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The arrest was certainly conducted with unnecessary harshness; but we concur with Mr. Lely in holding that the Legislature has left the protection of individuals from such conduct as the police were guilty of in the present case to the supervision of executive authority; and such supervision is shown to have been exercised as regards the accused.

The arrest of the deceased having been strictly legal, it is obvious that the accused could not be successfully proceeded against on a charge under section 342 of the Indian Penal Code (Act XLV of 1860).

For these reasons we decline to interfere with the Magistrate's order.

Rule discharged.

APPELLATE CRIMINAL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

1886. *March* 4.

QUEEN-EMPRESS *v.* LAKSHMAN DAGDU.*

Insanity—Plea of insanity in criminal cases—Indian Penal Code (Act XLV of 1860), Sec. 84—Legal test of responsibility in cases of alleged unsoundness of mind.

Section 84 of the Indian Penal Code (Act XLV of 1860) lays down the legal test of responsibility in cases of alleged unsoundness of mind. It is by this test, as distinguished from the medical test, that the criminality of an act is to be determined.

The accused killed his two young children with a hatchet. The reason given for the crime was that, while he was laid up with fever, the crying of the children annoyed him. It was alleged that the fever had made him irritable and sensitive to sound, but it did not appear that he was delirious at the time of perpetrating the crime. There was no attempt at concealment; and the accused made a full confession.

Held, that, as the accused was conscious of the nature of his act, he must be presumed to have been conscious of its criminality. He was, therefore, guilty of murder.

THIS was a reference to the High Court under section 374 of the Criminal Procedure Code (Act X of 1882) for confirmation of the sentence of death passed upon the accused by M. B. Baker, Sessions Judge of Násik.

* Confirmation Case, No. 2 of 1886.

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The accused was charged with murder under section 302 of the Indian Penal Code (XLV of 1860) under the following circumstances:—On the afternoon of 28th November, 1885, the accused was lying ill with fever in his house. His two children, aged three and one year respectively, began to cry, which, it was alleged, annoyed him. He took the younger child out of the cradle and cut her throat with a hatchet on the threshold of the inner room. The elder child was at the door of the house. He seized her, and cut her throat in a similar manner.

It did not appear that the accused had previously shown any symptoms of insanity. His wife stated in her evidence that he had been suffering from fever for five days, and was unable to go to work; that during the fever he did not become delirious, but was very irritable, sensitive to noise, and confused in his thoughts; that on the day in question, at about 2 o'clock in the afternoon, when she left her house, he had had much fever, and was lying on his bed, and that as usual before going out she left the two children in his charge, as he was very fond of them.

After the murder, the accused made no attempt to escape. He expressed no sorrow or remorse. He voluntarily surrendered himself to the police, and made a full confession of his guilt before the 2nd Class Magistrate.

At his trial before the Court of Session, the accused's pleader set up the plea of insanity in his defence. He was acquitted on that plea by both the assessors; but the Sessions Judge, disagreeing with the assessors, held the plea not established, and convicted the accused of murder under section 302 of the Indian Penal Code (XLV of 1860). Sentence of death was passed, subject to the confirmation of the High Court. Accordingly the proceedings were submitted to the High Court for confirmation of the sentence.

V. K. Bhatavdekar for the accused:—This case falls within the principle of the cases cited in Chevers' Medical Jurisprudence at pages 774 and 777. The accused had been suffering from fever for five days before the perpetration of the crime. He had become irritable, sensitive to noise, and confused in his thoughts. One

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witness says that he was delirious also. And the medical witnesses admit that delirium may so far deprive a man of his senses as to make him incapable of knowing the nature of his act, or that he is doing anything wrong. Refers to Roscoe on Evidence, p. 905, and Stephen's Criminal Law, pp. 86, 94 and 138. There is an entire absence of motive in this case.

Pándurang Balibhadra, (Acting Government Pleader), for the Crown :—It was for the accused to have clearly shown that at the time of the perpetration of the crime he was unconscious of the nature of his act. This he has not done. The mere fact that he was irritable, or that his mind was confused, will not absolve him from responsibility. Nor is the absence of motive an index of insanity. The evidence does not establish that he was delirious. The accused's wife admits that he was not so. If he had been delirious, he would not have made a full confession, detailing all the circumstances connected with the crime. The plea of insanity failing, the accused was rightly convicted of murder.

BIRDWOOD, J. :—The accused brutally killed his two young children with a hatchet. He is said to have been "very fond" of them; and the reason that he gives for the crime is that he was ill with ague, and the children began to cry, and this vexed him. After killing them, he went to bed and fell asleep. His manner was quiet when he was questioned, and there was no attempt at concealment. He has made a full confession, but has shown no signs of sorrow or remorse.

He had been ill with fever for several days, but he does not seem to have been delirious. His wife says: "He did not wander in his talk. When the fever came on, he was bewildered *(bhramist)* and unconscious." The evidence does not warrant a finding that the accused killed his children while delirious. If he had been in a state of delirium, he would have had no recollection of the circumstances, and could have made no confession. Though his wife describes him as "unconscious" *(beshudha)* when suffering from the fever, it is clear that he was quite conscious of all that had occurred.

The Sessions Judge has considered the question whether the accused was, in the language of section 84 of the Indian Penal

Code, "by reason of unsoundness of mind, * * incapable of knowing the nature of the act" done by him, or that he was "doing what is either wrong or contrary to law," and he has decided that question against the accused, and sentenced him to death. Both the assessors were of opinion that the accused was not guilty. One of them thought that he was suffering from fever and was ignorant of the nature of his act. The other says that he was not in possession of his senses, that he was ill, that he was on good terms with his wife and children, and that "no one but a lunatic would kill his own young children."

If the question of the sanity of the accused were to be decided by such medical tests as are referred to by Dr. Taylor in Chapter LXIX of his "Medical Jurisprudence" (6th ed.), it would necessarily, we think, be answered in accordance with the assessors' opinion. The case is one of a class which is very fully discussed by Dr. Taylor, in which, previously to the commission of the murderous acts, there were no symptoms of intellectual aberration, in the common meaning of the term. Those acts were, in some of the cases, directed against persons most closely connected with the homicides in blood, and to whom they were tenderly attached. Such crimes cannot, in Dr. Taylor's opinion, be fairly or reasonably regarded as the acts of sane and responsible persons.

However well-defined the theory of the English law as to such cases may be, its application to them in cases tried by juries has certainly not been always constant and invariable. It will be necessary only to refer to three well-known cases. In *Reg.* v. *Greensmith*[1] the accused was charged with the murder of four of his children. He was an affectionate father: but "having fallen into distressed circumstances, he destroyed his children by strangling them, in order, as he said, that they might not be turned into the streets." The idea only came to him on the night of his perpetrating the crime. He made a full confession the next day, and he made no defence at the trial. None of the witnesses had ever observed the slightest indication of intellectual insanity about him. He was convicted and sentenced to death;

(1) Med. Chir. Rev., Vol. XXVIII, p. 84.

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but, on the active interference of Dr. Blake and others, was subsequently respited, on the ground of insanity (Taylor, 6th ed., p. 926). A "high legal authority" is said to have remarked of this case that "the man's mind was clearly deranged,—the motive, the mode of committing the acts, and his conduct all show an entire perversion of the understanding." In *Greensmith's* case[1] "there was not the slightest proof of the existence of derangement of mind, except in so far as it was inferred from the nature of the crime committed." "It may be a dangerous doctrine," Dr. Taylor observes, "to adduce the *crime* or the mode of perpetrating it, as *evidence* of insanity; but such cases as these incontestably prove that there are some instances in which this is almost the only procurable evidence."

In *Reg.* v *Brixey*[2] the prisoner was "a quiet, inoffensive girl, a maid-servant in a respectable family. She had laboured under disordered menstruation, and, a short time before the occurrence, had shown violence of temper about trivial domestic matters. This was all the evidence of her alleged (intellectual) insanity,—if we except that which was furnished by the act of murder. She procured a knife from the kitchen on some trivial pretence, and, while the nurse was out of the room, cut the throat of her master's infant child." (Taylor, p. 926). "She was perfectly *conscious* of the crime she had committed, she appeared to treat the act as a crime, and showed much anxiety to know whether she would be hanged or transported;" and she told her master what she had done. That case satisfied three of the medical tests for detecting homicidal monomania, laid down by Dr. Taylor, *viz.*, absence of motive, of any attempt to escape, and of any accomplice. The prisoner was acquitted, though there was no proof of the existence of intellectual insanity.

In *Reg.* v. *Burton*[3] the prisoner was convicted of the murder of his wife by cutting her throat. He had no motive for the crime. He had been previously unwell and restless at night. There was no attempt at concealment, and no expression of

(1) Med. Chir. Rev., Vol. XXVIII, p. 84.
(2) Med. Gaz., Vol. XXXVI, pp. 166, 247.
(3) Huntingdon Summer Assizes, 1848.

sorrow or remorse. The medical witness attributed the act to a sudden homicidal impulse; but the Judge dissented from this view, because the excuse of an irresistible impulse, co-existing with the *full* possession of reason, would justify any crime whatever. Dr. Taylor remarks, however, on this case, that it is highly probable that there was not full possession of reason. "No reasonable being would commit an act of this nature under the circumstances mentioned." "There appears to have been no stronger reason for convicting the prisoner than for convicting Brixey. He was nevertheless found guilty, while Brixey was acquitted." He says further: "As in *Greensmith's* case[1], there may have been delusion, springing up in the mind suddenly, and not revealed by the previous conduct or conversation of the accused."

As to *Brixey's* case[2], he says: "The existence of insanity was a pure legal fiction, based on the act committed and on the mode in which it was committed;" and the precedent furnished by it and another similar case, *Reg.* v. *Stowell*[3], was not followed in *Reg.* v. *Burton*[4]. For, commonly, a Court of law will look for "some clear and distinct proof of mental delusion or *intellectual* aberration existing previously to or at the time of the perpetration of the crime." (Taylor, page 927.) (See also the charge of Baron Rolfe in *Reg.* v. *Layton*[5] and the report of *Reg.* v. *Law*[6].)

In dealing with all such cases, as remarked in the defence of *Brixey's* case[2], "no general rules can be applied * *. Each case must be decided by the peculiar facts which accompany it." In comparing the present case, then, with the three cases to which we have referred, it is to be noted that, though a motive was assigned by the accused himself for the crime, it was altogether insufficient and unreasonable—less reasonable than in *Greensmith's* case[1]. There was no premeditation proved. The idea came to the accused probably with more suddenness than to Greensmith. As in all the three cases, there was no precaution, no concealment or attempt to escape, no sorrow or remorse. In

(1) Med. Chir. Rev., Vol. XXVIII, p. 84.
(2) Med. Gaz., Vol. XXXVI., pp. 166, 247.
(3) Med. Gaz., Vol. XLVII., 569.
(4) Huntingdon Summer Assizes, 1848
(5) 4 Cox. C. C., p. 149.
(6) 2 F. & F., p. 836.

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all the cases, the act was done without the aid of any accomplice. And, according to the views of medical writers, there would be in the present case, as in the English cases, no responsibility attaching to the accused.

It is our duty, however, to apply the principles which have received judicial recognition; and these are substantially the same here and in England. And if the legal test of responsibility, in cases of unsoundness of mind, prescribed by section 84 of the Indian Penal Code (Act XLV of 1860), be applied to the present case, it would be impossible for us to acquit the accused, unless we could hold that the fever from which he was suffering had caused delirium. (See the discussion on this subject in Chevers' Medical Jurisprudence, p. 801.)

The fever had certainly made him irritable and sensitive to sound. He was '*bhramist*', as his wife says. His thoughts were confused; but there is not sufficient evidence, as we have already said, to warrant our holding that he was not conscious of the nature of his act. And if he was conscious of its nature, he must be presumed to have been conscious of its criminality.

We must, therefore, confirm the conviction recorded by the Sessions Judge under section 302 of the Indian Penal Code (Act XLV of 1860). But this is not a case in which a capital sentence should be passed. A sentence of transportation for life will, we think, satisfy the ends of justice.

We decline to confirm the sentence of death passed by the Sessions Judge, and sentence the accused, Lakshman, son of Dagdu, to transportation for life.

We, at the same time, direct that the proceedings be forwarded to His Excellency the Governor in Council, with a copy of our judgment, and with our recommendation that Government be moved to take the case into consideration. We do not make any specific recommendation as to how the accused should be dealt with. We would only observe that there is good ground for classing the case with those of Greensmith and Brixey, as to which so high an authority as Dr. Taylor has observed that they fairly establish the occasional existence of a state of homicidal

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mania, in which the mental condition of the accused persons at the time of perpetrating the acts of murder is such as to justify their acquittal on the ground of insanity. We can, at all events, say that we have applied the law, as it stands, to the facts. The case is one where future symptoms may, perhaps, throw more light on the accused's state of mind, and possibly justify a commutation or reduction of sentence, if not pardon.

Conviction confirmed, and sentence of death commuted to one of transportation for life.

APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Jardine.

KHEMJI BHAGVA'NDA'S GUJAR, (ORIGINAL PLAINTIFF), APPELLANT, *v.* RA'MA' AND ANOTHER, (ORIGINAL DEFENDANT), RESPONDENTS.*

1886. *March* 2.

Limitation Act (XV of 1877), Arts. 132 and 147—Suit for sale of immoveable property by a creditor who has a right to realise a charge not amounting to a mortgage.

The special provision of article 147 of the Limitation Act (XV of 1877) applies to all suits properly brought by a mortgagee for foreclosure or sale, while the general provision of article 132 applies to suits for sale by a creditor having a right to realise a charge not amounting to a mortgage.

Where immoveable property is made by act of parties security for the payment of a debt, but no power of sale, without the intervention of a Court, is given to the creditor, there is no transfer to him of an interest in the property until a decree for sale has been made in his favour, and the transaction does not amount to a mortgage. When immoveable property has been so made security for the payment of a debt, there can be no foreclosure by the creditor, unless the terms of the contract admit of it.

Pestonji Bezonji v. *Abdul Rahiman*(1), *Lalubhái* v. *Náron*(2) and *Rámdin* v. *Kálkaprasad* (3) referred to.

THIS was a second appeal from the decision of C. B. Izon, District Judge of Ratnágiri, confirming the decree of Ráv Sáheb Mániklál Narotamdás, Second Class Subordinate Judge of Dápoli.

The plaintiff sued to recover Rs. 90, being the amount of principal and interest due on two bonds, (exhibits 5 and 3), dated the

* Second Appeal, No. 119 of 1884.

(1) I. L. R., 5 Bom., 463. (2) I. L. R., 6 Bom., 720. (3) L. R., 12 I. A., 12.