ground that no appeal lay against that order. While dealing with this case, the Full Bench in *Jawahar Singh's* case (supra) doubted the correctness of the decision. *Aya Singh's* case (supra), is distinguishable on facts. Moreover, the learned Bench of Delhi High Court made certain observations contrary to those of the Full Bench in *Jawahar Singh's* case (supra). In the circumstances, it is not possible for me to agree with the view expressed therein. *Madho Parsad's case* (supra) is also distinguishable. In that case, an appeal had been filed to this Court against a dead person, which was dismissed as incompetent. The other party filed cross-objections before dismissal of the appeal. The cross-objectionist after dismissal of the appeal made an application for refund of the court-fee on the ground that the appeal had been dismissed and therefore the cross-objections were not maintainable. The learned Judge, in the circumstances of that case, ordered refund of the court-fee. In *Krutibasa Nayak's* case (supra) the learned Bench observed that the Court had inherent powers to refund court-fee under section 151 of the Code. It, at the time of rendering the judgment, did not notice the Full Bench judgment of this Court. It may also be mentioned, that the observations made by it, run counter to those of the Full Bench. In the circumstances, Mr. Bindra cannot take benefit from the cases referred to by him.

(8) For the aforesaid reasons I reject the prayer of the petitioner to the effect that the appeal be treated as a petition under Article 227 of the Constitution of India, or that the court-fee be ordered to be refunded. However, I accept the last prayer and order that the memorandum of appeal be returned to it for presentation to the proper Court. No order as to costs.

H.S.B.

Before: K. S. Tiwana and Surinder Singh, JJ.

GURJIT SINGH *alias* SAINTI,—*Appellant*

versus

STATE OF PUNJAB,—*Respondent.*

Criminal Appeal No. 258-DB of 1985

April 7, 1986.

Code of Criminal Procedure (II of 1974)—Section 329—Accused facing trial in court of Session raising plea of insanity—Court directing the examination of the accused in hospital—Report made by

Doctor adjudging the accused sane and competent to face trial—Judge accepting the report and proceeding with the trial—Reporting Doctor not examined as a witness and accused given no opportunity to produce other evidence to prove the plea of insanity—Judge also not recording his satisfaction that the accused was sane but merely acting on the report—Procedure adopted by the Court—Whether in consonance with Section 329—Trial held and conviction recorded in violation of the provisions of the aforesaid Section—Whether void.

Held, that a reading of Section 329 of the Code of Criminal Procedure 1974, shows that Court shall try the fact of unsoundness of mind and incapacity of the accused in the first instance. Sub-section (2) of this Section makes the preliminary trial of this fact, a part of the trial of the Court. The second stage comes when the Court is to enquire into the fact of unsoundness of mind and consequent incapacity of the accused to make his defence and it is at this stage when the Court is to ask for evidence. The onus to prove insanity is on the accused and for that purpose the accused may lead evidence. If the opinion of the medical expert examining the accused does not favour the accused he can lead evidence to prove his mental condition and the prosecution has a right to rebut the evidence led by the accused. After the recording of evidence led by the parties Section 329 provides that such evidence is to be considered and the consideration is to be demonstrated by its appraisal on the record. After appraisal a finding is to be recorded by him demonstrating the consideration of the evidence and the satisfaction about the fact of insanity. The matter cannot be judicially dealt with unless the evidence as may be led by the person raising the plea of insanity is dealt with in the manner indicated. Such a provision is clearly in consonance with the principles of fair administration of justice and any violation by a Court in not examining proper evidence for recording a finding as directed by Section 329 is to vitiate the trial and any conviction recorded thereby is, therefore, void.

(Para 10)

Appeal from the order of Shri T. S. Cheema, Sessions Judge, Patiala, dated 17th December, 1984 convicting and sentencing the appelant.

R. L. Gupta, Advocate, Amicus Curiae, *for the appellant.*

H. S. Bhullar, Advocate, for A.G. (Pb.), *for the respondent.*

JUDGMENT

K. S. Tiwana, J.

(1) Gurjit Singh alias Sainti son of Atma Singh, resident of Nabha, appellant was tried and convicted under section 302, Indian

Penal Code, for committing the murder of Nand Ram at Nabha on 11th of August, 1983 at 4-10 P.M. He has been sentenced by the learned Sessions Judge, Patiala to undergo life imprisonment and pay a fine of Rs. 500 for this offence. In default of payment of fine he has been further directed to undergo rigorous imprisonment for one year. The appellant has contested the order of conviction and sentence through this appeal.

(2) During the course of hearing of this appeal, the question which came to the fore was whether in the face of the plea of insanity raised by the appellant, the learned trial Court acted in violation of section 329 of the Code of Criminal Procedure, 1973, hereinafter referred as the Code, by not trying the fact of unsoundness of mind and incapacity of the appellant to make his defence before the start of the actual trial.

(3) As this is a preliminary question and in case of its determination in favour of non-compliance of the provisions of section 329 of the Code, the trial is to vitiate, we need not refer to the evidence in the case, on merits. It may, however, be noted that the appellant has led evidence in defence that he was mentally unsound prior to the commission of the offence and also subsequent thereto. To properly appreciate the case, the steps taken by the learned trial Judge and the orders made having a bearing on the plea of insanity and its decision, are to be referred in detail.

(4) The order dated 19th of December 1983 on the trial Court file reveals that the counsel for the appellant, who was appointed on State expense, made an application for medical examination of the appellant, as due to his insanity he could not give him (the counsel), the instructions. On 21st of January, 1984, the Public Prosecutor filed a reply to the application made on behalf of the appellant that he be got medically examined. The learned trial Court on that date directed the appellant to produce evidence to prove his insanity. On 4th of February, 1984, Dr. Gurmeet Singh, Professor and Head of the Psychiatry Department, Rejendra Hospital, Patiala, summoned by the appellant, appeared and stated that he could not give his opinion unless the appellant was admitted as an indoor patient for about a week. The learned trial Judge directed the jail authorities to arrange for the admission of the appellant as suggested by Dr. Gurmeet Singh. After that the report of Dr. Gudmeet Singh was received in court and an *ad interim* order, dated

13th of March, 1984, which contains the extract of the opinion of Dr. Gurmeet Singh, was passed which is:—

"The accused is facing trial in a case under Section 302 I.P.C. On 19th December, 1983, the accused filed an application through his counsel Shri D. P. Singh Anand, Advocate, Patiala for referring him to Psychiatry Department to determine that he was suffering from insanity. He attached with the application some photostat copies regarding his illness. On that application, he was referred to the Psychiatry Department of Rajendra Hospital, Patiala, from where a report has been received to the following effect:—

"Shri Gurjit Singh son of Shri Atma Singh, undertrail was referred to Psychiatry Department from Central Jail, Patiala and was admitted for observation and mental examination from 11th February, 1984 to 20th February, 1984. He was examined by Dr. Gurmeet Singh, the Registrar Dr. Paramjit Singh, Dr. S. R. Tiwari and Psychological testing done by Miss Monika Mehra.

I am of the opinion that he is suffering from Chronic pare-noid schizophrania, a form of chronic mental illness which is characterised by delusions of persecution, hallusinations and inappropriate emotional reaction and impulsive behaviour. During his admission the patient was very suspicious, evasive and uncoopera-tive in giving details about himself except that peo-ple are against him and doing things to harass or harm him.

He requires long term psychiatric treatment preferably in Mental Hospital because he may again show impul-sive or aggressive behaviour in the future."

(5) After that the appellant was sent to Mental Hospital, Amritsar, under orders of the learned trial Judge. The report of Dr. R. M. Sharma of Mental Hospital, Amritsar, was received in

court,—*vide* endorsement, dated 20th of June, 1984. The conclusion of Dr. R. N. Sharma about the condition of the appellant was:—

> "In the light of the above findings, I am of the opinion that in spite of some psychotic features evident of psychological testing and clinical assessment, Shri Gurjeet Singh alias Sainti is sane enough and fit to stand trial in the court of law."

The learned trial Judge referring to the report of the Mental Hospital, Amritsar, passed orders on 25th of July, 1984 as:—

> "Present:—P.P. for the State.
>
> Accused in custody with counsel.
>
> On 13th March, 1984 the accused filed an application through his counsel to the effect that he is insane and is incapable for making his defence. He was sent to Rajendra Hospital, Patiala. The Medical Superintendent, Rajendra Hospital, Patiala, reported that the Expert opinon be obtained from Mental Hospital, Amritsar. Then the accused was sent to Mental Hospital, Amritsar. A report has been received to the effect that the accused is sane enough and fit to stand trial in the court of law. In view of these circumstances it is ordered that further proceedings be taken. It be called again for hearing arguments on charge."

After this order charge was framed against the appellant on that very date—25th of July, 1984 and his trial under section 302, Indian Penal Code, for the murder of Nand Ram was commenced. The trial ultimately ended in conviction of the appellant giving rise to this appeal.

(6) The quesion involved in this case is preliminary and purely legal, that is, whether the procedure adopted by the learned trial Judge on 25th of July, 1984 and afterwards is in accordance with law. There are two sections in the Code prescribing procedure for enquiry and trial of lunatics or persons of unsound mind. One is section 328, which deals with the Magistrates holding enquiry. In this case section 328 is not attracted as no one raised the question

of insanity before the Committing Magistrate when he committed the case for trial to the Court of Session. It appears that the Committing Magistrate did not come to know of it, although some help was sought to be taken by the learned counsel for the appellant under section 328 of the Code to urge that the learned trial Judge did not examine the doctor certifying the mental condition of the appellant to understand the proceedings, but we do not think if this section is attracted, as the case had gone to the trial beyond the stage of the enquiry, as is the case in the cases exclusively triable by the Court of Session.

The second provision is section 329 of the Code, which is as under:—

> "(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."
>
> x x x x

(7) Section 329 of the Code deals with the trial of the cases and is not exclusively limited for application to the Magistrates, as is the case of section 328 of the Code. Section 329 of the Code is equivalent to section 465 of the Code of Criminal Procedure, 1898, hereinafter referred as the old Code. Section 465 of the old Code was as under:—

> "If any person committed for trial 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 jury, or the Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the jury or Court, as the case may be, is satisfied of the fact, the Judge shall record a finding to that effect and shall postpone further proceedings in the case and the jury, if any, shall be discharged.

(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."

This section of the old Code was amended in 1973, by substituting the words, "Court of Session and the High Court" by only word, that is, 'Court'. This word 'Court' is very comprehensive as used in section 329 of the Code and also includes a Magistrate.

(8) The mandate of section 329 of the Code is that when the plea of insanity is raised before a Court it shall try the fact of unsoundness of mind and incapacity of the accused in the first instance. Sub-section (2) of this section makes the preliminary trial of this fact, a part of the trial before the Court. Although section 465 of the old Code contained the same provision of the fact of the unsoundness of the mind of the accused and his incapacity to make defence at first, the Law Commission at the time of amendment of the Code re-emphasised this. At the time the Code was amended in the year 1973, in the Objects and Reasons for bringing legislation, the report of the Law Commission was referred as :—

"Clause 329 (original clause 337).—The clause has been so amended as to make it clear that in a trial before a Magistrate or Court of Session if the accused appears to be 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 of mind and incapacity; and if the Magistrate or Court is satisfied as to the unsoundness of mind or incapacity of the accused, he or it shall record a finding to that effect and shall postpone further proceedings in the case."

(9) Cases decided under section 465 of the old Code held that this section had two stages. For these stages case reported as *State vs. Koshaw Challayyan,* (1) can be referred. In para 9 of this judgment it was observed:—

"Section 465 contemplates two stages. The first stage laid down is that it must appear to the Judge that the accused placed on his trial was of unsound mind and incapable of making his defence. The next stage that was to follow

(1) A.I.R. 1954 T.C. 435.

> when it appeared to the Judge that the accused was of unsound mind and, consequently, incapable of making his defence, was that the fact of such unsoundness of mind and incapacity should be enquired into on the materials placed before the Court. Where it did not appear to the Judge that the accused was of unsound mind or that he was incapable of making his defence, it was not therefore necessary, much less was it incumbent upon the Judge, to adopt the procedure provided by the second part of the section, namely to hold an enquiry as to the unsoundness of mind of the accused placed on his trial, for the purpose of ascertaining whether he was incapable of making his defence."

(10) When the Court is at the second stage, above-referred, to enquire into the fact of unsoundness of mind and consequent incapacity to make his defence, it is to ask for evidence. When the accused raised the plea of unsoundness of mind, the onus is on him to prove it. He is to lead evidence. If the opinion of the medical expert examining the accused does not favour him, he can lead other permissible evidence to prove his mental condition. The prosecution has a right to rebut the evidence led by the accused. The procedure for the trial of the fact of unsoundness of mind and consequent incapacity to make a defence by the accused postulates recording of evidence in support and in rebuttal of it. The statement of the doctor, who examines the accused and certifies the accused to be of unsound mind should be recorded as a witness. The accused cannot be permitted to get away from punishment by malingering unsoundness of mind. The party contesting such a plea has an inherent right to rebut it by evidence. After such evidence as may be examined by the court. Section 329 of the Code again provides for performing three essential functions by it. The first is that such evidence has to be considered. The consideration is to be demonstrated by its appraisal on the record. The second essential is that the Court has to be satisfied of the fact, that is, the fact which is being tried first. After this satisfaction, the third element comes that a finding has to be recorded demonstrating the consideration of evidence and satisfaction about this fact. The three elements cannot be judicially dealt with unless the evidence as may be led by the person raising the plea referred in section 329 of the Code is dealt in the manner indicated. Such a

provision is clearly in consonance with the principle of fair administration of justice. Any violation by a Court in not examining proper evidence for recording a finding as directed by section 329 of the Code is to vitiate the trial as a lunatic, insance or mentally unsound accused cannot understand the trial and appreciate the evidence against him and answer the charge because of his mental incapacity. Any trial of an unsound person is void.

(11) Coming to the facts of the case we find that Dr. Gurmeet Singh in his report opined that the accused suffered from chronic paranoid schizophrenia. Dr. R. M. Sharma, however, in his report had stated that the accused was sane enough and fit to stand trial in the court of law. The learned trial Judge did not examine Dr. R. M. Sharma as a witness in court. He did not call upon the counsel for the accused, who had made an application, at the initial stage bringing to the notice of the Court the insanity of the accused, to lead evidence. It is regretable that the learned trial Judge did not hold an enquiry into the fact of unsoundness of mind of the accused and his consequent incapacity to make a defence as envisaged by section 329 of the Code. The order dated 25th of July, 1984 passed by the learned trial Judge has been reproduced in para 5 of the judgment. In it the learned trial Judge only repeated the words of Dr. R. M. Sharma and did not comment on his opinion to record his satisfaction, which was a necessary requirement of this section. As a matter of fact we find that the learned trial Judge did not record any finding one way or the other regarding the mental condition of the appellant on 25th of July, 1984, on which he framed the charge and commenced the trial. The commencement of trial meant that the learned trial Judge had rejected the plea of insanity raised on behalf of the appellant without recording the medical evidence, or satisfying himself or recording a finding on the material placed before him. The learned trial Judge did not come to grips with the situation and has violated the provisions of section 329 of the Code.

(12) For the foregoing reasons, the trial stands vitiated. As a matter of fact, it is a void trial. The appeal is, therefore, accepted, the conviction and sentence of the appellant are set aside and the case is sent back to the learned trial Court for proceeding in accordance with law and the observation recorded above.

Surinder Singh, J.—I agree.

H.S.B.

Before: Surinder Singh, J.

MADAN DANGI AND OTHERS,—*Petitioners.*

versus

STATE OF PUNJAB AND ANOTHER,—*Respondents.*

Criminal Misc. No. 5544-M of 1985

April 7, 1986.

Indian Penal Code (XLV of 1860—Section 420—Insecticides Act (XLVI of 1968)—Section 3(k)(viii) and 31—Insecticides Rules, 1971—Rule 24(2)—Insecticide sample said to be adulterated as having higher active ingredient—Analysis done as per method of examination approved by I. S.—Standard of toxicity, however, not prescribed—Said sample—Whether to be deemed to be misbranded in terms of section 3(k)—Charge under section 420 of the Code also added against the accused—Addition of the said charge—Whether entitles the Court to proceed with the prosecution ignoring the provisions of section 31 of the Act—Order summoning the accused—Whether liable to be quashed as an abuse of the process of the Court.

Held, that a reading of provisions of section 3(k)(viii) of the Insecticides Act, 1968, provides that insecticide shall be deemed to be misbranded if it has a toxicity which is higher than the level prescribed. Rule 24(2) of the Insecticides Rules, 1971, lays down the method of examination of samples. However, in the absence of any standard postulated or prescribed by any authority under the Act or otherwise there can be no question of article being substandard or misbranded as postulated in section 3(k) of the Act.

(Para 4)

Held, that as per the provisions of section 31 of the Act, no prosecution for an offence under the Act could be instituted except by or with the written consent of the State Government or a person authorised in this behalf by the said government. The requirements of the aforesaid section are mandatory and are salutory provisions of law which have to be complied with before summoning the accused to face prosecution. The mere addition of a charge under section 420 of the Indian Penal Code, 1800, would not nullify the requirements of law for offences under the Act and as such the order summoning the accused is to be quashed as being nothing but an abuse of the process of the Court.

(Paras 5 and 7)

Petition under section 482 Cr. P. C. praying that proceedings in case F.I.R. No. 144, dated 23rd May, 1984, P. S. Patti, District Amritsar for an offence under section 3K(3), 17(1), 18(1)(c) read with section 24(1) of the Insecticide Act, 1968 and under section 420 I.P.C. pending