her defence, it becomes obligatory upon the Court to embark upon conducting an inquiry to decide the issue of incapacity of the accused to face trial due to mental illness. Medical opinion is sine qua non in such an inquiry. For this purpose, the Court must get the accused examined by a Medical Board, to be notified by the Provincial Government, consisting of qualified medical experts in the field of mental health, to examine the accused person and opine whether accused is capable or otherwise to understand the proceedings of trial and make his/her defence. The report/opinion of the Medical Board must not be a mere diagnosis of a mental illness or absence thereof. It must be a detailed and structured report with specific reference to psychopathology (if any) in the mental functions of consciousness, intellect, thinking, mood, emotions, perceptions, cognition, judgment and insight. The head of the Medical Board shall then be examined as Court witness and such examination shall be reduced in writing. Both the prosecution and defence should be given an opportunity to cross-examine him in support of their respective stance. Thereafter, if the accused wishes to adduce any evidence in support of his/her claim, then he/she should be allowed to produce such evidence, including expert opinion with the prosecution given an opportunity to cross-examine. Similarly, the prosecution may also be allowed to produce evidence which it deems relevant to this preliminary issue with opportunity given to the defence to cross-examine. It is upon the consideration of this evidence procured and adduced before the Court that a finding on this question of fact i.e. the capability of the accused to face trial within the contemplation of sections 464 and 465 Cr.P.C. shall be recorded by the Court*."

13. For what has been discussed, the instant criminal revision is disposed of in the terms that the impugned order dated 16.09.2022 is set-aside with the direction to learned trial court to obtain fresh report about mental health of the accused on the pattern as ordained by Honourable Supreme Court in *Safia Bano's Case* PLD 2021 Supreme Court 488 Supra and then try the fact of unsoundness of accused first,

keeping in view the directions and processes highlighted above, thereafter, if finds the accused as of unsound mind shall pass an order u/s 466 of Cr.P.C and further process shall follow as mentioned in Chapter XXXIV of the Code.

(Muhammad Amjad Rafiq)
Judge

Jamshaid*

APPROVED FOR REPORTING

JUDGE