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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL CONFIRMATION CASE NO. 1 of 2018
With
R/CRIMINAL APPEAL NO. 474 of 2019

FOR APPROVAL AND SIGNATURE:
HONOURABLE MR.JUSTICE J.B.PARDIWALA **Sd/-**
and
HONOURABLE MR.JUSTICE A.C. RAO **Sd/-**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO
	CIRCULATE THIS JUDGMENT IN THE SUBORDINATE JUDICIARY	

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STATE OF GUJARAT
Versus
MANJUBEN D/O. KASTURBHAI NANJIBHAI KUNVARIYA (DEVIPUJAK)

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Appearance:
MR MITESH AMIN, PUBLIC PROSECURTOR with MR HIMANSHU K.PATEL, APP for the Appellant(s) No. 1
MR DARSHAN M VARANDANI for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR.JUSTICE A.C. RAO

Date: 18/03/2019

CAV JUDGMENT
(PER: HONOURABLE MR.JUSTICE J.B.PARDIWALA)

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1. As the captioned Criminal Confirmation Case as well as the Criminal Appeal arise from a self-same judgment and order of conviction and sentence of capital punishment, those were heard analogously and are being disposed of by this common judgment and order.

2. There is no higher principle for the guidance of the court than the one that no act of courts should harm a litigant and it is the bounden duty of the courts to see that if a person is harmed by a mistake of the court he should be restored to the position he would have occupied, but for that mistake. This is aptly summed up in the maxim 'actus curiae neminem gravabit'. (Jang Sing v. Brij Lal and others, AIR 1966 SC 1631)

CRIMINAL APPEAL NO.474 OF 2019 :

3. This Appeal is at the instance of a convict – lady accused and is directed against the judgment and order of conviction and death sentence passed by the 2nd Additional Sessions Judge, Gandhidham, Kachchh, dated 15th March 2018 in the Sessions Case No.31 of 2017.

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4. The appellant was put on trial in the court of the 2nd Additional Sessions Judge, Gandhidham, Kachchh, for the offences punishable under Sections 302, 307 of the Indian Penal Code and Section 135 of the Gujarat Police Act. At the conclusion of the trial, the trial court held the appellant guilty of the offences punishable under Sections 302 and 307 of the Indian Penal Code and Section 135 of the Gujarat Police Act. The trial court, having regard to the serious nature of the offence being one of double murder, sentenced the appellant to death.

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The appellant also came to be sentenced to rigorous imprisonment for a term of five years with fine of Rs.2,000=00 for the offence punishable under Section 307 of the Indian Penal Code.

THE CASE OF THE PROSECUTION :

5. The brother of the appellant, namely Vijaybhai Kasturbhai Kunvariya (Devipujak), lodged an FIR at the A-Division Police Station, Gandhidham, Camp Rambaug Hospital, Adipur, dated 17th February 2017 (Exh.31), which reads as under :

"Exhibit-31

Sessions Case No.31/17
Sd/-(Illegible)
Additional Sessions Judge,
Gandhidham-Kachchh

7th February, 2018

Date: 17/02/2017

My name is Vijaybhai S/o Kasturbhai Kunvariya (Devipujak), Aged: 30 years, Occupation: Hawker selling old clothes, Residing at: Kuvar, Ta-Shankheshwar, Dist-Patan, At present residing at: Sathavara Vas, Navi Sundarpuri, Gandhidham, Mobile No.85119 29469.

Upon being personally asked, I hereby state the fact of my complaint that at present, I have been residing with my parents, brother and sisters at the above mentioned address and earn my livelihood by selling old clothes. My father Kasturbhai Nanjibhai Kunvariya also does the

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business of selling of clothes. My mother Rajiben does the household work. We are six brothers and sisters. Kishan is the eldest one aged about 40 years, who is married and living with his family at Rajkot and doing the business in fruits. My sister Madhuben is younger than Kishor, aged about 34 years, who is a spinster and living with us. I am third in position and a spinster. My sister Aarti is aged about 25 years. My younger brother Naran is aged about 22 years and is living with me and doing the business of selling clothes. My sister Manjuben is a spinster and I do not know her exact age.

Yesterday, on 16.02.2017, we returned home from our work at 7 O'clock in the evening as per our daily routine. At that time, my mother Rajiben was scolding my sister Manju over the household chores and Manju was hurling abusive words. As the mental condition of Manju is not sound, she has been under treatment at Gandhidham and I do not know the name of the doctor and the hospital. As my sister Manju was hurling abusive words, my mother had slapped on her face. Thereafter, after having dinner of 'daliya' (khichadi) and after watching T.V. for a while, we all went to sleep. My father was sleeping outside the house. My sister Aarti and Madhu were sleeping in the front room of the house where the T.V. is kept and my brother Naran was also sleeping separately in that room. I, my mother Rajiben and Manju were sleeping and Manju was sleeping besides my mother.

Today, at about 5 O'clock, on hearing the screams of my mother Rajiben, I woke up and saw that my mother was

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bleeding profusely beside her abdomen. My mother was pointing with her hands towards the front room. Therefore, I immediately went into the front room and saw that my sister Manju was inflicting sword blows on Madhu and Aarti. Madhu and Aarti were bleeding profusely. My brother was sleeping, therefore, I pushed aside my sister Manju and asked her as to what she was doing. On hearing my voice, my brother Naran woke up and my father, who was sleeping outside the house, woke up and came inside. At that time, I told both of them that Manju inflicted blows with a sword, kept beside the temple in our house, to my mother, Aarti and Madhu beside their abdomen. Aarti fainted and Madhu and my mother were groaning in pain. You take care of them and I am going to call a rickshaw. Even after searching a lot, I could not find a rickshaw, therefore, I called up 108 ambulance and it arrived in a while. My mother Rajiben and sister Madhu were taken to the Rambaug Hospital by my father and brother Naran in ambulance. My sister Aarti was taken to the Rambaug Hospital in the car of Pappu Bavaji. I followed them to the hospital on my Luna. On reaching the Rambaug, the doctor declared my mother Rajiben and sister Aarti dead. As the condition of Madhu was serious, it was suggested to take her to a private hospital. My brother Naran took her to a private hospital. Thereafter, I contacted my brother Naran on his mobile phone and he told that Madhu was taken to the Divine Life Hospital, Adipur. From there, as referred, she was taken to the Sterling Hospital, Gandhidham. She was, thereafter, referred and taken to the Bhuj hospital. I do not know as to in which hospital she was taken to.

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My mother reprimanded and slapped Manju yesterday over the household work, therefore, Manju bore a grudge about it and inflicted sword blows to my mother Rajiben beside her abdomen at the time when she was asleep and also inflicted sword blows to my sisters Madhu and Aarti beside their abdomen. My mother Rajiben and sister Aarti were killed and my sister Madhu was grievously hurt, therefore, it is my complaint to take action against her.

My aforesaid complaint as dictated by me is read over to me and as it is true and correct, I put my signature below.

1. Sd./- Illegible	*Before me,* *Sd./- (J.P. Jadeja)* *I/c Police Inspector,* *A-Division Police Station* *Gandhidham,* *Camp Rambaug Hospital,* *Adipur."*
(I have received a copy of the complaint.) *2. Sd./- Illegible*	

6. Thus, it appears that on the previous day of the incident, i.e. on 16th February 2017, sometime in the late evening, the appellant was reprimanded by her mother (deceased) by giving one slap on her face. There was verbal altercation between the appellant and her mother (deceased) and in the said altercation, the appellant is alleged to have hurled abuses to her mother. Early in the morning, i.e. on 17th February 2017, the first informant heard the screams of her mother. On hearing the screams, the first informant woke up and noticed that his mother had suffered a serious injury beside her abdomen and was bleeding profusely. The first informant also witnessed that

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the appellant was hitting blows on her two sisters, namely Madhu and Aarti, with a sword. Both the sisters suffered serious injuries and were bleeding profusely. Another brother, namely Naran, was sleeping at that point of time. The mother and one of the sisters succumbed to the injuries, whereas Madhu was fortunate to survive despite serious injuries suffered by her on account of the assault by the appellant.

7. The appellant was arrested, and at the end of the investigation, charge-sheet was filed for the offences enumerated above. As the case was exclusively sessions triable, the same came to be committed to the court of sessions under the provisions of Section 209 of the Code of Criminal Procedure and upon committal, the same came to be registered as the Sessions Case No.31 of 2017.

8. The trial court, vide order Exh.5 dated 20th December 2017, framed the following charge :

"In the Court of the Second Additional Sessions Judge, Kachchh at Gandhidham-Kachchh

Sessions Case No. 31/2017

Complainant: *The State*

v/s

Accused: *Manjuben D/o Kasturbhai Nanjibhai Kunvariya (Devipujak)*

Age-19 years, Occupation-Housewife Residing at present - Sundarpuri, Sathwaravas, Gandhidham-Kachchh

Original resident of - Village- Kuvar, Taluka - Shankheshwar, District – Patan.

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-:: C H A R G E ::-

I, Mr.Rajdipsinh Gumansinh Devdhara, the Second Additional Sessions Judge, Gandhidham-Kachchh, hereby frame the following charges against you, the aforesaid accused that.....

(1) That, your mother Rajiben used to frequently reprimand you over the household chores and slap you. Being displeased with the same, you, the accused, intentionally inflicted sword blows on the abdomen side and different parts of the body of your mother Rajiben in the house of the complainant, situated in Sathwaravas in Navi Sundarpuri area of Gandhidham at about 5 O'clock on 17.02.2017 though you knew that the same would cause death of the deceased, and thereby caused death of the deceased Rajiben and committed her murder. You, the accused, intentionally caused injuries to your sisters Madhuben and Aartiben with the knowledge that such injuries would cause their death. You caused death of the deceased Aartiben and inflicted serious injuries to Madhuben and thereby, you, the accused, have committed offences punishable under Sections 302 and 307 of the Indian Penal Code under the jurisdiction of this court.

(2) Moreover, though notification of prohibition to keep arms issued by the District Magistrate, Kachchh-Bhuj was in force in the area where the incident took place at the time, place and date, you, the accused, being armed with deadly

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weapon like sword, inflicted serious injuries to the different parts of the body of the deceased Rajiben and Aartiben and caused their death and you also inflicted serious injuries to the deceased Madhuben by deadly weapon like sword and thereby, you breached the notification of prohibition to keep arms issued by the District Magistrate, Bhuj-Kachchh. Accordingly, you have committed offences punishable under Section 135 of the G.P. Act read with Section 114 of the IPC under the jurisdiction of this court.

Therefore, I order that the trial for the offences punishable under Sections 302 and 307 of the Indian Penal Code and under Section 135 of Gujarat Police Act be conducted against you, the accused, by this court and justice be rendered.

Date:- 20/12/2017 *Sd/- (Illegible)*
Gandhidham-Kachchh *(Rajdipsinh Gumansinh Devdhara)*
Second Additional Sessions Judge,
Gandhidham-Kachchh
Code No. GJ-00442"

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9. The prosecution, in the course of the trial, examined in all 22 witnesses and also led the documentary evidence in support of its case.

10. The trial court framed the following points of determination in its judgment to determine the guilt of the accused :

"1. Whether the Prosecution proves beyond doubt that the death of the deceased Rajiben and Aartiben in this case is homicidal ?

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2. Whether the Prosecution proves cogently and beyond doubt that at about 5 O'clock on 17.2.2017, in the house of the complainant situated in the Navi Sundarpuri Area, Sathvaravas at Gandhidham, the accused lady in this case had, by keeping vengeance about the fact that her mother Rajiben was frequently reprimanding her and slapping her over the household chores, caused death of her mother Rajiben by inflicting serious injuries with a sword beside her abdomen and various parts of her body and she also killed her sister Aartiben by inflicting serious injuries with sword to various parts of her body and by doing so, the accused has committed an offence punishable under Section 302 of the Indian Penal Code ?

3. Whether the Prosecution proves beyond doubt that at the above-mentioned date, time and place, the accused lady in this case had caused serious injuries on various parts of the body of her sister Madhuben by giving sword blows and, thereby, she has committed an offence punishable under Section 307 of the Indian Penal Code ?

4. Whether the Prosecution proves beyond doubt that at the above-mentioned date, time and place, even though the notification of prohibition to keep arms issued by the District Magistrate was in force, the accused committed breach of the notification of the prohibition to keep arms by possessing a sword as a weapon and, thereby, the accused has committed an offence punishable under Section 135 of the Gujarat Police Act ?

5. What order ?"

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11. The points of determination framed by the trial court came to be answered as under :

"1: In the Positive,
2: In the Positive,
3: In the Positive,
4: In the Negative.
5: As per final order."

12. Ultimately, upon appreciation of the oral as well as the documentary evidence on record, the trial court held the appellant herein guilty of the offence of murder of her mother and younger sister and also for the offence of attempt to commit murder of his another sister and sentenced the appellant to death.

13. As the trial court thought fit to impose death penalty, it forwarded the record and proceedings of the Sessions Case No.31 of 2017 to this Court under the provisions of Section 366 of the Code for confirmation of the death sentence.

14. The appellant, being dissatisfied with the judgment and order of conviction, has come up with the present Criminal Appeal.

15. We started going through the oral evidence on record. After going through the oral evidence of the eye-witnesses to the incident, more particularly, the evidence of the PW7 Vijay Kastur Kunvariya (Exh.30) (first informant), PW8 Narayan Kasturbhai Kunvariya (Exh.32) (brother of the appellant) and PW17 Madhuben Kasturbhai Kunvariya (Exh.64) (injured eye-witness declared hostile), we were left wondering about the mental

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condition of the accused at the time of the commission of the offence. We, however, noticed that in the course of the trial, the appellant had not raised any plea of insanity in accordance with the provisions of Section 84 of the Indian Penal Code. We also noticed that no evidence in this regard was led by the defence. Even, in the Section 313 statement of the accused recorded by the trial court, no such plea of insanity was raised by the accused. However, while going through the evidence on record, the first thing that was brought to our notice by the learned counsel appearing for the appellant is the statement made by the first informant in the FIR, wherein it has been stated that the mental condition of the accused was quite unstable and she was undergoing treatment in this regard past two years at the Gandhidham hospital.

16. The learned counsel appearing for the appellant thereafter invited the attention of this Court to the statement of Dr.Mahesh Pesuram Tilwani made before the 3rd Additional JMFC, Gandhidham, Kachchh, dated 20th July 2017 in the Criminal Case No.1563 of 2017. The statement of the doctor (Exh.10) recorded during the committal proceedings reads thus :

"CC No : – 1563/2017
Exhibit – 10.

Deposition

Name	*:*	*Maheshbhai*
Father's name	*:*	*Pesuram Tilwani*
Religion	*:*	*Hindu*
Aged about	*:*	*48 yrs*
Occupation	*:*	*Medical Officer, Mental Health Hospital, Bhuj*
Residing at	*:*	*Bhuj*
District	*:*	*Kachchh*

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Oath Administered.....

I have been serving as a Psychiatrist at the Mental Health Hospital, Bhuj for the last 18 years. Manjuben Kasturbhai was brought to our hospital in the evening on 11th May 2017 under police surveillance, and it was stated that the Jail Superintendent complains in his letter that the patient keep herself aloof. Therefore, I talked with the patient and after fifteen to twenty minutes of conversation, I came to the conclusion that the mental health of the patient was not sound. It appeared that the patient had an attack of psychosis, i.e. insanity. As there was no psychiatrist in the general hospital, the patient was required to be admitted in mental health hospital. Therefore, a certificate in the Form No.5 as per the provisions of the Mental Health Act, 1987 was issued stating that the patient was required to be admitted. However, the validity of the said Form No-5 is for seven days. Yesterday, i.e. on 19.07.2017, the patient was brought again to the Mental Hospital, Bhuj, for the treatment. At that time, her mental health was found to be sound. Therefore, it appeared that she was not required to be admitted for the treatment. Moreover, she is able to understand to defend herself. Presently, she is cured from madness.

Date – 20/07/17.

Before Me,
Sd/- (Illegible)
3rd Add. J.M.F.C.
Gandhidham - Kachchh."

17. The learned counsel thereafter submitted that there is something to indicate that the appellant had been taking treatment at the Aatmiya Hospital run by Dr.Dhaivat D.Mehta

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situated at Gandhidham, Kachchh. There is one certificate issued by Dr.Mehta dated 5th December 2016, which reads thus:

> *"AATMIYA HOSPITAL*
> *A Holistic Care for all type of Psychological Disturbances, Mental Disorders and De-Addiction Center*
>
> *Dr.Dhaivat D.Mehta*
> *(D.P.M., M.B.B.S.)*
>
> *5 – Dec - 16*
>
> *CERTIFICATION*
>
> *This is to certify that Pt. Manjuben Kuwaria, aged 17 years, residing at Gandhidham is suffering from Schizophrenia (Paranoid) and is on regular treatment for the same from here on OPD basis since one and a half year.*
>
> *Pt. is planning for trip to Rajkot and needs to continue Tr. From psychiatry hospital there."*

18. Thus, it appears that much before the criminal case came to be committed to the Sessions Court, the fact of the accused appellant being mentally ill and suffering from psychiatric problems had come on record. In fact, the brother of the convict himself has stated in the FIR that his sister is suffering from mental ailment and is undergoing treatment. The charge came to be framed by the trial court on 20th December 2017. Even at the time when the charge came to be framed, the trial court remained oblivious of the mental condition of the accused. Thus, it appears more than a prima facie that the accused is a patient of schizophrenia (psychosis).

19. In view of the aforesaid materials, we stopped going further into the oral evidence on record. We requested Mr.Mitesh Amin,

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the learned Public Prosecutor, to assist us in this Appeal. Mr.Amin, the learned Public Prosecutor, along with Mr.H.K.Patel, the learned APP, very fairly submitted that the trial court missed, or rather, overlooked something very important. Mr.Amin submitted that having regard to the nature of the mental illness, the trial court owed an obligation to undertake an inquiry under Section 329 of the Code so as to ascertain whether the appellant accused was capable of making her defence. Mr.Amin submitted that Section 329 of the Code is mandatory. He also fairly submitted that having regard to the materials on record, the trial court should have undertaken an inquiry under Section 329 of the Code and only thereafter could have proceeded further with the framing of the charge and recording of the evidence.

ANALYSIS :

20. Section 329 of Code of Criminal Procedure, 1973, pertains to the procedure in case of person of unsound mind tried before a court and reads thus:

> *"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.*

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1(A) If during trial, the Magistrate or Court of Sessions, finds the accused to be of unsound mind, he or it shall refer such person to a psychiatrist or clinical psychologist for care and treatment, and the psychiatrist or clinical psychologist, as the case may be shall report to the Magistrate or Court whether the accused is suffering from unsoundness of mind:

Provided that if the accused is aggrieved by the information given by the psychiatrist or clinical psychologist, as the case may be, to the Magistrate, he may prefer an appeal before the Medical Board which shall consist of-

(a) head of psychiatry unit in the nearest government hospital; and

(b) a faculty member in psychiatry in the nearest medical college.

(2) If such Magistrate or Court is informed that the person referred to in sub-Section (1A) is a person of unsound mind, the Magistrate or Court shall further determine whether unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate or Court shall record a finding to that effect and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if the Magistrate or Court finds that no prima facie case is made out against the accused, he or it shall, instead of postponing the trial, discharge the accused and deal with him in the manner provided under Section 330:

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Provided that if the Magistrate or Court finds that a prima facie case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the trial for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused.

3. If the Magistrate or Court finds that a prima facie case is made out against the accused and he is incapable of entering defence by reason of mental retardation, he or it shall not hold the trial and order the accused to be dealt with in accordance with Section 330.]"

21. Section 330 of Code of Criminal Procedure, 1973, pertains to release of person of unsound mind pending investigation or trial and reads as under:

"330. Release of person of unsound mind pending investigation or trial.- (1) Whenever a person if found under Section 328 or Section 329 to be incapable of entering defence by reason of unsoundness of mind or mental retardation, the Magistrate or Court, as the case may be, shall, whether the case is one in which bail may be taken or not, order release of such person on bail:

Provided that the accused is suffering from unsoundness of mind or mental retardation which does not mandate in-patient treatment and a friend or relative undertakes to obtain regular out-patient psychiatric treatment from the

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nearest medical facility and to prevent from doing injury to himself or to any other person.

(2) If the case is one in which, in the opinion of the Magistrate or Court, as the case may be, bail cannot be granted or if an appropriate undertaking is not given, he or it shall order the accused to be kept in such a place where regular psychiatric treatment can be provided, and shall report the action taken to the State 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 State Government may have made under the Mental Health Act, 1987 (14 of 1987).

(3) Whenever a person is found under Section 328 or Section 329 to be incapable of entering defence by reason of unsoundness of mind or mental retardation, the Magistrate or Court, as the case may be, shall, keeping in view the nature of the act committed and the extent of unsoundness of mind or mental retardation, further determine if the release of the accused can be ordered:

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Provided that-
(a) if on the basis of medical opinion or opinion of a specialist, the Magistrate or Court, as the case may be, decide to order discharge of the accused, as provided under Section 328 or Section 329, such release may be ordered, if sufficient security is given that the accused shall be prevented from doing injury to himself or to any other person;

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(b) if the Magistrate or Court, as the case may be, if of opinion that discharge of the accused cannot be ordered, the transfer of the accused to a residential facility for persons of unsound mind or mental retardation may be ordered wherein the accused may be provided care and appropriate education and training."

22. From the above, it can be seen that in terms of the sub-Section (1) of Section 329 of the Code, 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. Sub-Section (1) of Section 329 thus would apply when it appears to the Magistrate or Court that a person is of unsound mind and is consequently incapable of making his defence. In such circumstances, the duty of the Court is to try such fact of unsoundness of mind and incapacity of the accused to defend himself. If on the basis of the materials brought on record the Court is so satisfied, it should record the finding accordingly and in such case the trial shall have to be postponed.

23. The provisions contained in Section 329 serve an important purpose of not proceeding a trial against a person, who on account of his unsoundness of mind, is unable to defend

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himself. It is not difficult to appreciate that such requirement would be mandatory in nature. The Proceeding against a person of unsound mind and holding him guilty of criminal offence would be clearly violative of the guarantee contained under Article 21 of the Constitution that no person shall be deprived of his life or liberty without following the procedure established by law.

24. We take notice of the fact that the trial court ignored or overlooked something very important and the omission on the part of the trial court has rendered the judgment and order of conviction and sentence susceptible to the complaint that the same is illegal and deserves to be quashed and set aside.

25. We have perused Chapter-XXV of the Code pointed out to us by Mr.Darshan Varandani, the learned counsel appearing for the accused. This chapter starts from Section 328 and ends at Section 339. We are also conscious of the distinction of the defence raised under Section 84 of the Penal Code and Chapter-XXV of the Code. If a plea of insanity is raised by the accused, it is the duty of the prosecution to subject the accused to a medical examination immediately. This is important because if it is revealed, during the course of the investigation or even at the time of committal of the case or the framing of the charge that the accused was suffering from a mental disease, the prosecution is further duty bound to place before the court, all the evidence that could be available to show that the accused was in a proper state of mind when he committed the alleged offence.

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26. Mr.Patel, the learned APP appearing for the State vehemently submitted that there was no scope or any occasion for the trial court to determine the issue with regard to the capacity of the accused of making his defense having regard to the mental ailment, because at no stage, the accused raised such a plea. According to Mr.Patel, even at the time of framing of the charge the accused did not show any signs of mental ailment on the basis of which the trial court could have undertaken some inquiry.

27. We are afraid, we are not in a position to accept such submission. Even if the accused had not raised such a plea and even if the defence counsel had not bothered to look into it, still if the materials on record in the form of the documents disclose something about the mental condition of the accused, then it is the duty of the trial court to look into the materials and ascertain the capacity of the accused to enter the defence in accordance with the provisions of Section 329 of the Code. The satisfaction of the trial court should be recorded in so many words. The provisions of Section 329 do not embrace an idle formality but are calculated to ensure to an accused person a fair trial which cannot obviously be afforded to an insane person and the non-observance of those provisions must be held to convert a trial into a farce. The courts must, therefore, guard against dealing with the matter of suspected sanity of an accused person in a perfunctory manner as such a course is bound to result in the trial Judge, more often than not, coming to an incorrect conclusion about the sanity of the accused before him.

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28. The case of the State before the trial court is being represented by the public prosecutor. The Public Prosecutor is not supposed to seek conviction by hook or crook. Howsoever heinous or gruesome the crime may be, but that has nothing to do with the mandatory compliance of the provisions of Section 329 of the Code. It goes without saying and it is a settled position of law that Section 329 of the Cr.P.C is mandatory. Needless to say that the Public Prosecutor is the officer of the Court. His first and foremost duty to the Court is to place the entire material before the Court on behalf of the prosecution. He must be truthful and honest. We fail to understand why all these materials, referred to above, were not brought by the Public Prosecutor to the notice of the Trial Court even while the Public Prosecutor opened his case as envisaged under Section 226 of the Code.

29. Why talk about the Public Prosecutor only. It was also the duty of the Investigating Officer to bring all the materials to the notice of the trial court, through the Public Prosecutor, as regards the mental condition of the accused and the treatment he was undergoing at the relevant point of time. The Investigating Officer also failed in his duty. Even the defence counsel appointed by the Legal Services Authority failed in his duty.

30. In the case of I.V.Shivaswamy v. the State of Mysore, reported in AIR 1971 SC 1638, the Supreme Court observed that whenever a counsel raises a point before the Sessions Judge regarding the unsoundness of mind, he does not always have to hold an elaborate inquiry into the matter. If on examining the

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accused it does not appear to him that the accused is insane it is not necessary that he should go further and send for and examine medical witnesses and other relevant evidence. Of course if he has any serious doubt in the matter the Sessions Judge should hold a proper enquiry.

31. In the case of the State of Maharashtra v. Sindhi alias Raman, reported in AIR 1975 SC 1665, the Supreme Court held that such provision would apply even to the confirmation proceedings. It was observed that so far as the accused sentenced to death is concerned, his trial does not conclude with the termination of the proceedings in the Court of Sessions for the reasons that the death sentence passed by the Court of Sessions is subject to confirmation by the High Court. Viewed from that stand point, the confirmation proceedings are in substance continuation of the trial.

32. In the case of the State of Karnataka v. Doragal Kanakappa, reported in 1996 Cri. L.J. 599, a Division Bench of the Karnataka High Court held that the mere receipt of a letter by the Court from the Superintendent of Hospital that the accused was capable of understanding evidence was not sufficient compliance of Section 329 of Code and that the failure of the Court to arrive at a finding in this respect would vitiate the trial. It was observed as under:

> *"But mere production of Exh.P-18 and its proof through P.W.13 cannot be held to be the compliance with the requirement of Section 329, Cr.P.C. what is required is that the Court should record a finding as to whether the accused*

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is of sound mind or unsound mind and as to whether the is capable of or not capable of defending himself. Though Ex.P-18 is on record, the trial Judge has not recorded any such finding. The provisions of Section 329, Cr.P.C. are mandatory provisions. This Court in (1990) 3 Kant LJ (Supp) at page 213 (Pajappa v. State of Karnataka) has held that the provisions of Section 329, Cr.P.C. Are mandatory and it is mandatory on the part of the Court to first consider the fact of unsoundness of mind and incapacity of the accused to make defence after taking such evidence including medical evidence that may be necessary for the purpose. Failure to comply with such mandatory requirement will vitiate the trial. In this case also the order sheet dated 11.06.1993 mentions only receipt of the letter from the Superintendent of the Hospital, Dharwar, on 30.4.93 to the effect that the accused is capable of understanding evidence. We have seen that order- sheet. The Judge does not seem to have written the portion relating to that letter in his handwriting but he has signed the order-sheet. We do not find anything in the record whether the Judge has considered and given the finding about the mental condition of the accused and his capacity to defend himself. Mere receiving of Ex.P-18 by Court is not the compliance with the mandatory requirements of Section 329, Cr.P.C. After Exh.P-18 was received and exhibited through the evidence of P.W.13, the Court was required to consider all the material including Exh.P-18 and record a finding about the mental condition and the capability of the accused to defend the case. The non-compliance of the mandatory provisions of Section 329, Cr.P.C. by the Additional Sessions Judge who

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tried the accused in this case has vitiated the trial and the judgment rendered by him is liable to be set aside. Since we have to order for de novo trial, we do not want to comment on the merits of the contention raised by both sides in this appeal."

33. In the case of Gurjit Singh v. State of Punjab, reported in 1986 Cri. L.J. 1505, a Division Bench of the Punjab & Haryana High Court held that where the trial Judge without recording the medical evidence and without recording any finding one way or the other regarding the mental condition of the accused framed the charge and commenced the trial, the trial was vitiated being violative of the mandatory provisions of Section 329. It was observed that 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.

34. We may also refer to a Division Bench decision of this Court in the case of Salim Abhu Juneja vs. State of Gujarat (Criminal Appeal No.681 of 2010, decided on 19.09.2013). In the said case, the very same issue fell for the consideration of the Division Bench, and while answering the said issue, the Division Bench observed as under :

"18. From the above judgments, it clearly emerges that the requirements of Section 329 of Code of Criminal Procedure are mandatory in nature. It pertains to unsoundness of mind and resultant incapacity of the accused to defend himself at any stage of the trial. It is quite distinct from the defence of

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insanity which can be raised under Section 84 of IPC, which must have relevance to the point of insanity when the offence is committed. Provisions of Section 329 would apply irrespective of whether such a plea has been raised or not. The Legislature has advisedly used the expression, it appears to the Magistrate or the Court. Thus, even though no such plea is raised, but it appears to the Court that a person is of unsound mind and consequently incapable of making his defence, the further procedure in this regard must be followed. In the present case, even before the trial commenced before the Sessions Court, the material came on record to suggest that the accused was suffering from serious mental instability. He had to be shifted to hospital when the treatment given to him in jail did not result in any improvement. We may record that the accused was too poor to defend himself and therefore was represented by the legal aid counsel. If he was as seriously mentally ill as the medical opinion of 29th December 2008 suggested, the whole trial was a sham. Almost all stages of the trial were conducted without verifying whether the accused was capable of understanding what was going on and thus capable of defending himself. If a person of unsound mind is proceeded against in a criminal trial for a serious charge of murder, it is at least expected that the system ascertains that he is able to comprehend what he is charged with and the nature of evidence which is adverse to him, which is brought on record. If a person is unable to comprehend any of these aspects, we fail to see how he could instruct his advocate about his defence.

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19. To reiterate, it is true that the fact of accused discharge from the mental hospital was pointed out to the Magistrate on 9th March 2008. The medical papers supposed to have been accompanied, did not form part of the record. Neither the Magistrate nor the trial court, who was in-charge of the sessions trial, thus had any idea about the recovery of the accused. The previous medical opinions were more than sufficient to trigger an inquiry into the soundness or otherwise of the mental condition of the accused. The term it appears to the Magistrate or the Court is sufficiently wide to cover a situation of the present kind. It is not only a visual appearance which the Court must go by. When the medical papers suggested that the accused was at least for an extended period in recent past so mentally unsound as to be unable to defend himself, it was the duty of the trial court to try such fact and come to a definite conclusion whether he had recovered enough to face the trial. In absence of any such exercise, in our opinion, the entire trial would be vitiated.

20. The result of such finding would be that the judgment would have to be set aside. We would have to order re-trial. This can be done only after verifying presently whether the accused is of sound mind and consequently capable of making his defence. Such inquiry shall have to be done as provided under Section 329 of the Code of Criminal Procedure. On the basis of the outcome thereof the trial court shall have to proceed further."

35. We may also refer to few old decisions of the different High Courts on the issue.

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36. In Jhabbu v. Emperor, AIR 1920 All 354, the counsel who represented the accused had prayed to the Sessions Judge that evidence might be taken on the question of the sanity or otherwise of the accused in view of certain materials indicating that the accused had been in custody before the commission of the alleged offence as a lunatic. It was held that the provisions of Section 465 were obligatory on the Court and that as a preliminary to the hearing of evidence on the charge, the learned Sessions Judge should first of all have tried the plain issue whether or not the accused person as he stood before the Court was of unsound mind and consequently incapable of making his defence. The entire proceedings were regarded as vitiated because the question of soundness or unsoundness of the mind of the accused had not been tried as a preliminary issue.

37. In Pala Singh v. King Emperor of India, 54 Pun Re 1905, the Magistrate, by whom the confession of the accused was taken, recorded a note to the effect that either the accused was mischievous or was under the influence of some drug or under the influence of some narcotic or was unwell. The learned Sessions Judge remarked that the accused, without being actually insane so as not to be aware of what he was doing, appeared to be decidedly a man of weak intellect. It was held that it was incumbent on the Sessions Judge to make an enquiry under Section 465 of the Code of Criminal Procedure before the commencement of the trial, which not having been done, the trial was found to be vitiated and a retrial was ordered.

38. In Santokh Singh v. Emperor, AIR 1926 Lah 498, the Committing Magistrate had reason to think that the appellant

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might have been incapable of making his defence by reason of unsoundness of mind and, after examining the Civil Surgeon, recorded an order that the medical evidence showed the accused to be sane. While convicting the accused, the learned Sessions Judge made the following observations with regard to this aspect of the matter :

> *"In this Court the accused has refused to plead at all assuming an appearance of imbecility. He would only roll his eyes about and gaze at the ceiling and refuse to answer any question that was put to him. I, therefore, recorded a plea of not guilty and also recorded all the evidence in the case.....The Civil Surgeon who had the accused under observation for some time has found that though of peculiar temperament he knew the nature of the deed he was committing. Before the Committing Magistrate the accused made a perfectly intelligent statement and I am of opinion that his imbecility in this Court was largely assumed."*

39. It was held by Campbell and Addison, JJ. that it was nevertheless incumbent on the learned Sessions Judge himself to hold another enquiry on the question whether the accused was capable of making his defence at the trial and to come to a decision before proceeding further. The neglect of the learned Sessions Judge was held to have vitiated the trial and a retrial was ordered with a direction that the same should commence with the proceedings required by Section 465 of the Code of Criminal Procedure to be followed by a formal finding as to the capacity of the accused for making his defence.

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40. In Ramnath v. Emperor, AIR 1930 All 450, it was held that when there was something in the demeanour of an accused which would raise a doubt in the mind of the trial Judge about the accused being of sound mind, the trial court could not be proceeded with unless an enquiry under Section 465 was held and a finding arrived at that the accused was of sound mind and, therefore, capable of making his defence.

41. In State v. Kochan Chellayyan, AIR 1954 Trav. Co. 435, the Jailor, who had charge of the accused, reported on the 7th of June, 1952, to the Sessions Judge that the accused was showing signs of insanity and requested for orders that the accused be hospitalised. The request was granted but it was directed at the same time that the accused be produced in the court on the 9th of June, 1952, which was the date fixed for the commencement of the trial. On that date the Sessions Judge made a memorandum to the following effect :

> *"The accused was brought before the Court. The charge against him was read and explained. The accused was asked by me as to whether he had understood the same. He was giving repeated replies (P.W. 1 must be examined).*
>
> *Apparently, he was pretending to be devoid of understanding. Then a series of questions was put to him. He was able to understand every question put to him and gave relevant answers. But when he was questioned about the charge, he would again give the above answer. As I was convinced that he was not mentally affected, I again questioned him about the charge when he gave the answers and the same were recorded."*

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The deposition of one witness for the prosecution was then recorded and thereafter the case was adjourned with a direction to the Medical Officer, Incharge of the hospital from where the accused had been brought for trial, to examine him and to report on his mental condition. The Medical Officer certified on the 10th of June, 1952, that the accused was not a lunatic and the trial was proceeded with and concluded. It was held in these circumstances that the Sessions Judge was not absolutely certain of the sanity of the accused and that the trial was vitiated by reason of the Sessions Judge not following the procedure envisaged by the second stage mentioned in Section 465. A retrial was ordered.

42. In Chetu Mushar v. State, AIR 1954 Pat 129, it transpired during the cross-examination of the first witness for the prosecution that the accused had been insane and that his insanity continued up to the date of the trial. The learned Sessions Judge observed that the trial could not proceed and further noted in the order-sheet that after having put certain questions to the accused, he was not able to understand fully as to whether the accused was insane or sane. He, therefore, directed that the accuse! should be placed under medical observation and that the Civil Surgeon should report about his mental condition. The trial was adjourned for a week. Later on, however, the learned Sessions Judge rejected the plea of insanity raised on behalf of the accused even without examining the Civil Surgeon and without his report being placed on the record as legal evidence. Narayan, J., who delivered the judgement of the Division Bench deciding the case in appeal, referred to AIR 1920 All 354 (supra), and then observed :

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"This, in my opinion, is a much stronger case in which the procedure laid down by Section 465 should have been carried out, inasmuch as, as I have already pointed out, both the witnesses on whose evidence the prosecution relies for bringing home to the accused the charge under Section 302, Indian Penal Code, have stated that the accused had been insane ever since the death of his son about two years back and that he is insane even now. It is difficult to conceive of a stronger case in which the procedure laid down by Section 465 should be carried out, and it is regrettable that the learned Sessions Judge has rejected the plea of insanity raised by the accused even without examining the Civil Surgeon and without his report being placed on the record as a legal evidence in the case. This trial, therefore, stands vitiated, and the case has to be sent back for a retrial."

43. One of us J.B.Pardiwala, J. sitting as a Single Judge had the occasion to look into the provisions of Chapter XXV of the Cr.P.C in the case of Sunil Tejbahadur Singh Through Anil Singh S/o. Tejbahadur Singh v. State of Gujarat, 2018 (1) GLR 473. We may quote the relevant observations.

"22. The chapter XXV begins with Section 328 of the Cr.P.C., which provides the procedure for enquiry by a Magistrate in regard to the fact of unsoundness of mind. A Magistrate holding an enquiry, if has reason to believe that the person before him is of unsound mind and consequently incapable of making his defence, then he is enjoined upon to

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enquire into such unsoundness of mind and shall cause such person to be examined by a Civil Surgeon of the District or such other medical officer as the State Government may direct. Such Civil Surgeon or Medical Officer is thereafter to be examined as a witness. Pending this enquiry, the Magistrate may deal with such a person in accordance with the provisions of Section 330 of the Cr.P.C, which talks of release of lunatic pending investigation or trial. If the Magistrate is of the opinion that the person is of unsound mind, he is to record his finding to that effect and then postpone the proceedings in the case. This Section has been so amended from the old Section so as to provide for the procedure to be followed in any inquiry where person against whom inquiry is being held appears to be of unsound mind.

23. Section 329 of the Cr.P.C, on the other hand, provides for a procedure in case of a person of unsound mind tried before the Court. Section makes it clear that in a trial before the Magistrate or Court of Sessions, if the accused appears to be of unsound mind and consequently incapable of making his defence, then the Court shall, in the first instance, try the fact of such unsoundness of mind and incapacity and if satisfied in this regard, shall record a finding to that effect and shall postpone the further proceedings. This Section is similar to Section 328 of the Cr.P.C., with this difference that the latter relates to an enquiry before a Magistrate, while this Section relates to the trial before the Magistrate or Court of Sessions. However, both the Sections relate to unsoundness of mind at the time

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of inquiry or trial and not at the time of commission of offence. The distinction between incapacity at the time of doing the act charged and incapacity at the time of trial is, therefore, appreciable. The incapacity at the time of the commission of offence is dealt under Section 84 of the I.P.C. Section 84 of the I.P.C. is a substantive provision which excuses the offence whereas Sections 328 and 329 of the Cr.P.C. affects the procedure and postpone the trial. The condition essential for applicability of the Sections is that it must appear to the Court that the accused brought before it is of unsound mind. If it does so appear, then the fact has to be tried and decided first before calling upon the accused to stand trial for the offence charged. The word `appears' imports lessor degree of probability than proof. These provisions are mandatory and ought to be strictly complied with. The issue of insanity is to be tried only where the accused appears to be incapable of making his defence due to mental infirmity. The Magistrate is not to order inquiry on mere defence of insanity, he must have `reasons to believe' that the accused is of unsound mind. A Magistrate cannot act on his own opinion. He must have before him a statement of medical officer, who must be examined. Where the Court decides that the accused is of unsound mind and consequently incapable of making his defence, the trial is to be postponed. As provided in Section 330 of the Cr.P.C., such a person may be released 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 or for his appearance when required before the Magistrate or the Court. The Court or the Magistrate is also entitled to

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direct the accused to be detained in safe custody in such a place and manner as it may think fit if it is of the view that the bail should not be taken or sufficient security is not given. Section 331 of the Cr.P.C thereafter talks of resumption of enquiry or trial, when the concerned persons ceases to be of unsound mind. Section 332 of the Cr.P.C prescribes a procedure to proceed with the trial or enquiry as the case may be.

24. Since the requirement under these Sections is mandatory and the Court is to try the fact of unsoundness of mind and capacity of the accused at the first instance, the commencement of trial without recording the medical evidence or satisfying himself or recording a finding on the material placed before him, will vitiate the trial. Needless to mention that the conclusion of the Court that the person is or is not of unsound mind has to be on the materials placed on record and any decision without holding the enquiry or without recording reasons would be unsustainable. When the medical report is to the effect that the accused is of unsound mind, it would be reasonable to infer that he is incapable of making his defence. In such circumstances, the Court would almost be bound to afford the protection to him as he is entitled to under the law, being of unsound mind at the time of trial.

25. Unlike Sections 328 and 329 of the Cr.P.C., the Section 333 of the Cr.P.C, prescribe procedure, when the accused person appears to be of sound mind at the time of enquiry and trial but the Court finds that he was incapable of

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knowing the nature of the act or that it was wrong or contrary to law at the time when he committed the act by reasons of unsoundness of mind. Thus, Sections 333 of the Cr.P.C and 334 of the Cr.P.C. regulates the procedure, when the accused person is found capable of making a defence but pleads that the act was committed at the time when he, on account of reasons of unsoundness of mind, was incapable of knowing the nature thereof. In such a case, he is required to be acquitted on the ground of unsoundness of mind. This is so provided by Section 334 of the Cr.P.C. At the time of recording this finding, the Court is also to record a finding and state specifically whether the accused person had committed the act or not. Section 333, when read with Section 334 of the Cr.P.C, would provide for acquittal of an accused where the Court is satisfied from the evidence given before it that the accused was, at the time of commission of crime by reasons of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law. While acquitting the accused on the ground of he being insane, the Court is to give a specific finding whether the accused had committed the act charged. A provision has also been made for detaining a person acquitted on such grounds in safe custody in the form of Section 335 of the Cr.P.C.

26. As would be borne out from a bare perusal of the provisions reproduced above, before a Magistrate or Court proceeds to "try" to the fact of unsoundness and incapacity it must "appear" to the Magistrate or Court that the person is of unsound mind and consequently incapable of making his

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defence. The word "appears" surely imports a lesser degree of probability than "proof' but then 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.

34. Section 84, Indian Penal Code, one of the provisions contained in Chapter IV of the Indian Penal Code, which deals with the General Exceptions provides as under:

> *"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."*

35. Section 105, Evidence Act, 1872, which deals with the burden of proving the existence of circumstances bringing the case within any of the exceptions specified in the Indian Penal Code, provides:

> *"105. Burden of proving that case of accused conies within exceptions - When a person is accused of any offence, the burden of proving the existence of*

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circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, 1860 (45 of 1860) or within any special exception or proviso contained in any other part of the same Code, or in any Jaw defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

Illustrations

(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act. The burden of proof is on A.

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

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permanent. Lunacy and madness are spoken of as acquired insanity, and idiocy as natural insanity.

37. Section 84 of the I.P.C. embodies the fundamental maxim of criminal law i.e. actus non reum facit nisi mens sit rea (an act does not constitute guilt unless done with a guilty intention). In order to constitute an offence, the intent and act must concur; but in the case of insane persons, no culpability is fastened on them as they have no free will (furios is nulla voluntas est).

38. The Section itself provides that the benefit is available only after it is proved that at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or that even if he did not know it, it was either wrong or contrary to law then this Section must be applied. The crucial point of time for deciding whether the benefit of this Section should be given or not, is the material time when the offence takes place. In coming to that conclusion, the relevant circumstances are to be taken into consideration, it would be dangerous to admit the defence of insanity upon arguments derived merely from the character of the crime. It is only unsoundness of mind which naturally impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility. Stephen in History of the Criminal Law of England, Vol. II, p. 166 has observed that if a person cuts off the head of a sleeping man because it would be great fun to see him looking for it when he woke up, would obviously

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be a case where the perpetrator of the act would be incapable of knowing the physical effects of his act. The law recognises nothing but incapacity to realise the nature of the act and presumes that where a man's mind or his faculties or ratiocination are sufficiently dim to apprehend what he is doing, he must always be presumed to intend the consequence of the action he takes. Mere absence of motive for a crime, howsoever atrocious it may be, cannot in the absence of plea and proof of legal insanity, bring the case within this Section. [See: Harisingh vs. State of Madhya Pradesh, 2008 (16) SCC 109]

39. The Supreme Court in the case of Dahyabhai Chhaganbhai Thakkar vs. State of Gujarat [AIR 1964 SC 1563] held as under:

> *"The doctrine of burden of proof in the context of the plea of insanity may be stated in the following propositions: (1) The prosecution must prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea; and the burden of proving that always rests on the prosecution from the beginning to the end of the trial. (2) There is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by S. 84 of the Indian Penal Code: the accused may rebut it by placing before the court all the relevant evidence – oral documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil*

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proceedings. (3) Even if the accused was not able to establish conclusively that he was insane at the time he committed the offence, the evidence placed before the court by the accused or by the prosecution may raise a reasonable doubt in the mind of the court as regards one or more of the ingredients of the offence, including mens rea of the accused and in that case the court would be entitled to acquit the accused on the ground that the general burden of proof resting on the prosecution was not discharged. "

40. Dealing with the passage quoted above, the Supreme Court in Bhikari vs. the State of Uttar Pradesh [AIR 1966 SC 1] observed as under:

"This passage does not say anything different from what we have said earlier. Undoubtedly it is for the prosecution to prove beyond reasonable doubt that the accused had committed the offence with the requisite mens rea. Once that is done a presumption that the accused was sane when he committed the offence would arise. This presumption is rebuttable and he can rebut it either by leading evidence or by relying upon the prosecution evidence itself. If upon the evidence adduced in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the Court as regards one or more of the ingredients of the offence including mens rea of the accused he would be entitled to be acquitted. This is very different from saying that the

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prosecution must also establish the sanity of the accused at the time of commission of the offence despite what has been expressly provided for in Section 105 of the Evidence Act. ”

41. I would like to make it clear being a neat question of law that the evidence which is recorded during the course of an inquiry contemplated by Section 329 of the Cr.P.C. cannot be looked into for the purpose of a decision as regards the applicability of Section 84 of the Indian Penal Code.

42. It is significant to note that the enquiry as to the unsoundness of mind and incapacity of the accused under Section 329, Code of Criminal Procedure, relates only to the unsoundness of mind of the accused at the time of enquiry or trial, and not at the time of commission of the offence. [See: State of Maharashtra vs. Sindhi v. alias Raman, AIR 1975 SC 1665]

43. To earn an exemption under Section 84 of the Indian Penal Code, the accused has to prove insanity at the time of commission of the offending act. The behaviour antecedent, attendant and subsequent to the event may be relevant in finding the mental condition at the time of the event but not those remote in time.

44. The Supreme Court in State of M.P. v. Ahmadulla [AIR 1961 SC 998], has cited and followed the following observations of Reading C.J.:

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"Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved. To establish insanity it must be clearly proved that at the time of committing the act the party is labouring under such defect of reason as not to know the nature and quality of the act which he is committing - that is, the physical nature and quality as distinguished from the moral - or, if he does know the nature and quality of the act he is committing, that he does not know that he is doing wrong.."

45. To the similar effect are the observations in Dahyabhai vs. State of Gujarat [AIR 1964 SC 1563] and in Bhikari vs. State of U.P. [AIR 1966 SC 1]."

44. Even if we assume for the moment that the trial court, bona fide, had no occasion or chance to look into this issue, still, it could be said to be serious on the part of the trial court. We may quote two paras from the decision of the Supreme Court in the case of A.R. Antulay v. R.S. Nayak & Anr., AIR 1988 SC 1531. We would like to quote the observations made in paras 84 and 85;

"84. Lord Cairns in Alexander Rodger v. The Comptoir D'escompte De Paris, (Law Reports Vol. III 1869-71 page 465 at page 475) observed thus:

"Now, their Lordships are of opinion, that one of the first and highest duties of all Courts is to take care

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that the act of the Court does no injury to any of the Suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court."

85. This passage was quoted in the Gujarat High Court by D.A. Desai, J. speaking for the Gujarat High Court in Vrajlal v. Jadavji (supra) as mentioned before. It appears that in giving directions on 16th February, 1984, this Court acted per incuriam inasmuch it did not bear in mind consciously the consequences and the provisions of Sections 6 and 7 of the 1952 Act and the binding nature of the larger Bench decision in Anwar Ali Sarkar's case (supra) which was not adverted to by this Court. The basic fundamentals of the administration of justice are simple. No man should suffer because of the mistake of the Court. No man should suffer a wrong by technical procedure of irregularities. Rules or procedures are the hand-maids of justice and not the mistress of the justice. Ex debite justitiae, we must do justice to him. If a man has been wronged so long as it lies within the human machinery of administration of justice that wrong must be remedied. This is a peculiar fact of this case which requires emphasis."

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45. Thus, the basic fundamentals of the administration of justice are simple. No man should suffer because of the mistake of the court.

46. At this stage, we may also refer to one Division Bench decision of the Kerala High Court in the case of Dhora v. State of Kerala, reported in 1991(2) KerLT 775. We may refer to and rely upon the following observations;

> *"[9] It is also unfortunate that the Additional Public Prosecutor, who conducted the trial, did not address the trial court regarding the possibility of impairment of the mental condition of the appellant. Instead, he assiduously built up the argument for giving him death penalty. A counsel was appointed in the trial court to defend the appellant on state brief, but we are told that the said counsel was not an experienced advocate. We do not know why the learned Sessions Judge did not appoint an experienced counsel in this case to defend the accused particularly when this is a double murder case (this would have been a quadruple murder case but for the miraculous survival of P.Ws.2 and 3).*
>
> *[10] When the story gives a grotesque picture of the events, when the acts alleged have unusual brutality human mind tends to react with prejudice against the person indicted for the acts. Safety of such accused is that his case is tried in a Sessions Court presided over by a judicially trained personage who would decide uninfluenced by prejudices*

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and predilections. The graver are the facts or greater is the brutal nature of the case, greater must be the degree of concern and care in judicial forums.

[11] When learned Sessions Judge entertained doubt in this case that appellant might have been prompted by some mental derangement, we are at a loss to understand why it did not strike to him that he should adopt the procedure prescribed in Section 329 of the Code of Criminal Procedure (Code for short). The Section reads thus: 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 Sessions 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; (2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be pan of his trial before the Magistrate or Court. Thus, law enjoins on the Sessions Judge to hold a trial regarding the soundness of the accused's mind when it appears to him that the person brought to the trial is of unsound mind and consequently incapable of making his defence. According to the requirement, he shall in the first instance, try the fact of such unsoundness and incapacity. He can proceed only if he is satisfied that the accused is of sound mind and is

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capable of making his defence. The word appears in Section 329 is of lesser degree of probabilities than the word proof. The corresponding Section in the old Code of Criminal Procedure (Section 465) received such an interpretation from Supreme Court in I.V.Sivaswami v. State of Mysore. If there is something in the demeanour of accused or in facts of the case which raise a doubt in the mind of court that the accused is of unsound mind and consequently incapable of making his defence, it is obligatory on the court to try the said fact before proceeding with trial into the charge. Failure to follow the procedure laid down in Section 329 would vitiate the trial as the provision is mandatory Supdt. and Rem. of L. A. v. Durga Charan, Satya Devi v. State."

47. The case on hand is quite unusual. As noted above, neither the Public Prosecutor nor the Investigating Officer including the defence counsel invited the attention of the trial court to the materials on record as regards the mental ailment of the accused. However, as it has come to our notice, as an Appellate Court, it is our duty to rectify the error so that no doubt remains of any nature in our mind.

48. In view of the aforesaid discussion, we are left with no other option but to quash and set aside the judgment and order of conviction and death sentence. We would have to order re-trial. This can be done only after verifying presently whether the accused is of sound mind and consequently capable of making her defence. Such inquiry shall have to be done as provided under Section 329 of the Code. On the basis of the outcome thereof, the trial court shall have to proceed further.

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49. It is needless to clarify that at the end of the inquiry under Section 329 of the Code, if the trial court is convinced that the accused is capable of making her defence, then it shall resume with the trial by framing the charge afresh.

50. In the result, the Criminal Appeal filed by the appellant is hereby partly allowed. The judgment and order of conviction and death sentence passed by the 2nd Additional Sessions Judge, Gandhidham, Kachchh, dated 15th March 2018 in the Sessions Case No.31 of 2017 are hereby quashed and set-aside. The Criminal Confirmation Case also stands disposed of accordingly. The case is remitted to the Sessions Court for fresh trial from the stage of framing of the charge again after verifying the mental condition of the accused. The records and proceedings be transmitted to the trial court.

51. At this stage, we would like to say something very important. In a case of murder if the conduct of the accused demonstrate abnormality, it is the duty of the prosecution to subject the accused to a medical examination immediately especially when during the investigation the witnesses stated that the accused was suffering from mental disorders periodically and place before the court all the evidence that could be available to show that the accused was in a proper state of mind when he or she committed the alleged offence so as to rule out the plea of mental disease or insanity that may be raised at the trial.

52. We take notice of the fact that the appellant, at the time of the incident, was 19 years of age. She indeed behaved in a very

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abnormal manner. She first assaulted her mother, then she assaulted her sister and thereafter proceeded to assault her second sister. The assault took place early in the morning at around 5 O'Clock. On the previous day in the late evening, the mother of the appellant had reprimanded her and there was some altercation in that regard. This, according to the case of the prosecution, is the motive for the commission of the crime. It is indeed very shocking that a young girl aged 19 goes to the extent of mercilessly assaulting her mother and two sisters. The assault led to the death of the mother and one sister of the appellant. The second sister, despite suffering serious injuries, was fortunate to survive. If proper instructions would have been taken by the defence counsel in this regard and if the defence counsel would have read the papers thoroughly, then immediately he could have got an idea that something was wrong with the mental condition of the accused.

53. Unfortunately, on account of poverty and being a helpless girl just 19 years of age, she could not have managed to engage a seasoned, well-experienced trial side lawyer. She had to avail the legal aid provided by the District Legal Services Authority. We are informed that the District Legal Services Authority has prepared a list of the panel of lawyers for the purpose of legal aid. According to the turn, a particular lawyer from the panel would be appointed to defend the accused. This is a second matter in last 15 days we are dealing with in which we have noticed that the legal aid which is being provided is just for namesake. The legal aid is nothing but a farce. The panel of lawyers which is being prepared for the purpose of legal aid is not a platform to provide training to young lawyers or give them an opportunity to gain experience as regards conduct of a

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sessions case. The cross-examination of the witnesses in a serious offence like murder is not a child's play. It is very unfortunate to note that in the case on hand there is practically no cross-examination. This is not just one case on hand. We have come across so many appeals in which there is no cross-examination worth the name by the defence counsel appointed by the Legal Services Authority.

54. The question, therefore, that would arise in the circumstances is, whether the appellant was given a fair trial and effective opportunity to defend herself as postulated by Articles 21, 22(1) and 39A of the Constitution ? And, if not, what would be the effect of the deprivation on the validity of the judgment, and the further course of action. It is by far now well-settled for a legal proposition that it is the duty of the court to see and ensure that an accused put on a criminal trial is effectively represented by a defence counsel, and in the event on account of indigence, poverty or illiteracy or any other disabling factor, he is not able to engage a counsel of his choice, it becomes the duty of the court to provide him appropriate and meaningful legal aid at the State expense. What is meant by the duty of the State to ensure a fair defence to an accused is not the employment of a defence counsel for namesake. It has to be the provision of a counsel, who defends the accused diligently to the best of his abilities. While the quality of the defence or the caliber of the counsel would not militate against the guarantee to a fair trial sanctioned by Articles 21 & 22 of the Constitution, a threshold level of competence and due diligence in the discharge of his duties as a defence counsel would certainly be the constitutional guaranteed expectation. The presence of counsel

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on record means effective, genuine and faithful presence and not a mere farcical, sham or a virtual presence that is illusory, if not fraudulent.

55. Without casting any aspersions or without any intent to humiliate the defence counsel who was provided to the appellant by way of a legal aid, it seems that the lawyer was not sufficiently experienced particularly with regard to the conduct of the cases involving point of insanity of the accused. There is no cross-examination of the witnesses worth the name to find out the conduct of the accused just before and just after the incident.

56. Article 39A of the Constitution speaks about free legal aid which reads thus :

> *"Article 39A. The State shall secure that the operation of the legal system promotes justice, on the basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."*

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57. Section 304 of the Code of Criminal Procedure refers to legal aid to the accused at State expenses in certain cases which reads thus:

> *"304. Legal aid to accused at State expense in certain cases.-*

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(1) Where, in a trial before the Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.

(2) The High Court may, with the previous approval of the State Government, make rule providing for -

(a) the mode of selecting pleaders for defence under sub-section (1);

(b) the facilities to be allowed to such pleaders by the Courts;

(c) the fee payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section (1).

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification the provisions of sub-sections (1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before the Courts of Session."

58. Chapter V of the Criminal Manual issued by the High Court of Gujarat (Appellate Side) for the guidance of the criminal courts and their subordinate officers provides for the procedure and conditions prescribed in regard to engagement of advocate or pleader appointed for the defence of persons accused of offences punishable with death.

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59. Under Section 9 of the Legal Services Authorities Act, 1987, the District Legal Services Authorities are constituted for every District in the State to exercise powers and perform functions conferred on, or assigned to, the District Authority under the said Act.

60. The Supreme Court in para 13 of the judgment reported in Kishore Chand v. State of Himachal Pradesh, AIR 1990 SC 2140, held thus :

> *"13. Though Art. 39A of the Constitution provides fundamental rights to equal justice and free legal aid and though the State provides amicus curiae to defend the indigent accused, he would be meted out with unequal defence if, as is common knowledge the youngster from the bar who has either a little experience or no experience is assigned to defend him. It is high time that senior counsel practising in the court concerned, volunteer to defend such indigent accused as a part of their professional duty. If these remedial steps are taken and an honest and objective investigation is done, it will enhance a sense of confidence of the public in the investigating agency."*

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61. The Supreme Court, in the case of Zahira Habibullah Shekh v. State of Gujarat, reported in AIR 2006 SC 1367, has observed in paragraphs 30, 35, 39 and 40 at page 393 of the Journal as under :

> *"30. Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of*

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Courts of justice. The operative principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences.

35. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a Court of law in the future as in the case before it. If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial

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evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

39. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial.

40. The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

62. In Siddhapal Kamala Yadav v. State of Maharashtra, AIR 2009 SC 97, the Supreme Court held in para-8 as follows :

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"8.....The onus of proving unsoundness of mind is on the accused. But where during the investigation previous history of insanity is revealed, it is the duty of an honest investigator to subject the accused to a medical examination and place that evidence before the Court and if this is not done, it creates a serious infirmity in the prosecution case and the benefit of doubt has to be given to the accused. The onus, however, has to be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition and other relevant factors. Every person is presumed to know the natural consequences of his act. Similarly, every person is also presumed to know the law. The prosecution has not to establish these facts."

63. In Ranchod Mathur v. State of Gujarat, AIR 1974 SC 1143, it is observed that, the Sessions Judge should view with sufficient seriousness the need to appoint State Counsel for undefended accused in grave cases. Indigence should never be a ground for denying fair trial or equal justice. Therefore, particular attention should be paid to appoint competent advocates, equal to handling the complex cases, not patronising gestures to raw entrants to the Bar. Sufficient time and complete papers should also be made available to the advocate chosen so that he may serve the cause of justice with all the ability at his command, and the accused also may feel confident that his counsel chosen by the court has had adequate time and material to defend him properly.

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64. In Sunil Gaikwad v State 2009(3) BCR (Cri.) 504, a Division Bench of the Bombay High Court in a case of triple murder found that the advocate of 9 years standing was appointed for the accused, he had conducted sessions cases but had no experience to conduct sessions cases of this magnitude and complexities. It was observed that, by referring to the observations from Zahira Shaikh v. State of Gujarat, AIR 2006 SC 1367, regarding the concept of fair trial and the role of Judicial Officer as a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality to both the parties, "*we have minutely considered the evidence on record more particularly the cross-examination of the witnesses conducted by the defence. In the facts of the case, we are not of the opinion that, this is a fit case for setting aside the judgment and order of conviction and sentence and remanding the matter back to the court for holding fresh trial but certainly we are of the opinion that, some of the witnesses already examined are required to be cross-examined afresh maintaining the earlier cross-examination conducted by the defence counsel*". There was a direction issued for the appointment of an advocate for the accused having sufficient experience of conducting such cases and permitting the accused to take further cross-examination of the material witnesses.

65. It is settled that in cases of reference made under Section 366 of the Criminal Procedure Code for confirmation of death sentence, considering the provisions of the Code of Criminal Procedure in relation to powers of the High Court conferred

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under Sections 367 and 368 of the Code, the sessions trial could not be said to be concluded unless the reference is answered by the High Court. In other words, the proceedings of the sessions trial continue till the reference made to the High Court by the sessions court is finally disposed of.

66. This case provides us an opportunity to remind the learned District and Sessions Judges conducting sessions trials, more particularly relating to serious offences involving severe sentences, to appoint experienced lawyers who had conducted such cases in past. It is desirable that in such cases senior advocate practising in the court shall be requested to conduct the case himself or herself on behalf of the undefended accused or atleast provide good guidance to the advocate who is appointed as amicus curiae or an advocate from the legal aid panel to defend the case of the accused persons. Then only the effective and meaningful legal aid would be said to have been provided to the accused.

67. The Supreme Court, in the case of M.H.Hoskot v. State of Maharashtra, reported in 1978(3) SCC 544, had emphasized upon the the need of securing the competent and efficient legal services for a prisoner who is standing trial in a criminal case or for the commission of alleged offence. The Supreme Court, in paragraphs 14, 15 and 18 of the above judgment held as under:

> *"14. The other ingredient of fair procedure to a prisoner, who has to seek his liberation through the court process is lawyer's services. Judicial justice, with procedural intricacies, legal submissions and critical examination of*

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evidence, leans upon professional expertise; and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law. Free legal services to the needy is part of the English criminal justice system. And the American jurist, Prof. Vance of Yale, sounded sense for India too when he said:

> *"What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to inform him what the law is" Or that the courts are open to him on the same terms as to all other persons when he has not the wherewithal to pay the admission fee"*

15. Gideon's trumpet has been heard across the Atlantic. Black, J. there observed:

> *"Not only those precedents but also reason and reflection require us to recognise that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both State and Federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are*

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everywhere deemed essential to protect the public interest in an orderly society. Similarly, there are few defendants charged with crime who fail to hire the best lawyers they can get to prepare and present their defences. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trial in some countries, but is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trial before impartial tribunals in which every defendant stands equal before the law. This noble idea cannot be realised if the door man charged with crime has to face his accusers without a lawyer to assist him."

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18. The American Bar Association has upheld the fundamental premise that counsel should be provided in the criminal proceedings for offences punishable by loss of liberty, except those types of offence for which such punishment is not likely to be imposed. Thus in America, strengthened by the Powell, Gideon and Hamlin cases, counsel for the accused in the more serious class of cases which threaten a person with imprisonment is regarded as an essential component of the administration of criminal justice and as part of procedural fair play. This is so without

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regard to the sixth amendment because lawyer participation is ordinarily an assurance that deprivation of liberty will not be in violation of procedure established by law. In short, it is the warp and woof of fair procedure in a sophisticated, legalistic system plus lay illiterate indigents aplenty. The Indian socio-legal milieu makes free legal service, at trial and higher levels, an imperative processual piece of criminal justice where deprivation of life or personal liberty hangs in the judicial balance."

68. In Hussainara Khatoon and other v. Home Secretary, State of Bihar, reported in (1980)1 SCC 98, the Supreme Court observed in paragraphs 7, 9 and 10 as under :

"7. We may also refer to Article 39-A the fundamental constitutional directive which reads as follows: 39-A. Equal justice and free legal aid.- State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. This article also emphasizes that free legal service is an unalienable element of 'reasonable, fair and just' procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity for securing justice. The right to free legal services is, therefore, clearly an essential ingredient of 'reasonable, fair and just' procedure for a person accused of an offence and it must be held implicit in the guarantee of

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Article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer. We would, therefore, direct that on the next remand dates, when the under-trial prisoners charged with bailable offences, are produced before the Magistrates, the State Government should provide them a lawyer at its own cost for the purpose of making an application for bail, provided that no objection is raised to such lawyer on behalf of such under-trial prisoners and if any application for bail is made, the Magistrate should dispose of the same in accordance with the broad outlines set out by us in our judgment dated February 12, 1979. The State Government will report to the High Court of Patna in compliance with this direction within a period of six weeks from today.

9. We may also take this opportunity of impressing upon the Government of India as also the State Governments, the urgent necessity of introducing a dynamic and comprehensive legal service programme with a view to reaching justice to the common man. Today, unfortunately, in our country the poor are priced out of the judicial system with the result that they are losing faith in the capacity of our legal system to bring about changes in their life conditions and to deliver justice to them. The poor in their

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contact with the legal system have always been on the wrong side of the line. They have always come across "law for the poor" rather than "law of the poor". The law is regarded by them as something mysterious and forbidding--always taking something away from them and not as a positive and constructive social device for changing the social economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker sections of the community. It is, therefore, necessary that we should inject equal justice into legality and that can be done only by dynamic and activist scheme of legal services. We may remind the Government of the famous words of Mr. Justice Brennan :

> *"Nothing rankles more in the human heart than a brooding sense of injustice, illness we can put up with. But injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness"*

And also recall what was said by Leeman Abbot years ago in relation to affluent America:

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> *"If ever a time shall come when in this city only the rich can enjoy law as a doubtful luxury, when the poor who need it most cannot have it, when only a golden key will unlock the door to the court room, the seeds of revolution will be sown, the fire-brand of revolution will be lighted and put into the hands of men and they will almost be justified in the revolution which will follow."*

We would, strongly, recommend to the Government of India and the State Governments that it is high time that a comprehensive legal service programme is introduced in the country. That is not only a mandate of equal justice implicit in Article 14 and right to life and liberty conferred by Article 21, but also the compulsion of the constitutional directive embodied in Article 39-A.

10. We find from the counter-affidavit filed on behalf of the respondents that no reasons have been given by the State Government as to why there has been such enormous delay in bringing the under-trial prisoners to trial. Speedy trial is, as held by us in our earlier judgment dated February 26, 1979, on essential ingredient of 'reasonable, fair and just' procedure guaranteed by Article 21 and it is the constitutional obligation of the State to device such a procedure as would ensure speedy trial to the accused. The State cannot be permitted to deny the constitutional right of speedy trial to the accused on the ground that the State has no adequate financial resources to incur the necessary expenditure needed for improving the administrative and

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judicial apparatus with a view to ensuring speedy trial. The State may have its financial constraints and its priorities in expenditure but, as pointed out by the Court in Bhem v. Malcolm, 377 F Supp 995:

> *"The Law does not permit any government to deprive its citizens of constitutional rights on a plea of poverty."*

It is also interesting to notice what Justice, then Judge, Blackmum said in Jackon v. Bishop, 404 F Supp 2d 571:

> *"Humane considerations and constitutional requirements are not, in this day, to be measured by dollar considerations."*

So also in "Holt v. Sarver", 309 F Supp 362, affirmed in 442 F Supp. 362, the Court dealing with the obligation of the State to maintain a Penitentiary System which did not violate the Eighty Amendment aptly and eloquently said:

> *"Let there be no mistake in the matter; the obligation of the respondents to eliminate existing unconstitutionalities does not depend upon what the legislature may do, or upon what the Governor may do, or, indeed upon what respondents may actually be able to accomplish. If Arkansas is going to operate a Penitentiary System, it is going to have to be a system that is countenanced by the Constitution of the United States."*

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The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the constitutional obligation of this Court, as the guardian of the fundamental rights of the people, as a sentinel on the qui vive, to enforce the fundamental right of the accused to speedy trial by issuing the necessary directions to the State which may include taking of positive action, such as augmenting and strengthening the investigative machinery, setting up new courts, building new court houses, providing more staff and equipment to the courts, appointment of additional Judges and other measures calculated to ensure speedy trial. We find that in fact courts in the United States have adopted this dynamic and constructive role so far as the prison reform is concerned by utilising the activist magnitude of the Eighth Amendment. The courts have ordered substantial improvements to be made in a variety of archaic prisons and jails through decisions such as Holt v. Sarver, 309 F Supp 362, Johes v. Witlenberg, 330 F Supp 707, Newman v, Alabama, 349 F Supp 278 and Gates v. Collier, 349 F Supp 881. The Court in the last mentioned case asserted that it "has the duty of fashioning the decree that will require defendants to eliminate the conditions and practices, at Parchman, hereinabove, found to be violative of the United State's Constitution" and in discharge of this duty gave various directions for improvement of the conditions of those confined in the State Penitentiary. The powers of this

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Court in protection of the constitutional right are of the widest amplitude and we do not see why the Court should not adopt a similar activist approach and issue to the State directions which may involve taking of positive action with a view to securing enforcement of the fundamental right to speedy trial. But in order to enable the Court to discharge this constitutional obligation, it is necessary that the Court should have the requisite information bearing on the problem. We, therefore, direct the State of Bihar to furnish to us within three weeks from today particulars as to the location of the courts of Magistrates and courts of sessions in the State of Bihar together with the total number of cases pending in each of these courts as on December 31, 1978 giving year-wise break-up of such pending cases and also explaining why it has not been possible to dispose of such of these cases as have been pending for more than six months. We would appreciate if the High Court of Patna also furnishes the above particulars to us within three weeks from today since the High Court on its administrative side must be having records from which these particulars can be easily gathered. We also direct the State of Bihar to furnish to us within three weeks from today particulars as to the number of cases where first information reports have been lodged and the cases are pending investigation by the police in each sub-division of the State as on December 31, 1978 and where such cases have been pending investigation for more than six months, the State of Bihar will furnish broadly the reasons why there has been such delay in the investigative process. The writ petition well now come up for hearing and final disposal on April 4, 1979. We have

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already issued notice to the Supreme Court Bar Association to appear and make its submission on the issue arising in the writ petition since they are of great importance. We hope and trust that the Supreme Court Bar Association will respond to the notice and appear to assist the Court at the hearing of the writ petition."

69. We may also refer to a Division Bench decision of this Court in the case of Vedva Vaghari Ramesh Ramabhai v. State of Gujarat, 1994(1) G.L.R. 901. In that case also similar question with respect to the interpretation of Section 304 of the Code arose. Justice S.D.Dave, as His Lordship then was, while interpreting Section 304 of the Code, Article 21 of the Constitution of India and Para-125 of the Criminal Manual, observed thus:

"A conjoint reading of Art.21 of the Constitution of India and the provisions contained in Sec.304 of the Code of 1973 and para 125 of the Criminal Manual and the Rules which are known as the Gujarat Legal Aid to the Accused Expenses Rules, 1976, it cannot be urged that such a procedural formality is not required to be undergone by the Sessions Court, when the accused had stated before the Committing Magistrate that, he would make his arrangement for his defence and that, he would require the legal assistance at the cost of the State. On the contrary, it is clear that, in Sessions Case the trial commences not at the committal level but at the level when the charge is framed and the plea of the accused is being recorded by the Sessions Court. To argue or to accept that such a formality is not required to be

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undergone at the Sessions trial level would run counter to what has been commanded by the Constitution of India, the Code of Criminal Procedure, 1973 and the relevant provisions in the Criminal Manual."

70. Thereafter, the court went on further observing thus:

> *"Thus, on a compactus of the legal position emanating from the guarantees under Art.21 of the Constitution of India, Sec.304 of the Code of Criminal Procedure, 1973, Criminal Manual and the above said pronouncement of the Supreme Court and the Rajasthan High Court, it is clear that, even though, upon an inquiry by the learned Committal Magistrate the appellant-accused had stated that he would not require the legal assistance at the cost of the State, the very same exercise was once again required to be done by the learned Sessions Judge, before whom the trial had commenced and the appellant-accused was put to trial. This undoubtedly having not been done, there appears to be a clear violation of the letter and spirit of Art. 21 of the Constitution of India and Sec. 304 of Criminal Procedure Code and the relevant paragraphs of the Criminal Manual. On the basis of the above said, it must be accepted that, the trial has been vitiated and, therefore, the judgment of conviction and sentence cannot stand any longer."*

71. The Division Bench of this Court, in the case of Labhu Laxmanbhai Vaghasiya v. State of Gujarat, reported in 1999(1) GLR 889, had observed as under :

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"27. It must be, therefore, inevitably, remembered by one and all officers of the administration of justice, much less the Judge or the Magistrates, that the concept of equal justice system must be made meaningful and purposeful. The provision for legal aid under Article 39-A and stated in Article 21 of the Constitution of India also must be made effective and efficient, purposeful and meaningful for the Courts ought to adopt broad, liberal and dynamic approach with a view to see that the accused is given free and fair, just and reasonable trial. Let us never forget that we have a social, secular and democratic Republic State which has adopted doctrine of welfare State. Giving a go-by to welfare State under which millions and millions of our people suffered for several hundred years in the past before becoming independence. Let us, therefore, never forget that the right of free and competent legal aid, is, a 'sine-qua-non', for upkeepment and sustenance of the rule of law which is one of the important basic structures of the Constitution of India. The right to legal aid has become almost like a fundamental right by catena of judicial pronouncements by Constitutional Courts and the Honourable Supreme Court of India. It must be, seriously, noted that the legal aid is not a matter of charity or mercy. It is an important right backed by the Constitution and that is the reason why the Government of India in its national and legal aid policy programmes devised the Legal Services Authorities Act, 1987, and has amended from time to time and, thereby, translating the spirit of Article 39-A. The end result came to the constitutinalisation of legal aid.

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28. Again the 'legal aid' phrase is, designedly, given a go-by in the Legal Services Authorities Act, 1987, replacing it by the expression 'Legal Services'. 'Aid' means, to assist or to help, whereas, 'services' means to perform the duty. Therefore, it can, safely, be concluded that the legal aid is not, merely, a right of the needy and the deserving but is, correspondingly, duty of the authority to make it available to the deserving and the needy and more so in a case of a person who is facing the charge in a criminal trial. Judges play a more important role in dispensation of justice and they can never afford to be oblivious to the constitutionalisation of legal services concept, particularly, when a poor, unsophisticated, rural labourer is facing capital charge in a criminal trial. How can he be allowed to go undefended ? How can he be permitted to be unprotected and that too by the custodian and guardian of the rule of law ? where fair-play is the lynch-pin at the altar of, merely, asking a customary performance making a usual question at the time of recording of plea of the accused who is undefended and it would, obviously, therefore, radiate not only an imprint of insensitivity, if not inhumanity, but also non-application of mind to the constitutionalisation of concept of free and competent legal aid to be provided to the accused person in a criminal trial apart from the provisions of Section 304 of the Code. We can go one step further and incorporate that it is an inherent right of an accused person. Even no administrative action on a civil side can be taken without observance of the principle of, 'audi-alteram-partem'. How can a trial proceed in a Sessions case when the

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accused is charged with a capital crime by, merely, asking whether he would like to avail free legal aid and without waiting for the answer and without considering the answer which fell from the accused that he pleaded guilty ? It is a manifestation of non-understanding, non-application or sheer socio-economic pressure which prevented the accused from answering, correctly, to the question and leading him to repeat the same answer of plea of guilt, could it be said, even for a moment, a complete fulfillment of statutory provisions of Section 304 of the Code ? The spontaneous answer would be in the negative. Unfortunately, the trial Court concerned became a mute and helpless instrumentality of the dispensation of justice in the administration of justice, silently, watching, if not a perpetuation to eclipsing of the fundamental and valuable right of an accused, who is presumed to be innocent until the guilt is established ? Not only the criminal jurisprudence we have adopted in this country, but even the fundamental human rights came to be obliterated when the trial Court went on writing at the end of the examination-in-chief, in as many as 14 prosecution witnesses "no cross by the accused". With utmost respect within our command, we are constrained to mention that the manner and mode and the methodology the trial Court allowed to be employed, not only proved to be the last nail on the coffin of the defence of the accused but also flagrant perpetuation of the fundamentally constitutionalised background of free legal services.

29. We may also hasten to add even assuming that the accused refused to avail, in a given case, the free legal aid

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to him, the duty cast on the Court, does not end there. The main anxiety of the Courts of law, more so in a case of criminal trial, is to see that justice is done, observing fair, just and reasonable process and procedure. There is another important concept of protecting the interest of the accused (not only the accused, but also the doctrine of fair play), by requesting and appointing any advocate to act as an 'amicus-curiae' - (friend of Court). We fail to understand as to why even if it is presumed that the accused, understandably, declined to avail of the free legal services then also the duty of the Court does not cease there. The duty of the Court is to see that justice is done after free, fair and reasonable procedure is followed and sufficient opportunity is afforded to the accused. Of course, the concept to employ the service of 'amicus-curiae', has an English origin but it has a purpose and policy behind it and the Court, at any time, in a given case, for a proper reason, have been employing this services. The trial Court ought to have, at least, resorted to this principle, and nothing is borne out from the record, as to why, it was not resorted to."

72. In such circumstances referred to above, it is necessary to issue directions to all the Police Officers through the Director General of Police, State of Gujarat, and to all the Judicial Magistrates, Sessions Judges/Special Judges, through the Registrar General of the High Court of Gujarat as follows :

i. Whenever any accused person is arrested and there is any history or the conduct of the accused indicating that he is not mentally sound, it is the duty

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of the Police Officer who has arrested him to produce him before the Medical Officer for his examination with regard to his unsoundness of mind and to obtain the necessary certificate. If he is suffering from any unsoundness of mind, he should be forwarded to a mental hospital for treatment and until certificate of his fitness is received, the matter cannot proceed further.

ii. If the Investigating Officer fails to perform his duty of getting the accused person examined, it is the obligation of the Judicial Magistrate before whom he is produced for the first time. If he finds at the time of first remand that there is history of insanity or symptoms of the accused showing insanity, he should refer the accused for medical examination and find out whether the accused is suffering from mental or legal insanity or not. In case of mental insanity, he should be provided with appropriate medical help.

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iii. It should be also borne in mind by the trial Judges that, no criminal case particularly inviting the substantial sentence should be conducted without appointment of advocate. If the accused is not represented, appropriate legal assistance should be provided to him at the state expenses.

iv. In case of sessions triable offence, it is the duty of the Sessions Judge that sufficiently experienced lawyer

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should be provided for conducting the case of accused person. The inquiry should be made whether he has conducted sessions cases or not and his length of practice would not suffice for his appointment. In case of sessions cases of complex or peculiar facts it should be inquired whether he has conducted such case or not. The legal aid to be provided at the State expenses should not be for the namesake. Upon such inquiry only he should be appointed as the advocate for the accused, and that too, after recording his satisfaction of the competency of the advocate.

v. The Directorate of Prosecution, Legal Remembrancer and the Principal Secretary, Home Department, must regularly review the manner in which the Public Prosecutors in-charge of the sensitive cases are conducting the trial. Such review should be on a periodic basis and records in this regard shall be maintained.

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73. When the cases in which advocate is appointed at the State expenses at the trial stage comes before this Court in appeal, it becomes difficult for the appellate court to find out the competency of the lawyer or otherwise. It is therefore advisable that while appointing a lawyer at the State expenses, the trial court should disclose in its order the length of practice of the advocate appointed and his/her experience in conducting the criminal cases, sessions cases or sessions of particular type and

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his opinion that in the situation he/she was the competent person to be appointed for the accused particularly in cases where there is likelihood of conviction for major offences. (see The State of Maharashtra v. Sheshrao S/o Sonaji Jadhav, Criminal Appeal No.221 of 2002, decided on 21.12.2017)

74. We close this matter with a humble request to the senior seasoned criminal side lawyers practising at the Bar to take up this trial and defend the appellant-accused. The concerned trial Judge shall also request the senior members of the Bar practising on the criminal side to defend the appellant in the present case. In future also, in a particular case, if the trial Judge is of the view having regard to the serious nature of the crime that the assistance of a seasoned and experienced criminal side lawyer is required, then it would be the duty of the trial Judge to appoint one by fixing appropriate remuneration one befitting to the stature of the said lawyer concerned and thereafter recover the amount from the State Government and pay the same to the concerned lawyer. This will be in the larger interest of justice and this will be the legal aid in its real sense.

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75. In the aforesaid context, we may refer to the National Legal Services Authority (Free and Competent Legal Services) Regulations, 2010, more particularly, the Regulation-15, which reads thus :

> *"15. Special engagement of senior advocates in appropriate cases. -*

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(1) If the Monitoring and Mentoring Committee or Executive Chairman or Chairman of the Legal Services Institution is of the opinion that services of senior advocate, though not included in the approved panel of lawyers, has to be provided in any particular case the Legal Services Institution may engage such senior advocate.

(2) Notwithstanding anything contained in the State regulations, the Executive Chairman or Chairman of the Legal Services Institution may decide the honorarium of such senior advocate.

Provided that special engagement of senior advocates shall be only in cases of great public importance and for defending cases of very serious nature, affecting the life and liberty of the applicant."

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76. It is also brought to our notice that the Gujarat State Legal Services Authority has prepared a list of pro bono senior lawyers practising on the criminal as well as civil side for the purpose of providing legal aid and assistance to those litigants who are not able to afford to engage seasoned and experienced lawyers. The list of pro bono senior lawyers as prepared by the Gujarat State Legal Services Authority is as under :

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"Gujarat State Legal Services Authority

List of Senior Lawyers practicing in the State of Gujarat

Sr. No.	Name of DLSA	Criminal Side	Civil Side	Total
1	Ahmedabad	23	08	31
2	Amreli	15	05	20
3	Anand	15	05	20
4	Arvalli @ Modasa	00	00	00
5	B.K. @ Palanpur	09	05	14
6	Bharuch	15	05	20
7	Bhavnagar	15	14	29
8	Botad	00	00	00
9	Choota Udepur	00	00	00
10	Dahod	00	00	00
11	Devbhumi Dwarka @ Khambhalia	00	00	00
12	Gandhinagar	15	01	16
13	Gir-Somnath @ Veraval	00	00	00
14	Jamnagar	15	05	20
15	Junagadh	17	08	25
16	Kachchh @ Bhuj	15	05	20
17	Kheda @ Nadiad	15	05	20
18	Mahesana	15	05	20
19	Mahisagar @ Lunawada	00	00	00
20	Morbi	00	00	00
21	Narmada @ Rajpipla	15	09	24
22	Navsari	15	05	20
23	Probandar	15	05	20
24	Panchmahals @ Godhra	10	05	15
25	Patan	10	05	15
26	Rajkot	11	05	16
27	S.K. @ Himmatnagar	15	05	20
28	Surat	15	05	20
29	Surendranagar	16	12	28
30	Tapi @ Vyara	00	00	00

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31	Vadodara	14	07	21
32	Valsad	15	05	20
	TOTAL	335	139	474

77. Before we part with the case, we strike a note of warning. If inexperienced advocates alone are available to defend such unfortunate accused, the court has a primary duty to come to the aid of the accused by putting timely and useful questions and warning the advocates from treading on dangerous grounds.

78. The registry is directed to forward one copy each of this Judgment to the Director General of Police, State of Gujarat; Registrar General, High Court of Gujarat; Director, Gujarat State Judicial Academy at Ahmedabad; Member Secretary, Gujarat State Legal Services Authority; and Secretary, Gujarat High Court Legal Services Committee.

(J. B. PARDIWALA,J.)

(A. C. RAO,J.)

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