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407. Both these convictions were made by the Digh Nizamat in the Bharatpur State. I have no information as to the nature or constitution of this court. The question is whether section 75, as amended by Act III of 1910, contemplates a conviction by a court of this kind. The point was considered in *Bahawal* v. *King-Emperor* (1), and it was held that a previous conviction held by a Criminal Court in Bikaner could not come within the scope of the section. Under the circumstances I think section 75 is not shown to be applicable in this case. Having regard to all the circumstances of the case a sentence of three years' rigorous imprisonment will meet the ends of justice. With this modification I dismiss the appeal.

Sentence reduced.

Before Mr. Justice Piggott and Mr. Justice Dalal.

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Criminal Procedure Code, sections 464, 465—Insanity—Inquiry into present unsoundness of mind of accused person to precede his trial on the substantive charge.

Where there is any reason for supposing that an accused person may be of unsound mind and consequently incapable of making his defence, it is imperatively necessary that this question should be inquired into or tried under the provisions of section 464 or section 465 of the Code of Criminal Procedure *before* the Court proceeds to inquire into or try the substantive charge against the accused. *Muhammad Husain* v. *King-Emperor* (2), referred to.

The facts of this case were as follows:—

The accused, a blacksmith, was convicted of the murder of his elder brother's wife. The case for the prosecution was that the wife of the accused and the deceased were one day laughing and joking among themselves in the presence of the accused who resented this disrespectful behaviour and abused the two ladies. At night he got up from his bed and with a heavy hammer struck the deceased on the head and killed her. The defence put forward was insanity. Before the committing Magistrate the accused said that he did not remember whether he killed the woman and before the Sessions Judge he did not say anything and no witness was produced in either court for his defence.

* Criminal Appeal no. 981 of 1919, from an order of H. E. Holmes, Sessions Judge of Bareilly, dated the 21st of August, 1919.

(1) (1913) 48 Punj. Rec., Cr. J., 64. (2) (1912) 15 Oudh Cases, 321.

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The committing Magistrate, after taking the evidence of the prosecution witnesses, sent the accused for medical examination with regard to his state of mind but did not record the doctor's evidence. The learned Sessions Judge held that the accused knew very well what he was doing at the time of inflicting the blow and that he was not entitled to the benefit of section 84, Indian Penal Code, and convicted him of an offence under section 302, Indian Penal Code and awarded him a sentence for transportation for life.

Dr. *J. N. Misra*, for the appellant :—

Two questions arise in this case, first, whether the accused was of such a state of mind as would bring him within the purview of section 84, Indian Penal Code, and, secondly, whether the court acted with material irregularity in not complying with the provisions of section 464 of the Code of Criminal Procedure in not recording the medical evidence. The Magistrate holding the inquiry had reason to believe that the accused was of unsound mind and caused him to be examined by a doctor, but the Magistrate did not comply with the provisions contained in the latter part of the section. The Magistrate should first have inquired about the fact of his unsoundness and then he should have examined the prosecution witnesses, which he did not do in the present case. On facts the accused was entitled to the benefit of section 84 of the Indian Penal Code; *Shibo Koeri* v. *The Emperor* (1), *Dil Gazi* v. *Emperor* (2). If it be said that the burden lay on the accused to satisfy the court that his unsoundness of mind was of such a nature that by reason thereof he was incapable of knowing the nature of the act or of knowing that he was doing what was either wrong or contrary to law, the accused could not do so, as at the time of the trial he could not enter into his defence on account of unsoundness of mind. The medical evidence is not on the record, and I have no opportunity of criticizing it.

The Assistant Government Advocate (Babu *Lalit Mohan Banerji*) for the Crown.

PIGGOTT and DALAL, JJ.—Jhabbu, blacksmith, has been found guilty under section 302 of the Indian Penal Code of the

(1) (1905) 10 C.W.N., 725. (2) (1907) I.L.R., 34 Calc., 686.

murder of Musammat Resham, the wife of his own brother, Jhamman. In his petition of appeal to this Court Jhabbu says that he did not kill his brother's wife; that he was not in his proper senses at the time when the woman was killed, or for some time previously, and that he does not know who killed her. In the Sessions Court Jhabbu refused to answer any of the questions put to him by the Sessions Judge. In the court of the committing Magistrate he was asked whether he had struck his sister-in-law, Musammat Resham, with a hammer causing her such bodily injury as led to her death. To this he replied:—"I do not remember if I did so."

Only one further question was asked of him, and in reply to that he said that he did not know why he was being accused of the crime. The case for Jhabbu has been very satisfactorily argued before us by counsel, and as so laid before us that case involves two distinct points. There is of course the question whether the learned Sessions Judge was or was not right in holding that the accused was not entitled to an acquittal under the general exception of insanity as defined by section 84 of the Indian Penal Code. This question, however, can only arise after the Court is satisfied that the accused was properly and legally tried, in other words, that the procedure laid down in sections 464 and 465 of the Code of Criminal Procedure was duly followed by the committing Magistrate and by the Sessions Judge, respectively. The vernacular record shows that, when the case was first brought before the committing Magistrate, the latter undoubtedly found reason to believe that the man was of unsound mind and consequently incapable of making his defence. He so far complied with the provisions of the law that he caused inquiry to be made into the fact of such unsoundness and caused the accused's person to be examined by an officer who is described as the Civil Assistant Surgeon of Bareilly. So far as the record goes, it is not quite clear whether the officer in question was the proper officer to perform this duty under the provisions of the section in question, but in any case the committing Magistrate failed to follow up his action by examining the Civil Assistant Surgeon and reducing his examination to writing, as required by law. In saying this we are not over-looking the fact that, when the Civil

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Assistant Surgeon was examined by the Magistrate on the 7th of August, 1919, that is almost a month and a half after the accused, Jhabbu, had first been brought before the Magistrate, he did depose that during the period between the 4th of July and the 22nd of July, 1919, he had kept Jhabbu under observation and had come to the conclusion that he was sane and could understand what he was doing. This, however, was unsatisfactory for two reasons. In the first place, section 464 of the Code of Criminal Procedure clearly contemplates that a Magistrate who has once found reason to doubt the soundness of mind of an accused person brought before him shall examine the medical expert whose opinion was taken as a preliminary to the holding of the inquiry and not, as was done in this case, at the very close. In fact the committing Magistrate was bound to inquire, before he began to record evidence in this case, whether the accused, Jhabbu, was or was not incapacitated by unsoundness of mind from making his defence. He did not record any finding to that effect before entering upon the inquiry, and his subsequent examination of the Civil Assistant Surgeon does not really cover the defect. Moreover, the evidence of the medical expert, as it stands, is directed to the state of the accused's mind between the 4th and the 22nd of July, 1919. What the Magistrate had to find was that the accused person before him was capable of making his defence when the inquiry commenced, that is to say, on the 2nd of August. This we might have passed over as an irregularity not material to the case, if we could have felt satisfied that the Sessions Judge himself had fully complied with the provisions of section 465 of the Code of Criminal Procedure. So far as the record goes, it would seem, that the learned Sessions Judge was satisfied from the committing Magistrate's record, and perhaps from the appearance of the accused person before him, that there was no reason to doubt Jhabbu's soundness of mind or his capacity of making his defence. In our opinion, however, the record discloses strong reasons for casting doubt on this point. There is evidence on the record that the accused had been in custody at Budaun, not long before the commission of the alleged offence as a dangerous lunatic. We notice that counsel who represented the accused at the Sessions trial particularly asked that evidence might be taken

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as to these proceedings at Budaun and invited the attention of the court to the fact that the accused seemed to be incapable of making a proper defence, at any rate to this extent that the learned counsel was unable to obtain any instructions from him. Under these circumstances we are of opinion that the provisions of section 465 of the Code of Criminal Procedure 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 him, was of unsound mind and consequently incapable of making his defence. The proof of the fact of the soundness or unsoundness of mind of the accused is to be deemed part of his trial before the court, and in the absence of a clear finding on this point, we are of opinion that the entire proceedings in the Sessions Court are vitiated and ought to be set aside. We accordingly set aside the conviction and sentence in this case, but we do not acquit the accused of the offence charged. We order that he be placed on his trial again before the Sessions Court of Bareilly and that the trial do commence with the proceeding required by section 465, Code of Criminal Procedure, leading up to a formal finding as to the capacity of the accused for making a defence. If the accused is now found to be capable of making a defence, the trial will proceed, and the onus will be laid on the accused of satisfying the court that, on the date on which he committed the crime, he was by reason of unsoundness of mind incapable of knowing the nature of his act, or that he was doing what was either wrong or contrary to law. There has been some argument before us as to the law on this point. We are content to refer to the case of *Muhammad Husain* v. *King-Emperor* (1), partly because one of us was a party to that decision, and also because it contains a complete discussion, from three different points of view, of the law on the subject of criminal, as distinguished from medical, insanity, and a review of a number of previous authorities. In conclusion we may say that in our opinion it is important, both as bearing on the inquiry under section 465 of the Code of Criminal Procedure and on the question of the guilt or innocence of the accused, that the evidence of the

(1) (1912) 15 Oudh Cases, 321.

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medical expert who examined Jhabbu at Budaun should, if possible, be brought upon the record. With these directions we return the case to the Court of Session at Bareilly for a new trial as ordered. Pending his re-trial the accused should be detained in custody as an under-trial prisoner.

Re-trial ordered.

APPELLATE CIVIL.

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Before Justice Sir Pramada Charan Banerji and Mr. Justice Piggott.

HANUMAN PRASAD NARAIN SINGH (AUCTION-PURCHASER) *v.* HARAKH NARAIN (JUDGMENT-DEBTOR) AND SHEO TAHAL (DECREE-HOLDER) *

Act (Local) no. II of 1903 (Bundelkhand Alienation of Land Act) section 16—Member of an agricultural tribe—Restrictions on dealings with property—Mortgage—Decree for sale—Sale in execution of decree—Insolvency—Property of member of agricultural tribe not vesting in Receiver.

Where a mortgage has been executed by a member of an agricultural tribe to whom the provisions of the Bundelkhand Alienation of Land Act, 1903, apply, in contravention of that Act, even a decree passed in a suit for sale and a sale in execution following thereon cannot pass a good title in the mortgaged property to the auction-purchaser. Nor does it make any difference that, after the passing of the decree, the judgment-debtor has become insolvent, because under the terms of the Act the mortgaged property does not vest in the Receiver in insolvency, and cannot, therefore, be sold by him.

The facts of this case were as follows :—

Harakh Narain, a member of an agricultural tribe to whom the Bundelkhand Land Alienation Act (United Provinces Act no. II of 1903) applied, executed a simple mortgage of his property in 1911. The mortgagee sued on his mortgage and obtained a final decree for sale on the 3rd of March, 1917, the suit being uncontested. Shortly afterwards, Harakh Narain was adjudged an insolvent and a Receiver was appointed of his property. Thereafter, when the decree-holder in execution of his decree sought for sale of the property, Harakh Narain raised the objection that under the prohibition contained in section 16 of the Bundelkhand Land Alienation Act the property could not be sold. The court executing the decree over-ruled this objection, holding that

* Second Appeal no. 7 of 1919, from a decree of Pratap Singh, Subordinate Judge of Allahabad, dated the 16th of July, 1918, reversing a decree of Sidheshwar Moitra, Munsif of Allahabad, dated the 21st of January, 1918.