P L D 1980 Peshawar 103

Before Mian Burhanuddin Khan, J

NOOR JEHAN-Appellant

Versus

THE STATE-Respondent

Criminal Appeal No. 83 of 1979, decided on 5th November, 1979.

Criminal Procedure Code (V of 1898) ----

-- S. 465-Lunatic-Trial of-Court entertaining doubts as to sanity of accused-Has not merely to put questions to accused but also to try fact of such unsoundness of mind by examining Civil Surgeon or some other Medical Officer and to take such evidence as might be procurable with a view to ascertain whether accused exhibited symptoms of insanity-Sessions Court not found to have tried question of accused's capacity to make his defence nor deciding such question-Provisions of S. 465, held, not complied with in circumstances and trial in circumstances vitiated-Conviction set aside and case remanded for retrial.-[Remand of case].

T. M. Hayat for Appellant.

S. Ibni Ali, Addl. A.-G. for the State.

Date of hearing: 5th November, 1979.

JUDGMENT

Noor Jehan accused aged 41 years son of Noor Badshah resident of Sumari Bala Police Station Lachi was put on trial before the learned Additional Sessions Judge, Kohat on a charge under section 302, P. P. C. for murdering Abdul Afzal deceased by firing at him with a shot-gun. He was convicted and sentenced to death by the learned Sessions Judge vide his judgment dated 12-3-1979 under section 302, P. P. C. and in case of non confirmation of the death sentence the accused was to pay a fine of Rs. 2,000, or in default to undergo six months' R. I. Fine if recovered is to be paid to the heirs of the deceased under section 544-A, Cr. P. C. The convict has come up in appeal against his conviction and sentence and there is also murder reference,

The learned counsel for the accused-appellant raised a preliminary objection to the legality of the trial by the learned Sessions Judge on account of non-compliance with the provision of section 465, Cr. P. C. in that the learned Additional Sessions Judge who had initially started the trial passed an order on the order-sheet dated 25-6-78 wherein it was recorded:-

> "The accused by his gesture does not appear to be of a sound mind though he answers the questions intelligently. He shall also be produced before the M. S. within one week for his examination who will examine him and submit his report before the date fixed about the sanity or otherwise of the accused."

Another order on the order-sheet dated 16-7-78 wherein the learned Addi tional Sessions Judge recorded:

> "On the previous occasion this Court had observed that the accused is not behaving like a sane person. He was accordingly referred to M. S. Kohat who has, in his Memo No. 2331 /D-20 dated 28-6-78, opined that he is of sound mind. At the same time the M. S. has also recommended that the accused be referred to Mental Hospital, Peshawar for expert opinion. He shall be produced before the Superintendent, Mental Hospital, Peshawar within two days who will keep him under observation for the required period and then submit the report of the Mental Specialist on or before 8-8-78, on which date the accused shall also be produced in this Court."

Thereafter, there is a note by the Reader of the Court showing that the report of the Specialist of the Mental Hospital was not received and the case was adjourned to 9-9-78. Before 9-9-78 the services of the learned Additional Sessions Judge, Kohat were terminated and the learned Sessions Judge, Kohat took up the case himself for trial. He passed no order before proceeding with case about the mental capability of the appellant as required under section 465, Cr. P. C. The wordings of the section ibid are:

> 465. Procedure in case of person (sent for trial) Court of Session or High Court being lunatic.-(1) If any person before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the Court shall, in the first instance, try the fact of such unsoundness and incapacity and if the Court is satisfied of the fact, it shall record a finding to that effect and shall postpone further proceedings in the case.
>
> (2) That trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court.

So far there is, in our view, fault to be found with the proceedings. Sec tion 465, Cr. P. C. requires that the question whether the accused is of unsound mind and consequently incapable of making his defence should be tried by the Court and should be deemed to be part of his trial before the Court. We are satisfied that the learned Sessions Judge was himself of the opinion, on seeing the second certificate of the Special Medical Board dated 20-8-78 given after observation for some period that the accused-appellant was not then of unsound mind and was capable of making his defence; but we are unable to find any trace of any proceeding by which the Judge tried the question of the accused 's capacity td make his defence,

and came to the decision on that point. Where a Court entertains doubts to the sanity of the accused, the Court should. not merely put questions to the accused, butt should try the fact of such unsoundness of mind by examining the Civil Surgeon or some other Medical Officer, and taking such evidence as might have been procurable, with a view to ascertaining whether the accused had at any time previous to the commission of the crime exhibited symptoms of insanity, and where by the trial Court does not comply with the provision of section 465, Cr. P. C. but convictes the accused the trial is vitiated.

We conclude that the learned. Sessions Judge was personally himself satisfied for otherwise we could not understand how he could have proceeded with the trial. But we find in his judgment in the case the following para. No. 20:-

> "So far as the question of sentence is concerned from the evidence on record there is no mitigating circumstance at the time of occurrence in favour of the accused for lesser punishment. It was, however, suggested to me by learned counsel for the defence that the accused came under attacks of fits specially during the interrogation of the police as admitted by A. S. I. P. W. 10 but I am not prepared to accept the theory of unsoundness of mind at the time of commission of the offence because just after the occurrence the accused entered his house and chained the door from inside in order to protect himself from apprehension and arrest. Moreover, the accused was arrested by Khan Wazir A. S. I. from Ziarat on 21-4-77 which sufficiently indicate that the accused was conscious of his guilty conscience and was knowing the consequences of his act."

This would suggest that actually in Court there was something' in the demeanour of the accused; which raised doubts in the Judges' minds. The absence of any proper trial and finding as to the accused's capacity to make his defence results in our order: setting aside the conviction and sentence and direct retrial of the accused at Session by a competent Court.

S. A. H.

Appeal dismissed.

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