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In the result, therefore, I agree with my learned brother in holding that the judgment of the learned Magistrate in the Court below is right and this appeal must be dismissed.

Appeal dismissed.

R. R.

CRIMINAL APPELLATE:

Before Mr. Justice Shah and Mr. Justice Marten.

EMPEROR v. SOMYA HIRYA MAHAR.*

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March 26.

Criminal Procedure Code (Act V of 1898), section 471—Acquittal of criminal lunatic—Court can order his detention in jail—Further orders to be passed by Government.

When a criminal lunatic is acquitted under the provisions of section 470 of the Criminal Procedure Code, the Court can order under section 471 of the Code that the accused be detained in custody in the jail where he then is until the further orders of Government and that the case be reported to Government for further orders.

THIS was an appeal from the conviction and sentence passed by C. C. Dutt, Additional Sessions Judge of Khandesh.

The facts were that the accused was charged with the offence of murder. The then Sessions Judge of Khandesh (Mr. Murphy) tried him for the offence; but the trial was not proceeded with as the learned Judge was of opinion that the accused was insane. The accused was accordingly kept in the Dharwar Lunatic Asylum. When it was ascertained that he was no longer insane, he was again tried for the offence by the Additional Sessions Judge of Khandesh (Mr. Dutt). The learned Judge was of opinion that the accused was able to understand

*Criminal Appeal No. 510 of 1917.

the proceedings and making his defence. The trial went on and ended in conviction of the accused. The accused was sentenced to transportation for life.

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The accused appealed to the High Court.

The appeal was first heard by Shah and Marten JJ., when their Lordships delivered the following judgments:—

SHAH, J.:—The accused is not represented in this appeal. We have however heard a fair and helpful argument from the learned Government Pleader, and the principal point to be considered in the appeal is whether the accused is shown in this case to have been by reason of unsoundness of mind incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The accused is aged about 35 and is a Mahar by caste. The charge against him is that on the 3rd November 1916 he gave a fatal blow to his wife with an axe, as a result of which his wife died. An intimation was given to the Patil who found the accused in the adjoining room occupied by his brother. The investigation was completed practically on the same day. There is no doubt in the present case on the evidence that the accused caused the wound which resulted in the death of his wife. The accused was committed to the Court of Session on the 11th of December 1916 and when his trial commenced it was found necessary under section 464, Criminal Procedure Code, to make an inquiry as to whether he was of unsound mind and consequently incapable of making his defence. On that question both the Sessions Judge and the assessors came to the conclusion, on the 22nd of January 1917, that he was of unsound mind and consequently incapable of making his defence. Subsequently he was kept under observation, and ultimately a report was received from the

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proper authorities in September 1917 that he was of sound mind and capable of making his defence. As a result of this report, the trial of the accused was resumed on the 22nd of October 1917. The two assessors, who assisted the Additional Sessions Judge in the further trial of the accused, were divided in their opinion as to the mental condition of the accused. One of them was of opinion that the accused was not guilty as he had committed the act in a fit of insanity. The other assessor was of opinion that he was guilty though he was subject to epileptic fits and was of excitable temperament and had committed the act in consequence of the provocation. The learned trial Judge was of opinion that it was not shown in the case that at the date of the offence he was of unsound mind so as to be incapable of knowing the nature of his act.

We have considered the whole evidence in the case, and though the question is by no means free from difficulty, on the whole I have come to the conclusion that the evidence in the case is sufficient to establish that the accused was, at the date of the offence, of unsound mind and incapable of knowing the nature of his act or that he was doing what was either wrong or contrary to law. It is clear in this case that the act was done without the aid of an accomplice; there was no premeditation, and no attempt to escape, on the part of the accused. There was no indication of any remorse on his part after the act was done and no concealment. There was no such motive as could be considered adequate in the case of a sane person. Undoubtedly there were quarrels prior to this occurrence between the husband and the wife; but there is nothing to show that the quarrels had ever assumed such gravity as would operate as a fairly sufficient motive on the mind of the accused, if he were of sound mind. The evidence also shows that he was subject to epileptic fits. He

had passed a sleepless night, and in the morning he was found in such a condition on the 3rd of November that his relations thought it necessary to treat him. A quack who is examined as a witness in the case prescribed some ointment for application on his eyes. This the accused bitterly resented; still the ointment was applied. It was soon after the application of the ointment that this act was done by him. The evidence of the Patil is important as showing the conduct of the accused after he was found by him in his brother's house. He says: "Somya then began to grow excited. Supdia and another Mahar brought him on to the road, when I said to them 'bring him here'. He was in an excited state, when they brought him. Because he was too wild for the Mahars to hold him, I had him bound and put him under arrest in the Chavdi." Thus his conduct on the day, taken along with the fact that he was subject to epileptic fits and that in January 1917, that is, sometime after the date of the offence he was found to be of unsound mind and incapable of making his defence, shows that he was of unsound mind at the time of the offence, and not capable of knowing the nature of the act or that he was doing what was either wrong or contrary to law.

It was argued that the fact of an axe having been found concealed in the house of his brother is not consistent with his unsoundness of mind. I have considered the evidence of the Patil on this point. I do not think it is established that the axe was removed by the accused to the place where it was found, nor is it proved that if the axe had been washed at all, it was washed by the accused. It is quite possible that both these things may have been done if at all by his relations. The question of determining the unsoundness of mind on a particular day, as I have said, is difficult; but on the whole I do not see any sufficient ground for not

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giving effect to the inference, which the circumstance I have referred to above naturally suggests.

I would, therefore, set aside the conviction and sentence passed on the accused and acquit him of the offence, with which he is charged. But under section 471 of the Code of Criminal Procedure, I would direct that he should be detained in custody in the jail where he is at present until the further orders of the Government, and that this case should be reported to the Local Government for orders under that section. As required by section 470 I formally record my opinion that the act, which would constitute the offence but for the unsoundness of mind, was committed by the accused.

MARTEN, J. :—I agree. On the 22nd of January 1917, the then Sessions Judge, Mr. Murphy, and the two assessors all agreed in finding that the accused was then insane and incapable of pleading. That finding is in accordance with the previous opinion of the Civil Surgeon of Dhulia, Dr. Cordeiro, viz., that in the preceding December the accused was then insane. The offence was committed on the 3rd of November 1916. In my opinion having regard to these findings of the Judge, assessors and one Doctor and to the other evidence in the case as to what took place and as to the condition of the accused on or about the 3rd November 1916 it would be unsafe to convict that man of murder.

Under these circumstances I think this conviction and sentence ought to be set aside and the course taken as indicated by my brother Shah. I quite agree that it is clear that the man did the act but in my opinion he did it while insane.

THE case was accordingly reported to the Government of Bombay, under whose instructions the Chief Secretary

to Government addressed to the Court a letter of which the material paragraphs were as follows :—

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I am to request that the attention of the Honourable the Judges may be invited to the fact that sub-sections (2) and (3) of section 471 of the Code of Criminal Procedure were repealed by the Lunacy Act IV of 1912, that the last twelve words of sub-section (1) of the same section were repealed by Act X of 1914, and that Government have no power to order the lunatic to be confined in a Lunatic Asylum under section 471 of the Criminal Procedure Code. I am at the same time to invite your attention to letter No. 2060-G, dated the 28th March 1913, from the Government of India, printed in the preamble of Government Resolution No. 6484, dated the 16th of September 1913, which points out that Courts are competent to pass final orders in such cases. Reference is also invited to section 24 of the Lunacy Act. No fresh rules of the nature referred to in paragraph 3 of the above Resolution have yet been made.

I am accordingly to suggest that the Honourable the Judges should be moved to pass final orders in the matter. I am at the same time to refer to Circular No. 76-B, ordered by the Honourable the Chief Justice and Judges to be inserted in the High Court Criminal Circular Order Book.

The Circular referred to runs as follows :—

76 B. In order to accelerate the process of transferring a criminal lunatic from a jail to a more proper place of custody, it is desirable that the Court passing an order under section 471, Criminal Procedure Code, should direct that the criminal lunatic in question shall be kept in safe custody in a particular jail and shall then be transferred, after the necessary arrangements have been made, to a particular asylum or to such other asylum as may have accommodation for him.

The case was again placed before Shah and Marten JJ. for orders.

The accused did not appear.

S. S. Patkar, Government Pleader, for the Crown.

SHAH, J. :—This appeal has been set down for further orders in view of the letter received from the Government of Bombay, inviting our attention to the repeal of sub-sections (2) and (3) of section 471 of the Code of Criminal Procedure by the Lunacy Act of 1912 and of the last twelve words of sub-section (1) of the same

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section by Act X of 1914, to a letter of the Government of India referred to in the preamble of the Government Resolution No. 6484 of the 16th of September 1913, to section 24 of the Lunacy Act (IV of 1912) and to Circular No. 76B of the Criminal Circulars of this Court and asking us to pass final orders.

We have heard the learned Government Pleader in support of the view expressed in the letter. In the course of the argument the Government Pleader has pressed for an order that the appellant in this case be ordered to be transferred to the Lunatic Asylum at Thanā or such other asylum as may have accommodation for him after the necessary arrangements have been made.

After hearing the appeal on the 22nd January last, we ordered under section 471 of the Code of Criminal Procedure that the appellant be detained in custody in the jail where he then was until the further orders of the Government and that the case should be reported to the Government for orders under that section. Our order was practically final and in accordance with the provisions of the Code, except that the words "under that section" were inappropriate. It is clear that there is no reference to sub-sections (2) and (3) in our order and none was intended. The repeal of these sub-sections and of section 472 is not relevant for our present purpose.

The words "and shall report the case for the orders of the Local Government" in sub-section (1) of section 471 were repealed by the Repealing and Amending Act X of 1914. This was not brought to our notice by the learned Government Pleader at the time when we heard the appeal, and speaking for myself I was not aware of the repeal of these words, when we made the order on 22nd January.

We are obliged to the Government for having drawn our attention to it and for having pointed out the inaccuracy in the order.

But I think that the inaccuracy is verbal. The words were repealed by the Repealing and Amending Act of 1914, and in my opinion it made no substantial change in the law relating to lunatics under the Code. The powers of the Court and of the Government were not altered by the repeal of those words, and the law practically remained the same after the repeal as it was before.

It is clear that under sub-section (1) we can order the person concerned to be kept in safe custody in such place and manner as we think fit. The subsequent discharge, detention and transfer to any public lunatic asylum referred to in section 474 and the delivery of the person to a relative under section 475 are matters for the Local Government, and not for the Court to deal with. It is quite clear that we cannot exercise the powers conferred on the Local Government under sections 474 and 475.

The learned Government Pleader has not referred to any provision of the Lunacy Act to show that we can deal with those questions. It is not necessary for the purpose of this case to examine in detail the provisions of the Lunacy Act as to criminal lunatics. It is significant, however, that under section 91, sub-section (1), clauses (c) and (e), the power to frame rules for the purpose of regulating the confinement, care, treatment and discharge of criminal lunatics, and their transfer to asylums has been conferred upon the Local Government subject to the control of the Governor-General-in-Council. Apparently no rules have been framed yet by the Local Government, and we have not the advantage of having the assistance which such rules

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might afford in making the order under section 471 for the custody of the person concerned.

It is clear that the proper order to make in this case is the one which we have already made, viz., that the appellant be detained in custody in the jail subject to the further orders of the Local Government. We cannot make the order as suggested by the Government Pleader, as the medical evidence in this case shows that at the date of the trial the appellant was not insane. It would not be proper to order his transfer to any lunatic asylum. That is a matter which the Local Government will have to regulate in accordance with the information which they may receive as to the mental condition of the appellant and the rules which they may make as to the transfer of criminal lunatics to the lunatic asylums.

I am not sure that we have any power to alter the order as suggested by the Government Pleader. Assuming, without deciding, that we can modify the order, I see no reason to direct that the appellant should be transferred to the lunatic asylum at Thana.

The Criminal Circular 76B must be applied with due regard to the facts of each case. It is not intended to, and cannot, override the discretion which the Courts have under section 471, sub-section (1). I would, therefore, order that the words "under that section" be omitted and the word "further" be added before the word "orders", so that the sentence in our order may read as follows:—But under section 471 of the Code of Criminal Procedure the Court directs that he be detained in custody in the jail where he is at present until the further orders of the Government, and this case should be reported to the Local Government for further orders.

I desire to make it clear that I have altered the previous order, as I think that the alterations are merely verbal. If it had been a question of making any material alteration in the order, we should have considered whether any notice should be given to the accused before making the alteration.

MARTEN, J.—I agree. The order made by this Court on the 22nd January 1918 was as follows:—"For the reasons given in the accompanying judgments, the Court sets aside the conviction and sentence and acquits the accused of the offence charged. But under section 471 of the Code of Criminal Procedure the Court directs that he be detained in custody in the jail where he is at present until the further orders of the Government and this case should be reported to the Local Government for orders under that section. As required by section 470 the Court records its opinion that the act which would amount to an offence but for the unsoundness of mind was committed by the accused." I have taken this from the Registrar's endorsement on the record.

By a letter, dated the 20th February 1918 the Bombay Government have questioned this order and have suggested that the Court should be moved to pass what are described as final orders in the matter. In so doing they have asked that our attention should be invited to the repeal of part of section 471 of the Criminal Procedure Code, and to certain other matters mentioned in the letter.

Within a few days of this letter, the case was put down on our Board for disposal and was duly called on. Unfortunately the Government Pleader was engaged in another Court and consequently the case had to be adjourned. My learned brother and I have since been sitting in separate Courts and hence it was not till the 21st March that we were able to take up the case again.

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On that date the Government Pleader appeared to us to be without adequate instructions and hence the case was adjourned again to the 25th March. The delay therefore which has taken place is unavoidable though regrettable.

We have now heard the Government Pleader on the subject-matter of the Government letter. In the result I think that the order of the 22nd January 1918 is in substantially the proper form and that no further orders need be passed by us. I say "substantially" because I think it would be better to omit the reference to section 471 in that part of the order which speaks of reporting the case for the orders of the Local Government under section 471. The section under which Government will order whether the prisoner is to be discharged or detained in custody or transferred to a public lunatic asylum will be section 474. It is true as pointed out by Government that sub-sections (2) and (3) and part of sub-section (1) of section 471 of the Criminal Procedure Code have been repealed. But section 474 has not been repealed, and this taken in conjunction with section 471 (4) enables Government to do what may be necessary in the matter. I say this because in the letter from Government as also in the correspondence therein referred to, section 474 appears to have been overlooked. While section 474 stands, the repeals referred to in the Government letter are of little practical importance in the present case. This indeed might be assumed as regards the repeal of the last sentence of section 471 (1), for that repeal was only effected by a Statute Law Revision Act—a class of Act which is usually intended to delete unnecessary provisions and not to make substantive alterations in the Statute law.

As far as this Court is concerned, section 471 (1), as amended, is imperative. We are bound to order the

prisoner "to be kept in safe custody in such place and manner as the Court thinks fit". At the first trial, on the 22nd January 1917, the prisoner was found insane and incapable of pleading by the then Sessions Judge, Mr. Murphy, and the two assessors. At the second trial or hearing, on the 22nd October 1917, he was considered sane and capable of pleading by the then Sessions Judge, Mr. Dutt, and accordingly the trial proceeded. In his judgment Mr. Dutt said: "As far as I can make out from his behaviour in Court I think he is quite sane though there is an expression in his eyes which is not quite 'natural'". The learned Judge also referred to a report from Col. Fooks, the Superintendent of the Dharwar Asylum, to the effect that he saw no signs of insanity in the prisoner.

Whatever then was the condition of mind of the prisoner on the 3rd November 1916 when he committed the act in question or on the 22nd January 1917 when he was first tried, it would appear that by the 22nd October 1917 he had recovered his sanity. *Prima facie*, therefore, he is now sane, and accordingly I think it would be quite wrong of us to direct his detention in a lunatic asylum as has been suggested by the Government Pleader. It is surely only common sense and common humanity that a sane man should not be sent to a lunatic asylum. There is of course the possibility that though outwardly sane he is subject to occasional fits of insanity in which he may develop homicidal tendencies or that for some other reason he ought to be detained in an asylum. That will be for the medical experts to determine, and the necessary inquiry can be made by Government under section 474. But at present there is no evidence before us which would justify us in sending the man to a lunatic asylum. The Government Pleader has referred us to Criminal Circular 76B, but that Circular does not seem to me to

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apply to a case like the present where the Court on the materials before it does not consider a lunatic asylum to be a proper place of custody for the prisoner.

As regards the repeals, it is interesting to note that they have partially eluded the vigilance of the text-book writers. The 1917 Editions of Ratanlal and of Sohoni do not give the partial repeal of section 471 (1) effected by the Statute Law Revision Act of 1914. The 1914 Edition of Mayne does not notice the repeal of section 471 (2) and (3) effected by the Lunacy Act of 1912. This illustrates the practical inconvenience to legal practitioners of effecting petty amendments to an important criminal code by different Acts of a civil nature with a civil title. Nor is the situation made any simpler by the fact that though six years have passed since the Lunacy Act was enacted, no rules have been made by Government for dealing with criminal lunatics as was contemplated by section 91 of the Lunacy Act. It would, however, seem likely that the present intention of the Legislature is in effect to restore section 471 (1), (2) and (3). The present bill to amend the Criminal Procedure Code is on those lines, and the Committee have reported as follows:—"We think that when a person has once been ordered by a Court to be detained as a lunatic, the place and method of his detention and the provisions for his care, periodical examination, release, &c., should be a matter for the Local Government and not for the Courts, and we propose to amend this and the following sections on these lines." This really follows the previous practice in India as well as in England where the usual order has been to order the person in question to be kept in custody as a criminal lunatic till His Majesty's pleasure is known [see Halsbury's Laws of England, Vol. IX, p. 242, (section 515)]; Trial of Lunatics Act, 1883, (46 and 47 Vic. c. 38), section 2 (2) and Criminal Appeal

Act, 1907 (7 Edw. VII, c. 23), section 5 (4). In England, however, the prisoner has to be formally found guilty. In India he is formally acquitted under the Indian Penal Code, section 84 and the Criminal Procedure Code, section 470. But even under the Criminal Procedure Code as it at present stands, I think that under section 471 (1) and (4) and section 474 the Court is entitled to direct the prisoner to be detained pending further orders from Government.

In the result, therefore, I see no reason to modify the Court's order except as regards the verbal amendment I have already referred to, viz., to delete the words "under that section" and insert the word "further" before "orders".

I will only add that I think it was quite proper to bring the matter to our attention and that the discussion which has ensued has been a useful one.

Order accordingly.

R. R.

CRIMINAL REVIEW.

Before Mr. Justice Shah and Mr. Justice Marten.

EMPEROR v. MADHAV LAXMAN AND ANOTHER.*

Criminal Procedure Code (Act V of 1898), sections 197, 239 and 532—

Sanction to prosecute public servants—Form of sanction—Public servants conspiring to cheat three persons—Joint trial—Commitment, quashing of, after the trial has once commenced—Practice and procedure.

The two accused, the Kulkarni and the Patil of a village, conspired to cheat certain ryots of their money. Sanction to prosecute them was given by the Collector "for cheating or for such other offence with which it may be necessary to prosecute them in connection with obtaining money from ryots".

* Criminal Review No. 415 of 1917.

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April 3.