

Before S. S. Saron & S. P. Bangarh, JJ.

KULDEEP SINGH—Appellant

versus

STATE OF HARYANA—Respondent

CRA No.D-540-DB of 2005

September, 14 2012

Indian Penal Code, 1860 - S.302 - Code of Criminal Procedure, 1973 - S.173, 207, 329 - Appellant convicted by trial court under S.302 IPC - During trial, documents placed on record to show that appellant was of unsound mind - Trial Court also noticed that the appellant/accused appeared to be of unstable mind - Procedure under S.329 Cr.P.C. not followed to ascertain whether the accused was of unsound mind or not - Conviction set-aside in appeal - Matter not remanded to trial court for de novo trial for the reason that the appellant had already undergone 9 years imprisonment, and two eye-witnesses, including daughter of one of the deceased, had not supported the prosecution case - Appeal allowed.

Held, that after going through the material on record and hearing counsel for the parties, one aspect is quite certain that the appellant was not having good mental health. In fact, the learned trial Court in para No. 15 of its impugned judgment observed that during the course of trial, appellant was sent on few occasions to the Post Graduate Institute of Medical Sciences, Rohtak for his treatment for mental disorder, but it is nowhere the case that he (Kuldeep Singh) was a man of unsound mind at the time of occurrence. It was held by the learned trial Court that the appellant was in a fit state of mind when he committed the murder of his wife (Rajo Devi) and elder brother (Harchand) and later on, on account of shock and registration of the case, he lost his balance of mind and became a patient of disorderly mind.

(Para 34)

Further held, that it may, however, be noticed that the learned trial Court in this case had noticed that the appellant was not having too stable a mind. Therefore, it was liable to postpone the trial and satisfy itself as

to whether the appellant was capable of defending himself and if it was satisfied that he was capable of defending himself, only then the trial was liable to have proceeded further. In this manner, there has been a transgression of Section 329 Cr.P.C. and due to this reason, the trial stands vitiated which would warrant the setting aside of the impugned judgment and order of sentence. The learned trial Court has proceeded on the premise that at the time of the incident, the appellant was of sound mind. However, in terms of Section 329 (1) Cr.P.C., it is to be seen and ascertained as to whether the person being subjected to trial was of unsound mind and consequently, incapable of making his defence. This aspect has admittedly not been adverted to in the present case.

(Para 44)

Further held, that in the normal course due to non-compliance of Section 329 (1) Cr.P.C. the conviction is to be set aside and the case remanded for de novo trial, but in the present case the appellant, admittedly, has already undergone about 9 years of imprisonment in Jail during investigation, trial and after conviction. Besides, the material witnesses in the case namely PW-9 Anusuiya, PW-10 Promilla and PW-11 Shakuntla did not support the prosecution case in its entirety and have made discrepant and inconsistent statements as regards the occurrence. At one stage two of them namely Anusuiya (PW-9) and Promila (PW-10) say that they saw a man with the muffled face committing the murders and they could not identify him. However, they also say that they had seen the occurrence but no statement was made to the police in this regard and the family had decided to bare the tragedy. They are the close relative of the deceased. PW-9 Anusuiya is daughter of Harchand (deceased) and niece of Rajo Devi being the wife of Kuldip Singh (appellant). PW-10 Promila is the maternal granddaughter of Harchand (deceased). PW-11 Shakuntla is the daughter-in-law of Harchand (deceased) and she had not supported the prosecution case at all. In these circumstances, it shall not be in the interest of justice to order de novo trial and the appellant be given the benefit of doubt due to discrepant evidence on record and due to noncompliance of Section 329 (1) Cr.P.C. and he be acquitted by setting aside the impugned judgment and resultant order of sentence. The aforesaid eye witnesses in this case have not supported the prosecution in their examination-in-chief though two

eye witnesses supported the case in cross-examination by learned Public Prosecutor but that would not be of much consequence, in view of the non-compliance of Section 329 (1) Cr.P.C by the learned trial Court.

(Para 45)

Anju Arora, Advocate, *for the appellant.*

H.S. Sran, Addl. AG., *for the respondent.*

S.P. BANGARH, J.

(1) Challenge in the appeal is to the legality and propriety of judgment of conviction and order of sentence dated 31.05.2005 passed by the Learned Sessions Judge, Sirsa in Sessions case No. 69 of 2003, emanating from FIR No. 240 dated 10.06.2003, whereby, the appellant was convicted for commission of offence punishable under Section 302 IPC and sentenced to undergo imprisonment for life and to pay a fine of Rs. 30,000/-. In default of payment of fine to further undergo rigorous imprisonment for a period of 18 months.

(2) On 09.06.2003, Om Parkash, his mother and his children were away to village Sheranwali in Punjab to attend the marriage of sons of the sister of his mother. Harchand, Anusuiya (daughter of Harchand) and Promila (sister's daughter of Harchand), remained at the house of Harchand at village Bharolianwali. On 09.06.2003 at about 2-3 p.m., Kuldeep Singh (appellant) uncle of Om Parkash, gave a beating to his wife (Rajo Devi). Thereupon he was rebuked by Harchand and Rajo Devi was rescued. After some time, on 09.06.2003 on account of a quarrel between Kuldeep Singh (appellant) and his wife (Rajo Devi), the former committed the murder of latter with a spade and then he came to the house of Harchand and committed his murder also with a spade. Om Parkash, on having learnt about the murder of his father (Harchand) and aunt (Rajo Devi), returned to his village Bharolianwali where his sister (Anusuiya) narrated the entire occurrence to him and she also told him that she herself, Promila and Shakuntla, on seeing Harchand had become unconscious.

(3) Aforementioned statement (Ex.PK) of Om Parkash was recorded by SI/SHO Panjab Singh of Police Station Rania at General Hospital, Sirsa, who sent the same to the Police Station with his endorsement

Ex.PK/2 thereon which formed the basis of formal FIR (Ex.PK/1). SI Panjab Singh also went to General Hospital Sirsa on 09.06.2003 on receipt of verbal transmission message from Police Station City Sirsa regarding the admission and death of Harchand and he also collected ruqas (Ex.PB & Ex.PC) from Police Station City Sirsa. He prepared inquest report, Ex.PH/1 on the corpse of Harchand and Ex. PE/1 on the corpse of Rajo Devi at General Hospital Sirsa. Later, he sent the dead bodies for autopsy vide applications Ex.PH and Ex. PE.

(4) After the autopsy, the copies of autopsy report of Harchand (Ex.PG) alongwith pectorial diagram showing the seats of injuries Ex.PG/1, inquest report of Harchand (Ex.PH/1) and similarly the copy of the autopsy report of Rajo Devi (Ex.PD) with diagram showing the seats of injuries (Ex.PD/1) and the inquest report (Ex.PE/1) and sealed parcels of belongings of both the deceased (Harchand and Rajo Devi) were handed over to SI Panjab Singh by the Medical Officers, who conducted autopsies on the dead bodies of Harchand and Rajo Devi. Sealed parcels, which were handed over to SI Panjab Singh by the Medical Officers, were also seized vide memo Ex. PQ. Inspector Panjab Singh later visited the place of occurrence on 10.06.2003 and prepared rough site plan of the place of occurrence (Ex.PR) with correct marginal notes. He also lifted blood stained earth from both the places of occurrence where Harchand and Rajo Devi were murdered and these were sealed into separate parcels with seal bearing impression 'PS' and both the parcels were seized vide memo Ex.PS. He also recorded the statements of the witnesses and on return to Police Station, he deposited the sealed parcels with the MHC.

(5) Later, on 07.10.2003, Kuldeep Singh (appellant) was arrested by SI Manvir Singh, who interrogated him and during interrogation, Kuldeep Singh (appellant) suffered a disclosure statement Ex.PU and pursuant thereto, got recovered a spade from the heap of chaff (toora) lying near the brick kiln in the mustard field, which was sealed with seal bearing impression 'MS'. A parcel was prepared and taken in possession vide memo Ex.PU/1. Later, SI Manvir Singh prepared a rough site plan of the place of recovery of spade (Ex.PU/2) with correct marginal notes. The case property was deposited by him with the MHC. The statements of witnesses were also recorded by him.

(6) After completion of investigation, Station House Officer of Police Station Rania instituted police report under Section 173 Code of Criminal Procedure (Cr.P.C-for short) before the learned Illaqa Magistrate to the effect that it appears that the appellant had committed an offence punishable under Section 302 IPC. On presentation of police report, copies of documents as required under Section 207 Cr.P.C. were furnished to the appellant and the case was later committed to the Court of learned Sessions Judge, Sirsa.

(7) On receipt of Session Case, learned Sessions Judge, Sirsa, framed charge under Section 302 IPC against the appellant, whereto, the latter pleaded not guilty and claimed trial. Consequently, prosecution evidence was summoned.

(8) At the trial, the prosecution examined as many as sixteen witnesses.

(9) PW-1 Dr. Dale Singh medically examined Harchand (deceased) on 09.06.2003 at 3.25 p.m. and found the following injuries on his person:

1. An incised wound of 22 cms. x 2cms. x grey matter coming out from cut part of the bone. Fresh bleeding was present. Surgeon's opinion was sought.
2. Incised wound on right elbow 5 cms. x 1/4th cm x bone deep. Fresh bleeding was present. X-ray was advised.
3. Incised wound of right parietal region 5 cms. x 1/2 cm x bone deep. Fresh bleeding was present. X-ray was advised.
4. Incised wound of 12 cms. x 1/2 cm x bone deep on right occipital region. Fresh bleeding was present. X-ray was advised.

(10) He further testified that injury No. 1 was dangerous to life, while other injuries were advised for x-ray and all the injuries were caused by sharp edged weapon within probable duration of 24 hours. He testified that Ex.PA was the correct carbon copy of the medico-legal report, while Ex.PA/1 were the diagrams showing the seat of injuries. He also proved ruqa Ex. PB, which he sent to the SHO, Police Station City Sirsa. He further testified that the patient succumbed to the injuries and in this connection,

he sent ruqa Ex.PC to SHO, Police Station City, Sirsa. Ex.P1 Kassi was shown to him in the Court. He testified that injuries found on the person of Harchand could be caused, therewith, on 09.06.2003 at about 2.00 p.m.

(11) PW-2 Dr. Jagdish Chaudhry, conducted autopsy on the corpse of Rajo Devi (deceased) at General Hospital Sirsa on 10.06.2003 at 12.05 p.m. and found following injuries on her person.

1. An incised wound of size 11.5 cms. x 2.5 cms. x 4 cms. deep, extending from mandibular angle of mandible over right side to the upper part of external ear. The underlying bone and vessels were cut through with extensive bleeding. Muscles were also cut through.

2. An incised wound over left fore-arm, 5 cms, above the left wrist measuring 6 cms. x 3 cms. with underlying bones fractured. The wound was bone deep. Effusion of blood in subcutaneous tissue was seen.

3. An incised wound on left cheek measuring 3 cms. x 1 cm. x 1 cm. near left angle of mouth. Effusion of blood in subcutaneous tissue was seen.

(12) He further testified that the cause of death in this case in his opinion was multiple injuries and its complications, which were antemortem in nature and sufficient to cause death in the ordinary course of nature. He also testified that the time elapsed between injuries and death was variable and between death and post-mortem was within 24 hours. He also testified that after post-mortem examination, he handed over to the police a well stitched dead body with a carbon copy of post mortem report, police papers no. 1 to 14 duly signed by him and a sealed packet containing clothes of the deceased. He further testified that Ex.PD is the correct carbon copy of post mortem report, while Ex.PD/1 were the diagrams showing the seat of injuries. He also proved inquest report Ex. PE of the police, whereby, he was asked to conduct post mortem on the corpse of Rajo Devi. He also proved inquest report Ex.PE/1. He also testified that the injuries on the dead body of Rajo Devi could be caused with kassi Ex.P1 and the deceased could have died within a few minutes after receipt of the injuries. He also testified that injuries could have been received by the deceased at 1.00 p.m. on 09.06.2003.

(13) PW-3 Dr. Gaurav Bishnoi, testified that on 10.06.2003 at 11.15 a.m., he alongwith Dr. V.K. Mahipal, conducted post mortem examination on the corpse of Harchand (deceased) and found following injuries on his person :

1. A stitched wound measuring 22 cms. in length present on the interparietal region of scalp, extending from just above left ear pinna upto right fronto parietal region. On dissection, subcutaneous infiltration of blood was present alongwith subglial haematoma. The underlying skull bone was cut in the direction of the wound. Underlying brain matter was also cut in the line of wound upto depth of 2 inches. Localised subdural and extra-dural haematoma was present.

2. An incised wound 5 cms. x 0.5 cm. on right parietal region, 2 cms. posterior to injury no.1. On dissection, subcutaneous infiltration of blood was present. Upper table of skull was cut in the direction of the wound.

3. C-shaped incised wound 12 cms. x 0.5 cms. chopped type, in the occipital region of scalp. On dissection, subcutaneous infiltration of blood was present. Upper table of skull was cut in the direction of the wound.

4. Incised wound 5 x 0.5 cm. on right elbow, posterior surface. On dissection, subcutaneous infiltration of blood was present.

(14) He further testified the cause of death in this case, as per their opinion was injury to brain as described , which was ante-mortem in nature and sufficient to cause death in ordinary course of nature. He also testified that the probable time that elapsed between injuries and death was variable and between death and post mortem was within 24 hours. They handed over to the police a well stitched dead body, police paper no. 1 to 12 duly signed by them, a carbon copy of post mortem report and a sealed parcel containing clothes of the deceased. He further testified that Ex.PG is the correct carbon copy of the post mortem report, while Ex.PG/1 are the diagrams showing the seat of injuries.

(15) PW-4 ASI, Sant Lal and PW-5 EHC Madan Lal tendered their affidavits Ex.PF and Ex.PI respectively. PW-6 Radhey Sham deposed that on 28.10.2003, he visited the place of occurrence and prepared scaled

plan Ex.PJ with correct marginal notes on the pointing of PWs Anusuiya and Shakuntla.

(16) PW-7 Trilok Singh deposed that on 10.06.2003 he visited the place of occurrence and took photographs Ex.P2 to Ex.P9 and proved negatives, thereof, Ex.P10 to Ex.P17.

(17) PW-8 ASI Mohinder Singh deposed that on 10.06.2003, he recorded formal FIR Ex.PK/1 on receipt of ruqa Ex.PK and sent the copies of the FIR to the higher authorities, as also, to the Illaqa Magistrate.

(18) PW-9 Anusuiya deposed that on 09.06.2003, she was present at her parental house at village Bharolianwali while her brother (Om Parkash) was away to village Sheranwali to attend the marriage of son of the sister of her mother and her father Harchand (deceased) was also present at his house while Rajo Devi (deceased) and her husband (Kuldeep Singhappellant) were present in their house adjoining to the house of her father. On the point of occurrence, she did not support the prosecution version and testified that on that day at about 2.00 or 2.30 p.m. somebody with a muffled face committed the murder of Rajo Devi and her father (Harchand) with a spade. Since the assailant had a muffled face, she and other inmates of the house could not identify him and that the appellant did not commit the murder of her father (Harchand) and aunt (Rajo Devi). This witness was got declared hostile by the prosecution and was cross examined by the learned Public Prosecutor at length, but in crossexamination, she could not suppress the truth and admitted the prosecution version.

(19) PW-10 Promila also deposed that on 09.06.2003, she was present at the house of her maternal grand-father (Harchand) at village Bharolianwali on account of her summer vacations and she was there for the last ten days prior to 09.06.2003 and Anusuiya (daughter of the deceased-Harchand) and Shakuntla her maternal aunt were also present at the house of deceased (Harchand) on 09.06.2003 and that appellant and his wife (Rajo Devi) were present at their house adjoining to the house of deceased (Harchand). She testified that her maternal uncle Om Parkash and other family members of the house of the deceased (Harchand) were away to attend marriage. She also did not support the prosecution version in her examination-in-chief and testified that a man with a muffled face first intruded

in the house of Kuldeep Singh (appellant) and committed the murder of his wife (Rajo Devi) with a spade and, thereafter, he intruded in the house of her maternal grand-father (Harchand) and committed his murder. She was also got declared hostile by the prosecution and crossexamined by the learned Public Prosecutor at length, but she could not withstand the test of cross-examination and admitted the entire prosecution case.

(20) PW-11 Shakuntla also testified that on 09.06.2003, she, Anusuiya, Promila and deceased (Harchand) were present at the house of the latter at village Bharolianwali and that Kuldeep Singh (appellant) and his wife Rajo Devi were present in their adjoining house and that on 09.06.2003, a quarrel had taken place between the appellant and his wife (Rajo Devi) in the morning. Her father-in-law (Harchand), however, separated them. In respect of the occurrence, she did not support the prosecution version and deposed that at about 2.00 or 2.30 p.m. a man with muffled face entered their house armed with a spade and committed the murder of her father-in-law (Harchand) and also of Rajo Devi. She could not identify the assailant as his face was muffled. She was also declared hostile by the prosecution and cross examined by the learned Public Prosecutor at length. In the cross-examination, she maintained her stand as was taken in her examination-in-chief.

(21) PW-12 Om Parkash son of Harchand Ram also testified that on 09.06.2003, he, his wife, his children, mother and brother were away to attend a marriage at Village Sheranwali while his sister (Anusuiya), Shakuntla, his sister's daughter (Promila) and his father (Harchand) were present at their house at Village Bharolianwali. He further testified that Kuldeep Singh (appellant), his wife (Rajo Devi-deceased) and their children were present in their house at Bharolianwali and on 10.06.2003 when he returned to village Bharolianwali after attending the marriage, Anusuiya and Promila narrated the occurrence with respect to the murder of his father Harchand and aunt (Rajo Devi), by stating that a man with a muffled face had entered the house and committed the murder of Rajo Devi and Harchand. This witness did not support the prosecution version and was declared hostile and in the cross-examination conducted by the learned Public Prosecutor, he did not support the prosecution version. .

(22) PW-13 HC Roshan Lal tendered in evidence his affidavit EX. PO.

(23) PW-14 HC Satbir Singh tendered in evidence his affidavit Ex. PP.

(24) PW-15 Inspector Panjab Singh and PW-16 SI Manvir Singh conducted investigation of this case and deposed on the lines of the investigation, which has been reproduced in the earlier part of this judgment.

(25) After examining 16 witnesses the learned Public Prosecutor before the learned trial Court, closed the prosecution evidence after tendering the report (Ex.PU) of Forensic Science Laboratory.

(26) After the close of prosecution evidence, the appellant was examined under Section 313 Cr.P.C, wherein, he denied the allegations of the prosecution and pleaded innocence and false implication in the case. He stated that he was of unstable mind and did not commit murder of anybody and that he has been falsely implicated in this case on suspicion.

(27) Appellant was called upon to enter defence and he examined his daughter Poonam as DW1, she deposed that on 09.06.2003 in the morning, there had been a quarrel between her father and her mother over the preparation of tea. Her mother refused to prepare the same and, thus, a quarrel had arisen. After the quarrel, Kuldeep Singh (appellant) went out of the house and thereafter, at noon time a person with muffled face came to their house and committed the murder of her mother (Rajo Devi) with a spade. After committing the murder of her mother (Rajo Devi), the said person committed the murder of her grand uncle Harchand in the adjacent house with a spade. They could not identify the assailant as his face was muffled face.

(28) DW-2 Om Parkash son of Bahadur Ram also deposed that on 09.06.2003 at about 2.30 p.m., he heard a noise and went out of his house and many people were standing in front of the house of the appellant and there was a noise of "Maar Diya - Maar Diya". The children of the appellant informed that a person with a heavy body and long height had committed the murder, but they could not see his face as it was muffled. After committing the murder of Rajo Devi and Harchand, the said person

fled from the spot. He also testified that the appellant was mentally sick and for months together he used to be out of the house and many a times, they used to bring him back after searching for him and that on 09.06.2003, the appellant was not present at his house in the village.

(29) Defence evidence was closed, thereafter.

(30) After hearing both the sides, the learned trial Court convicted and sentenced the appellant vide impugned judgment and order of sentence. Aggrieved, therefrom, the appellant, has filed this appeal with a prayer for acceptance of the same and for his acquittal of the charge framed against him.

(31) Learned counsel for the appellant and learned Additional Advocate General, Haryana for respondent have been heard and record of the case perused with their assistance.

(32) Learned counsel for the appellant has contended that the appellant is disoriented and mentally unsound. Therefore, he can not be said to have committed the alleged offence. It was also contended that there was no motive on his part to commit the murders of Harchand and Rajo Devi. Learned counsel for the appellant further contended that the eye witnesses have not corroborated the prosecution case, therefore, he should be acquitted by giving him the benefit of doubt.

(33) On the other hand, learned Additional Advocate General, Haryana for respondent contended that the appellant was in a fit state of mind when he committed the offence and, therefore, there is no flaw in the trial and the appellant was rightly convicted and sentenced by the learned trial Court vide impugned judgment and order, which are liable to be upheld and affirmed.

(34) After going through the material on record and hearing counsel for the parties, one aspect is quite certain that the appellant was not having good mental health. In fact, the learned trial Court in para No.15 of its impugned judgment observed that during the course of trial, appellant was sent on few occasions to the Post Graduate Institute of Medical Sciences, Rohtak for his treatment for mental disorder, but it is nowhere the case that he (Kuldcep Singh) was a man of unsound mind at the time of occurrence.

It was held by the learned trial Court that the appellant was in a fit state of mind when he committed the murder of his wife (Rajo Devi) and elder brother (Harchand) and later on, on account of shock and registration of the case, he lost his balance of mind and became a patient of disorderly mind.

(35) The said observation of the learned trial Court would make it quite evident that after the commission of the murder, during trial the appellant did lose his balance of mind and became a patient of mental disorder. The said observation of the learned trial Court reveals that it learnt about the disordered mind of appellant during trial. When once it appeared to the learned trial Court that the appellant was not mentally stable, it ought to have invoked the provisions of Section 329 Cr.P.C.

(36) It has in fact also come on record that, DW-2 Om Parkash had deposed that the appellant had been mentally sick and for months together he used to be out of the house. Many a times they used to bring him back by searching him. The said deposition would show that the appellant may not have been in a fit state of mental health.

(37) During the pendency of the appeal in this Court, an application was filed by the appellant seeking suspension of sentence of imprisonment on the ground that he was suffering from mental illness. A certificate dated 17.02.2005 recorded by Medical Officer, District Jail, Rohtak was reproduced in the order dated 01.02.2012 passed by this Court. The said medical certificate reads as under:

“Kuldeep s/o Bahadur about 40 years old male was transferred on medical ground from District Jail Sirsa to District Jail Rohtak on 19.10.2004 by the order of District and Sessions Judge, Sirsa vide order no. 5355 dated 16.10.2004. He is diagnosed case of Amoebic colitis Chaemorrhoids with Schizophrenia. He was referred to PGIMS, Rohtak vide SOPO No. 9186 (Card No. 483832) prescribed treatment and diet was given. He was regularly examined in District Jail Hospital by the visiting Psychiatrists from PGIMS Rohtak. The treatment and diet is being regularly given to him as advised by the consultant. He was followed up in PGIMS Rohtak on dated 18.01.2005 and 15.02.2005 vide OPD No. 766/05. Treatment is being provided to him. Treatment can be continued while staying in District Jail Sirsa.

So in my opinion if authorities agree, he may be shifted back to District Jail Sirsa.

This is for your information please.”

(38) The aforesaid certificate as reproduced above would also show that the appellant was under treatment for his mental ailment during the trial of the case. This was liable to be taken into consideration so as to ascertain as to whether the appellant was suffering from mental disorder. In the said circumstances, the provisions of Section 329 (1) of the Code of Criminal Procedure were liable to be invoked. The said provision reads as under:

“329. Procedure in case of person of unsound mind tried before Court.

(1) If at the trial of any person before a Magistrate or Court of Session, it appears to the Magistrate or Court that such person is of unsound mind and consequently incapable of making his defence, the Magistrate or Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Magistrate or Court, after considering such medical and other evidence as may be produced before him or it, is satisfied of the fact, he or it shall record a finding to that effect and shall postpone further proceedings in the case”.

(39) In *Yogesh Kumar versus State and another (1)*, it was held by the Hon'ble Delhi High Court that the word 'appears' surely imports a lesser degree of probability than 'proof'. It was further held that this would not mean that the Magistrate or Court must proceed to 'try' the question on mere asking. There must be something either in the form of medical record or other material to raise a reasonable doubt in the mind of the Magistrate or Court that the accused is of unsound mind. Even the demeanour of the accused may sufficiently lead to such a doubt. It is only on the crossing of this hurdle that it becomes obligatory on the Magistrate or Court to 'try' the fact of such unsoundness of mind and incapacity of the accused. Therefore, in view of the judgment (*supra*), as also, in view of the certificate dated 17.02.2005 reproduced above an inquiry into the fact as to whether the appellant was of unsound mind or that he was capable of defending himself in the trial was liable to be conducted. This inquiry admittedly was not held in the present Court.

(40) This Court in *Gurjeet Singh versus State of Punjab (2)*, held that any violation by a Court in not examining proper evidence for recording a finding as provided for by Section 329 of the Code of Criminal Procedure is to vitiate the trial, as a lunatic, insane or mentally unsound accused cannot understand the trial and appreciate the evidence against him and answer the charge because of his mental incapacity. It was further held that the trial of an unsound person is void. In the said case, the appeal was accepted and the conviction and sentence of the appellant, therein, were set aside. The case was sent back to the learned trial Court for proceeding in accordance with law and observations recorded in the said judgment.

(41) The Hon'ble Gujarat High Court in "*Raval Mohanbhai Laxmanbhai versus State of Gujarat (3)*", held that there need not be a medical certificate to prove the unsoundness of mind of an accused. It was further held that the conduct of an accused prior to the incident, at the time of commission of the offence and conduct of accused subsequent to the incident leads to infer that the accused was not in a fit state of mind. In the said judgment the conviction and sentence in respect of the accused were set aside and the accused was acquitted.

(42) This Court in "*Makhan Singh versus State of Punjab (4)*", held that due to non application of Section 329 Cr.P.C., the trial is vitiated for want of enquiry under Section 328 Cr.P.C and the case was remanded for *de novo* trial.

(43) The Hon'ble Gauhati High Court in "*Nandeswar Dass versus State of Assam (5)*", also set aside the conviction of the accused due to non consideration of factual position as to the mental health of the accused by the trial Court, in terms of Section 329 Cr.P.C. It was held that trial Judge ought to have satisfied himself as regards the mental health of the accused.

(44) During the pendency of the appeal this Court vide order dated 01.02.2012 asked the Head of the Psychiatry Unit, PGIMS, Rohtak to

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- (2) 1986 (2) RCR (Criminal) 458
 - (3) 1998 (4) RCR (Criminal) 402
 - (4) 2006 (2) RCR (Criminal) 420
 - (5) 2004 CriLJ 4723

constitute a Medical Board and after examining the appellant by the Medical Board, give a definite opinion as to whether in view of the certificate dated 17.02.2005, the appellant during the trial of the case which commenced from 19.01.2004 and ended after passing of the judgment and order on 31.05.2005 and 03.06.2005, was mentally fit so as to effectively pursue his defence. The necessary report has been received. The learned State counsel has no serious objection to this report being taken on record. Being a report of the experts it has been taken on record as Ex.C1. In the said report the Medical Board has opined that opinion about the fitness for trial in the Court can not be commented upon for the period from 17.02.2005 to 03.06.2005, as no medical records pertaining to this period were available with the Medical Board. It may, however, be noticed that the learned trial Court in this case had noticed that the appellant was not having too stable a mind. Therefore, it was liable to postpone the trial and satisfy itself as to whether the appellant was capable of defending himself and if it was satisfied that he was capable of defending himself, only then the trial was liable to have proceeded further. In this manner, there has been a transgression of Section 329 Cr.P.C. and due to this reason, the trial stands vitiated which would warrant the setting aside of the impugned judgment and order of sentence. The learned trial Court has proceeded on the premise that at the time of the incident, the appellant was of sound mind. However, in terms of Section 329 (1) Cr.P.C., it is to be seen and ascertained as to whether the person being subjected to trial was of unsound mind and consequently, incapable of making his defence. This aspect has admittedly not been adverted to in the present case.

(45) In the normal course due to non-compliance of Section 329 (1) Cr.P.C. the conviction is to be set aside and the case remanded for *de novo* trial, but in the present case the appellant, admittedly, has already undergone about 9 years of imprisonment in Jail during investigation, trial and after conviction. Besides, the material witnesses in the case namely PW-9 Anusuiya, PW-10 Promilla and PW-11 Shakuntla did not support the prosecution case in its entirety and have made discrepant and inconsistent statements as regards the occurrence. At one stage two of them namely Anusuiya (PW-9) and Promilla (PW-10) say that they saw a man with the muffled face committing the murders and they could not identify him. However, they also say that they had seen the occurrence but no statement

was made to the police in this regard and the family had decided to bare the tragedy. They are the close relative of the deceased. PW-9 Anusuiya is daughter of Harchand (deceased) and niece of Rajo Devi being the wife of Kuldip Singh (appellant). PW-10 Promila is the maternal grand daughter of Harchand (deceased). PW-11 Shakuntla is the daughter-in-law of Harchand (deceased) and she had not supported the prosecution case at all. In these circumstances, it shall not be in the interest of justice to order *de novo* trial and the appellant be given the benefit of doubt due to discrepant evidence on record and due to noncompliance of Section 329 (1) Cr.P.C. and he be acquitted by setting aside the impugned judgment and resultant order of sentence. The aforesaid eye witnesses in this case have not supported the prosecution in their examination-in-chief though two eye witnesses supported the case in cross-examination by learned Public Prosecutor but that would not be of much consequence, in view of the non-compliance of Section 329 (1) Cr.P.C by the learned trial Court.

(46) Resultantly, the appeal succeeds and is, hereby, accepted; the impugned judgment and order of sentence are set aside and the appellant is acquitted of the charge framed against him by the learned trial Court. The appellant was released on bail vide order dated 01.02.2012 passed by this Court. The bail bonds furnished by him shall stand discharged.

P.S. Bajwa