

IN THE HIGH COURT OF SINDH, KARACHI

Before:-

Mr. Justice Ahmed Ali M. Shaikh, C.J.
Mr. Justice Mohammad Karim Khan Agha, J.

C.P. No.D-822 of 2016

Petitioner: Mst. Rahila w/o Fawad Ahmed Batra
through Mr. Muhammad Ilyas Khan,
Advocate.

Respondents: NAB through its Chairman & others,
through Mr. Muhammad Altaf, Special
Prosecutor, NAB alongwith Baqa
Mohammad, I.O.

Date of hearing: 29-08-2017.

Date of order: 03-10-2017.

ORDER

Mohammad Karim Khan Agha, J:- Through this petition, the petitioner (the wife of the accused Fawad Ahmed Batra) has challenged the order dated 02.12.2015 passed by the Accountability Court No.IV Sindh at Karachi whereby the petitioner's application under S.465 Cr.PC was dismissed (the impugned order) and prayed that the same be set aside and that this court order that the case of the petitioner's husband comes within the ambit of Section 84 PPC.

2. Briefly stated the facts of the case are that the husband of the petitioner is facing trial vide Reference No. 09 of 2009 filed by the National Accountability Bureau (NAB) under the

National Accountability Ordinance 1999 (NAO) for his involvement in corruption and corrupt practices, more particularly his role in embezzling approx RS7 crore whilst he was HBL Garden branch manager through operating a parallel banking system with other co-accused who have now entered into plea bargains under the NAO, which reference is presently proceeding before the Accountability Court No. IV, Karachi and according to the special prosecutor NAB is on the verge of conclusion.

3. The petitioner's husband was arrested by the NAB on 08-05-2009 and as per record he sought admission to a psychiatric hospital on the grounds of his poor state of mental health. By order dated 26-04-2012 this court granted the petitioner's husband bail on medical grounds wherein it was held that in view of two reports of two renowned Doctors the stay of the petitioner in jail would be dangerous to his life as according to the doctors the accused/petitioner has the tendency of suicidal idea.

4. It appears that the petitioner then moved an application before the trial court under S. 465 Cr.PC which was dismissed and then challenged before this court. This court vide order dated 02-05-2011 with the agreement of the DPG remanded the matter back to the trial court for a fresh decision on the petitioner's application u/s 465 Cr.P.C. keeping in view of all the provisions which are relevant to be examined including 464 Cr.P.C. After hearing both parties and recording evidence and considering medical evidence the

trial court dismissed the petitioner's application under S.465 Cr.PC vide the impugned order which the petitioner's wife has now assailed before this court through this Constitutional petition.

5. Learned counsel for the petitioner's husband contended that at the time of commission of the offense in 2005 whilst working at the bank the petitioner's husband was of unsound mind due to mental health reasons and as such could not be tried for the commission of the offense as he in effect did not know what he was doing or that he was committing any wrong on account of his on going mental health condition. In this respect he contended that the evidence and material on record based on his hearing before the trial court under S.465 Cr.PC had shown that he was of unsound mind at the time when he committed the offense and as such S.84 PPC was applicable which meant that he could not be liable for committing any offense. He contended that the trial court in the impugned order had erred in not fully appreciating or understanding the medical evidence placed before it and as such the impugned order should be set aside and this court should find that S.84 PPC was applicable to him. In this respect he placed reliance on various medical reports and evidence of CW Prof. Mohammed Iqbal Afridi , Article 59 Qanoon-e-Shahadat Ordinance 1984 and the following authorities; **Khan Baig v. The State** (PLD 1984 Lahore 434) **State of Rajasthan v. Shera Ram alias Vishnu Dutta** (2012 SCMR 1768), **Fauqal Bashir v. The State** (1997 SCMR 239), **Munshi Khan v. The State** (1983 P. Cr. L.J. 778 [SC

(AJ&K) 1955 NUC (Madhya Bharat 5686) (V 42), **Surendra Mishra V State of Jharkhand** (SC India dated 06-01-2011) and **Archbold** (2008).

6. On the other hand learned Special Prosecutor for NAB fully supported the impugned order and emphasized that there was no medical evidence that at the time of the commission of the offense the petitioner's husband was of unsound mind and that even now he was not of unsound mind and was fully aware of the nature of the proceedings and was simply raising the S.465 issue now at this belated stage in order to wriggle out of facing the trial which was close to conclusion and as such his petition should be dismissed. In support of his contentions learned counsel for NAB placed reliance on the following authorities; **Muhammad Anwar v. The State** (2000 P. Cr.L.J. 64 (Karachi), **Walidad Khan v. The State and another** (PLD 2011 Lahore 153) and **Irfan ul Haq v. The State and another** (2012 P. Cr.L.J. 1328 (Lahore),

7. We have considered the submissions of learned counsel for the parties, case laws cited by them and carefully perused the material available on record.

8. In essence this petition revolves around whether the petitioner's husband was/is of unsound mind. In our view this aspect divides into two parts:

(a) Whether the petitioner was of unsound mind **at the time** when the offense was committed and

(b) If not, whether the petitioner is **now** of unsound mind so that he is unable to understand the nature of the proceedings and thereby is incapable of making a defense.

Turning to whether the petitioner was of unsound mind at the time when the offense was committed.

When is a person of "unsound mind"?

9. In answering Para 8 (a) and (b) above we must first define what we mean by an "unsound mind" since it is of crucial significance in terms of S.84 PPC.

10. According to **Blacks Law Dictionary** (6th Ed) "unsound mind" is defined as follows:

"Unsound mind. Non-legal term referring to one who from infirmity of mind is incapable of managing himself or his affairs. **The term, therefore, includes insane persons (see Insanity). It exists where there is an essential deprivation of the reasoning faculties, or where a person is incapable of understanding and acting with discretion in the ordinary affairs of life.** Oklahoma Natural Gas Corporation v. Lay, 175 Okl. 75, 51 P.2d 589, 582. But eccentricity, uncleanness, slovenliness, neglect of person and clothing, and offensive and disgusting personal habits do not constitute unsoundness of mind (bold added)".

11. According to **Blacks Law Dictionary** (6th Ed) "insanity" is defined as follows:

"Insanity. The term is a social and legal term rather than a medical one, and indicates a condition which renders the affected person unfit to enjoy liberty of action because of the unreliability of his behavior with concomitant danger to himself and others. **The term is more or less synonymous with mental illness or psychosis. In law, the term is used to denote that degree of mental illness which negates the individual's legal responsibility or capacity.**" (bold added)

Insanity as Defense to Crime

There are various tests used by the courts to determine criminal responsibility, or lack thereof, of a defendant who asserts the defense that he or she was

insane at the time of crime. A frequently used test as provided in Section 4.01 of the Model Penal Code is as follows: **"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law."** Under this test there must be a sufficient causal link between the defendant's mental disease or defect and his inability to control his behavior. *U. S v. Jackson*, 553 F.2d 109, 113, 179 U.S. App. D.C. 375. **This test, as defined by the American Law Institute, has been adopted (sometimes with slight modifications) by a number of states and also in most federal courts.** See 18 U.S.C.A. s 4241.(bold added)

12. According to **K.J.Aiyar Judicial Dictionary** (13thEd)

"unsound mind" is defined as follows:

"Unsound mind. The term comprehends imbecility whether congenital or arising from old age or mental aberration, resulting from disease" [See Lunatic].

13. According to **K.J.Aiyar Judicial Dictionary** (13thEd)

"Lunatic" is defined as follows:

"Lunatic. The word 'lunatic' except in the phrase 'criminal lunatic' and in relation to person detained as lunatics outside England, **shall cease to be used in relation to any person of or alleged to be of unsound mind, and the words 'person of unsound mind, 'person' patient of unsound mind', or 'of unsound mind', or such other expression as the context may require are to be substituted** in any enactment or document thereunder. (Wharion's Law Lexicon, 1976 reprint, p 613. See also Mental Health Act 1987, s 2).

The Act is intended to be exercised in respect of lunatic or a criminal lunatic. No body has case that Satyanathan is a criminal lunatic as defined in s 3(4) of the Lunacy Act is defined as an idiot or person of unsound mind. Who is a person of unsound mind? **The said words have not been defined in the Act, but those words indicate an abnormal state of mind as distinguished from weakness of mind. A man of weak mental strength cannot be called a man of unsound mind. Unsoundness of mind implies an unusual feature of the mind as has tended to make if different from the normal and has in effect impaired the man's capacity to look after his affairs**

in manner in which another person without such mental irregularity will be able to do in the matter of his own. The idea suggests some derangement of the mind. Whatever be its degree and it is not to be confused with or taken as analogous a mere mental weakness or lack of intelligence. [Abdul Kareem v. T Gopalakrishnan Nambisan 1990 CrLJ 742 (745) (Ker).

A lunatic is one who is affected by his disorder only at certain periods of vicissitudes, having intervals of reason. Madness is permanent. Lunacy and madness are spoken of as required insanity, and idiocy as natural insanity.

The definition is very wide in terms and will certainly include a schizophrenic. In the Mental Health Act 1987, expression 'lunatic' is not used, but instead, the expression 'mentally ill person' is used. [Mini v. James Koshy Alexander (1996) 1 Hin LR 294 at 296 (Mad); Usha Gupta v Santosh Kumar 1996 MPLJ 42, (1996) 1 Hind LR 233]. (bold added)"

14. According to **K.J.Aiyar's Judicial Dictionary** (13th Ed)

"Insanity" is defined as follows:

"Insanity" implies the existence of either or both of the mental conditions namely, an incapacity (i) to know the nature of the act; and (ii) to know that the act is wrong or contrary to law. [Sankaram v. State 1994 CrLJ 1173 at 1178 (Ker).

There is a clear distinction between legal insanity and medical insanity. **Legal insanity is the insanity which affects not only the cognitive faculties of the mind, which guide our actions, but also our emotions which prompt our actions and the will by which our actions are performed. It is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act or that he is doing what is wrong or contrary to law. It is this rule which is the basis of s 84 IPC.** (Kalicharan v Emperor ILR 1947 Nag. 226; Baswantrao Bajrao v. Emperor (bold added)

15 In M Illyas Khan's and Farah Khan's Medico Legal

Digest of Pakistan "insanity" is defined as follows:-

Insanity: **In law the term insanity is used interchangeably with unsoundness of mind.** This covers a wide range of synonyms lunacy, madness, mental disorder, and mental disarrangement. In this situation an individual loses the power of regulating his actions and conduct according to the rules of society in which he is moving. **Insanity is solely a legal and a sociological concept, has no technical meaning in law or in medicine and does not connote any definite medical entity. Insanity is seen to be a social inadequacy and medically it takes the form of a mental disease. Insanity implies a degree of mental disturbance so meaning and so disabling that the person may be considered from the legal point of view to be immune from certain responsibilities and may disallow him certain privileges that may require a degree of competence such as a decision to marry, make business contracts or manage property (Modi). (bold added)**

16. In Pakistan the Lunacy Act of 1912 was repealed and was replaced by the Mental Health Ordinance 2001 (Ordinance VIII of 2001) which no longer uses the word lunatic which is in line with K.J.Aiyar's aforementioned Judicial Dictionary definition which appears to reflect the Indian Mental health Act 1987 with a view to perhaps helping reduce the negative social stigma which is associated with this term. The Mental Health Ordinance 2001 provides the following definition in terms of mental illness at S. 2 (m) as set out below:

“(m). “mental disorder” means mental illness, including mental impairment, severe personality disorder, severe mental impairment and any other disorder or disability of mind and “mentally disordered” shall be construed accordingly and as explained hereunder:

(i) “mental impairment” means a state of arrested or incomplete development of mind (not amounting to severe mental impairment) which includes significant impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned and

"mentally impaired" shall be construed accordingly;

(ii) "severe personality disorder" means a persistent disorder or disability of mind (whether or not including significant impairment of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the person concerned'

(iii) "severe mental impairment" means a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned and "severely mentally impaired" shall be construed accordingly;

Explanation. - Nothing contained in clause (m), sub-clause (i), (ii) and (iii) above shall be construed as implying that person may be dealt with under this Ordinance as suffering from mental disorder or from any other form of such mental disorder defined in this section, by reason only of promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs.

17. Under the Mental Health Ordinance 2001 the courts in Pakistan in recent times have tended to give a **narrow interpretation** to these definitions under the Mental Health Ordinance 2001. For instance, in the recent Supreme Court case of **Mst Safia Bano V Home Department Government of Punjab** (PLD 2017 SC 18) it was held at P.26 Para 10 that schizophrenia in all cases was not a permanent mental disorder as to come within the definition of "mental disorder" as defined in the Mental Health Ordinance 2001 in the following terms:

"10. Thus, schizophrenia is not a permanent mental disorder, rather imbalance, increasing or decreasing, depending the level of stress. In recent years, the prognosis has been improved with drugs, by vigorous psychological and social managements, and rehabilitation. It is, therefore,

a recoverable disease, which, in all the cases, does not fall within the definition of "mental disorder" as defined in the Mental Health Ordinance, 2001".

18. However in the earlier case of **Mehran alias Muna V State** (PLD 2002 SC 92) which dealt specifically with S.84 PPC at P.96 the Hon'ble Supreme Court laid down some guidance on the **potential width** of S.84 PPC which we shall consider later in this order.

19. In considering the question of unsound mind/insanity as a defense in criminal law it is also useful to consider the various tests as mentioned in Parikh's (2006 Ed) Textbook on Medical Jurisprudence, Forensic Medicine and Toxicology (for class rooms and Court rooms) which at P.6.29 provides as under:

McNaghten Rules

The present legal test on the defence plea of insanity is based on McNaghten rules. McNaghten was an accused in a criminal case. He, while laboring under a delusion of persecution, shot Mr. Drummond, the private secretary of the Prime Minister Sir Robert Peel, at Charing Cross, London, in mistake for the latter. Evidence of insanity was led and a verdict of "not guilty by reason of insanity" was given. The public reacted adversely to the acquittal and a discussion took place in parliament. The House of Lords put certain questions to all the 14 judges in connection with this case. From the answers given by them, some rules were framed for the criminal responsibility of the insane, and they have been named after McNaghten. **According to these rules, to establish defence on the ground of insanity, it must be clearly shown that at the time of committing the act, the accused was laboring under such defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know this, that he did not know that what he was doing was wrong it must be borne in mind that the defence can be founded only on a known and nameable disease of the mind.** Lesser conditions which may prevail temporarily at the time of the act do not suffice, and these include rage, jealousy,

transient loss of control, and others including unresisted impulse.

The legal test of insanity that is accepted in India is embodied in Section 84 IPC which lays down that nothing is an offence which is done by a person who at the time of doing it is by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

With the advances in medicine, insanity is better understood now and many criminologists and psychiatrists are of the opinion that McNaghten Rules are now totally outdated and require a complete revision. Some of the States in the West have already formulated certain improvements in these rules.

Criticism of McNaghten Rules.

The primary defect of McNaghten rules is that the criterion for deciding that a person is insane is purely an intellectual one. There is no place for emotional factors of the ability of the individual to control his impulses. Medicine has now come to recognise that there is mental disorder, however partial, that does not have its repercussions throughout the rest of the affected mind. **Consequently, it is now accepted that intellectual defect means deficient emotional control. Allowance is therefore being made in some states for all such well-known phenomena as the disordered ideation of the schizophrenic, post-hypnotic and epileptic automatisms, and the overwhelming influence of affective disorders which may, for example, cause a depressed person to murder his wife or children whom he loves and whom he knows full well it is normally wrong to kill.**

Doctrine of Partial Responsibility

The doctrine is recognized in some of the states in the West. According to it, if a person who had committed a crime is suffering from some aberration or weakness of mind, though not completely insane, he is not fully but only partially responsible for his act. Thus, a charge of murder may be reduced to one of manslaughter. **This doctrine is applicable in cases of depression, obsessional states, paranoid states, and certain organic states.**

Durham Rule

In 1954, the United States Court of Appeals in the case of *Durham vs. United States* **held that an accused**

is not criminally responsible if his unlawful act was the product of mental disease or mental defect. This corresponds very nearly to the strong subjective sense that psychiatrists have of what responsibility should mean. It has an advantage over the irresistible impulse rule in that it covers acts which are the result of slowly rather than suddenly formed resolutions such as the acts of the melancholic and the paranoiac.

Currens Rule

Currens Rule (1961) postulates that an accused is not criminally responsible if at the time of committing the act he did not have the capacity to regulate his conduct to the requirements of the law as a result of mental disease or mental defect. This is similar to the irresistible impulse rule, proposed by Lord Justice Atkin's Committee in 1923 but withdrawn in 1924.

American Law Institute's Test

Under this test (1970), proof that a criminal defendant as a result of mental disease or defect lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to requirements of law now constitutes defence to a criminal charge. The test does not cover repeated criminal or otherwise antisocial acts of psychopaths.

Norwegian System

Norwegian law provides that no defendant considered insane or unconscious at the time of committing the offence may be punished. The term insane means whatever doctors at the time classify as mental illness. Thus, there is no difference between medical and legal insanity. The term unconscious includes a series of abnormal mental states characterized by peculiar conduct associated, among other things, with a total loss of memory. Many pathologic states such as hysterical or schizoid reaction, or epileptic seizure, are considered legally as predisposing the offender to a state of unconsciousness during which time he could not be considered responsible for his actions. Once insanity or unconsciousness is established as existing at the time of the crime, this is complete defence under the Norwegian law. No other element, e.g., a lack of knowledge that what he did was wrong, or a casual link between insanity and crime needs to be established. (bold added)

20. Under English law in recent times it even appears that the defense of insanity is not limited to mentally ill people

through a so called disease of the mind as is illustrated in Smith and Hogan's criminal law (13th Ed) at P.295 to 298 as under:

11.2.2.2 The test of insanity

Whatever the effect of the recent changes on procedure and disposal, **the M'Naghten Rules remain of great importance symbolically both because they provide the legal test of responsibility of the mentally abnormal and because they set a limit to the defences of automatism and, in theory, of diminished responsibility. The basic propositions of the law are to be found in the answers to Questions 2 and 3 of the M'Naghten Rules.**

the jurors ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfactions; **and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring 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, if he did know it, that he did not know he was doing what was wrong.**

It will be seen that there are two lines of defence open to an accused person (often called the two limbs):

- (1) He must be acquitted if, because of the mind, he did not know the nature and quality of his act (effectively a denial of mens rea); or
- (2) Even if he did know the nature and quality of his act, he must be acquitted if, because of a disease of the mind, he did not know it was 'wrong'.

The Rules have been heavily criticized for being over-inclusive; 'disease of the mind' has been widely construed as to include within the scope of insanity such everyday illnesses as diabetes. In addition, in some instances D qualifies for the defence even though he was responsible for his inability to appreciate the nature or wrongness of his actions. As Mackay has recently pointed out, some commentators have argued that the first limb is superfluous as anyone who did not know the nature and quality of the act must also not have known it was wrong. Others, including Glanville Williams, argued that the second limb was superfluous since anyone who did not know the nature and quality of his act must also have lacked awareness that it was wrong. The Rules are also

criticized for focus on the cognitive state of D (has he appreciated the nature or wrongness) rather than on whether D had the capacity to be held responsible or to conform with criminal regulation.

Disease of the mind

The two limbs of the Rule require separate consideration **but the first question, under either limb, is whether D was suffering from 'a defect of reason from a disease of the mind'**. If D was unaware of the nature and quality of his act for some reason other than a defect of reason from a disease of the mind (such as mistake) he will usually be entitled to a straightforward acquittal on the ground that he lacked the necessary mens rea. Moreover, in such a case the onus of proof remains on the Crown, whereas it shifts to D once he tenders evidence of a defect of reason arising from disease of the mind. If D was unaware that his act was 'wrong' for some reason other than from a defect of reason from a disease of the mind, this will generally not amount to a defence at all. **It is a cardinal principle that neither ignorance of the law, nor good motive will normally afford a defence.**

The question whether D has raised the defence of insanity is one of law for the judge. Whether D, or indeed his medical witnesses, would call the condition on which he relies, 'insanity' is immaterial. **The expert witnesses may testify as to the factual nature of the condition but it is for the judge to say whether that is evidence of 'a defect of reason, from disease of the mind', because, as will become apparent, these are legal not medical, concepts.** In the leading case of **Sullivan**, the defence to a charge of assault occasioning actual bodily harm was that D attacked V while recovering from a minor epileptic seizure and did not know what he was doing. The House of Lords held that the judge had rightly ruled that this raised the defence of insanity. D had then pleaded guilty to the charge of which he was manifestly innocent, and his conviction was upheld.

It seems that any disease which produces a malfunctioning of the mind is a disease of the mind. Commonly the insanity plea will involve mental illness. (schizophrenia being the most common, epilepsy, diabetes, sleepwalking, pre-menstrual syndrome and all physical diseases, may amount in law to a disease of the mind if they produce the relevant malfunction. The lack of correlation with medical definitions of mental illness renders this aspect of the test potentially incompatible with the ECHR (see below) where it results in D's loss of liberty or loss of private life.

It is critical to reiterate the distinction between pleas of insanity and pleas of sane automatism. **A transitory malfunctioning of the mind is not a disease of the mind when it is caused by some external factor – a blow on the head causing concussion, the consumption of alcohol or drugs, or the administration of an anaesthetic. In such cases sane automatism may be pleaded.** That 'defence' imposes no burden of proof on D and, if successful, results in a complete acquittal. **Insanity on the other hand must be proved by D (on the balance of probabilities) and results in a special verdict of not guilty by reason of insanity.** In terms of process and outcome much turns on this distinction between internal and external causes of the malfunction of the mind, yet the basis for the distinction is unsatisfactory.

In determining whether D suffers a disease of the mind, it is clear that the law considers not only D's state of mind at the time, but how it came about. Devlin J thought that the object of the inclusion of the words 'disease of the mind' was to exclude 'defence of reason caused simply by brutish stupidity without rational power; but it seems the words exclude more than that. **In Quick, D who had inflicted actual bodily harm called medical evidence to show that he was a diabetic and that he was suffering from a hypoglycemic attack at the time of the alleged offence and was unaware of what he was doing. Bridge J ruled that he had thereby raised a defence of insanity, whereupon D pleaded guilty. On appeal it was held that D's mental condition at the time of the offence was caused not by D's diabetes (an internal factor) but by his use of insulin prescribed by the doctor coupled with his failure to follow that prescription by eating after injecting insulin (an external factor). This use of the prescribed drug was an external factor and the plea of sane automatism should have been left to the jury. If D's mental condition had been caused by his diabetes the plea would have been insanity, being based on that internal factor of disease.** The case illustrates the fine line between the two pleas although the consequence of pleading them successfully is markedly different. The unsatisfactory nature of this distinction is further discussed in the next section.

Disease of the mind includes physical illnesses that manifest themselves by affecting reasoning. In Kemp, D made an entirely motiveless and irrational attack on his wife with a hammer. He was charged with causing grievous bodily harm to her with intent. D suffered from arteriosclerosis which caused a congestion of blood in his brain, leading to a temporary lapse of consciousness during which he

made the attack. It was conceded that D did not know the nature and quality of his act and that he suffered from a defect of reason but it was argued on his behalf that this arose, not from any mental disease, but from a purely physical one. It was argued that, if a physical disease caused the brain cells to degenerate (as in time, it might), then it would be a disease of the mind; but until it did so, it was said, this temporary interference with the working of the brain was like a concussion or something of that sort and not a disease of the mind. Devlin J rejected this argument and held that D was suffering from a disease of the mind. He said.

"The law is not concerned with the brain but with the mind, in the sense that 'mind' is ordinarily used, the mental faculties of reason, memory and understanding. If one reads for 'disease of the mind' disease of the brain', it would follow that in many cases pleas of insanity would not be established because it could not be proved that the brain had been affected in any way, either by degeneration of the cells or in any other way. In my judgment the condition of the brain is irrelevant and so is the question of whether the condition of the mind is curable or incurable, transitory or permanent".

In the earlier case of **Charlson**, where the evidence was that D was 'acting as an automaton without any real knowledge of what he was doing as a result of cerebral tumour. Barry J directed the jury to acquit if the defence might reasonably be true. Devlin J distinguished Charlson on the ground that there the doctors were agreed that D was not suffering from a mental disease. As this is a question of law the distinction seems unsound and in **Bratty** Lord Denning approved **Kemp** and disagreed with Charlson. Lord Denning put forward his own view of a disease of the mind.

"It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified acquittal".

Quick casts some doubt on this dictum, and it is surely right to do so. The definition might fit a diabetic, but 'no mental hospital would admit a diabetic merely because he had a low blood sugar reaction', and it might be felt to be 'an affront to common sense' to regard such a person as insane; yet the Court saw the weakness of the argument, agreeing with Devlin J that the disease might be 'curable or incurable... transitory or permanent', and the fact that the Home Secretary

might have had a difficult problem of disposal did not affect the matter. Lord Denning's dictum has also been rightly criticized on the ground that it is tautologous and that a disease of the mind may manifest itself in wrongful acts other than violence, such as theft." (bold added)

21. For the purposes of Pakistani law the case of **Mehran alias Muna V State (PLD 2002 SC 92)** at P.96 the Hon'ble Supreme Court laid down some guidance on the **potential width** of S.84 PPC in the following terms;

"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."

A bare perusal would indicate that there are four important ingredients of the said section, which are as under:--

- (a) Commission of an offence;
- (b) Unsoundness of mind;
- (c) Incapability of knowing the nature of act/offence;
- (d) Distinction between right and wrong.

5. It may be kept in view that word "insanity" has not been used in the said section but on the contrary the Legislature has chosen the word "unsoundness of mind". It is not an accidental choice but a deliberate one because an unsoundness of mind covers almost all the ailments concerning mind. The very intendment of the Legislature as manifested in the said section seems to be that provisions as contained therein should be considered in a broader spectrum. The pivotal question, however, would be as to whether the petitioner was capable enough to know the nature of the act duly committed, whether he was permanently incapable (antecedents, subsequent and past conduct, family history and medical expert's opinion are to be seen) or is incapable during certain intervals and thereafter cause/causes for permanent or temporary incapability will have to be examined which can possibly be as follows:--

- (1) Lunacy.
- (2) Idiocy/imbecility.
- (3) None compos meritis (sic)
- (4) Temporary paroxysms.
- (5) Insanity/Insane delusions.
- (6) Somnambulism.
- (7) Frantic humour and its gravity.
- (8) Maniacal trend.
- (9) Periodic epileptic fits.
- (10) Delirium tremens.
- (11) Irresistible impulsive insanity.
- (12) Obsession.
- (13) Mania.
- (14) Amentia.
- (15) Dementia.
- (16) Melancholia.

None of the above mentioned causes were ever referred by the learned counsel except that he was an insane person that too without any evidence. The plea of unsoundness of mind cannot be agitated if at the time of commission of offence accused was capable enough and can make distinction in between right and wrong. **It is also to be examined as to whether his cognitive facilities were impaired due to unsoundness of mind and if so up to what extent. It is well settled by now that "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".** If at that moment a man is found to be labouring under such a defect of reason as not to know the nature of the act he was doing or that, even if he knew it, he did not know it was either wrong or contrary to law, then this section must be applied. **In coming to that conclusion, the relevant circumstances like the behaviour of the accused before the commission of the offence and his behaviour after the commission of the offence, should be taken into consideration.**

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It may be kept in view that it is not every person suffering from mental disease that can avoid responsibility for a crime by invoking the plea of insanity. There is distinction between medical insanity and legal insanity and the Courts are only concerned with the legal and not with the medical view of the question. (Bagga v. Emperor (1931) 32 Cr.LJ1230, Emperor v. Saggan Singh (1991) 32 Cr.LJ 816). There is no cavil to the proposition that there is a clear difference between medical insanity and legal insanity. It is only legal insanity which furnishes a ground for exemption from criminal responsibility. **There can be no legal insanity unless the cognitive faculties of the accused are, as a result of**

unsoundness of mind, completely impaired. In order to constitute legal insanity the unsoundness of mind must be such as should make the offender incapable of knowing the nature of the act or that he is doing what is wrong or contrary to law. (1952) Patiala 254)".(bold added)

22. The point of setting out the above definitions and tests is to show how difficult it is to precisely determine whether a person is of unsound mind **although it appears that despite the importance of medical reports it is a question of law for the judge to decide.**

23. Whilst it seems that no hard and fast rule can be set down which defines unsoundness of mind and that each case will depend on its own particular facts and circumstances, the medical opinion of an expert medical board and the **extent** of that illness taking the various definitions/tests into account we are of the view that from a Pakistani legal perspective being of unsound mind would in **most cases** be a permanent medically recognized mental condition / impairment which was **not** self induced and which was **so severe/disabling** that the person having such illness was incapable of knowing the nature of the act or that what he was doing is either wrong or contrary to law.

24. This determination of what amounts to an unsound mind is of key significance since under S.84 PPC, which very much follows the above mentioned M'Naughten Rules (as does S.84 of the Indian Penal Code 1860 which is identical to S.84 PPC as pointed out in **Modi's, Medical jurisprudence and Toxicology 23rd Ed**) if a person is of unsound mind at

the time when the offense is committed then he cannot be held liable for committing any offense and will be entitled to be acquitted. For ease of reference S.84 PPC is set out as under:

"S. 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.(bold added)

25. It is also of significance that S.84 PPC as mentioned earlier is also identically worded to S.84 of the Indian Penal Code 1860 and as such the Indian courts interpretation of the section may also be of some assistance.

26. Thus, having come to a determination of what, in our humble opinion, is most likely to amount to an "unsound mind" for the purposes of S.84 PPC we need to consider whether the petitioner's husband was of unsound mind **at the time of the commission of the offense.**

27. If, as in this case, the accused through an application raises the plea under S.84 PPC of being of an unsound mind then the procedure to be followed by the court is set out under S.465 Cr.PC which provides as under;

S. 465. Procedure in case of person [sent for trial] before 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) The 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."

28. At the outset we would make it clear that having reviewed the record we are satisfied that the trial court fully complied with S.465 Cr.PC and in effect held a trial to see if the petitioner's husband could satisfy the court that he was of unsound mind at the time of commission of the offense or was of unsound mind now so that he was incapable of making his defense. For example, an expert medical board was constituted which produced an expert medical report on the petitioners husband's mental condition (including past history) which was considered and the Chairman of that medical board was examined by the Court and cross examined by the petitioners husband's counsel as well as counsel for the NAB in order to assist the trial court in reaching the decision of whether the petitioners husband was of unsound mind at the time of committing the offense that found through the impugned order, which is a well reasoned and speaking order and is now under challenge, that the petitioner's husband was of sound mind at the time when the offense was committed and was capable of making his defense. Thus, the requirements as set out in **Fauquial Bashar V State** (1997 SCMR 239) and **Khan Baig V State** (PLD 1984 Lah 434) were fully satisfied.

29. In our view in making this determination of whether the petitioners husband was of unsound mind at the time of committing the offense we must consider (a) any medical evidence supporting the contention of the petitioners

husband **at the time when the offense was committed** and (b) the conduct of the petitioner **at the time when the offense was committed** i.e. it is obvious/deducible from his behavior, demeanor, attitude and general conduct that he was of unsound mind bearing in mind the possibility that the petitioner's husband may be feigning his illness in order to avoid his criminal liability as alluded to in the case of **Nasir Mehmood V State** (2017 P.Cr.LJ 255 SC AJK)).

30. As alluded to above, it is for the concerned judge to decide whether the petitioner's husband was of unsound mind and the following criteria may of be assistance in this regard as was held in **Nasir Mehmood V State** (2017 P.Cr.LJ 255 SC AJK) as under at P.265

"The provisions of section 465, Cr.P.C. are mandatory in nature and omission to observe the provisions thereof would vitiate the conclusion and the result reached thereon. **There may be the cases where the accused may feign to be insane.** The section confers the power upon the Court by using the words "appears to the Court" for determining the fact that the accused is of unsound mind. **The question of unsoundness of mind of an accused is to be decided by the Court from the attending circumstances, attitude, behavior of the accused and the medical record if any,** and if from the attending circumstances, the accused appears to the Court to be of unsound mind and consequently incapable of making his defense, the Court in the first instance shall try such fact of unsoundness of mind and incapability to defend the case and determination of such fact shall proceed in the matter.(bold added)

31. However in cases such as this where a past history of mental illness exists in our view it is **incumbent** upon the court to constitute a medical board consisting of experts in the relevant field to opine through detailed reasoning whether the accused is of unsound mind and whilst not being bound

by such report use it in assisting it to reach its determination on this issue. In this respect reliance is placed on **State of Rajasthan V Shera Ram** (2012 SCMR 1768 which held as under at P.1776 Para's 19 and 20

“19. To commit a criminal offence, mens rea is generally taken to be an essential element of crime. It is said *furiost nulla voluntaus est*. In other words, a person who is suffering from a mental disorder cannot be said to have committed a crime as he does not know what he is doing. For committing a crime, the intention and act both are taken to be the constituents of the crime, *actus non facit ream nisi mens sit rea*, **Every normal and sane human being is expected to possess some degree of reason to be responsible for his/her conduct and acts unless contrary is proved. But a person of unsound mind or a person suffering from mental disorder cannot be said to possess this basic norm of human behavior.** In the case of *Surendra Mishra v. State of Jharkhand* (2011) 3 SCC (CrI) 232 : (AIR 2011 SC 627)], the Court was dealing with a case where the accused was charged for an offence under section 302, I.P.C. and section 27 of the Arms Act. While denying the protection of section 84 of the I.P.C. to the accused, the Court held as under:--

“9. In our opinion, an accused who seeks exoneration from liability of an act under Section 84 of the Indian Penal Code is to prove legal insanity and not medical insanity. Expression “unsoundness of mind” has not been defined in the Indian Penal Code and it has mainly been treated as equivalent to insanity. But the term insanity carries different meaning in different contexts and describes varying degrees of mental disorder. Every person who is suffering from mental disease is not ipso facto exempted from criminal liability. The mere fact that the accused is conceited, odd, irascible and his brain is not quite all right, or that the physical and mental ailments from which he suffered had rendered his intellect weak and affected his emotions or indulges in certain unusual acts, or had fits of insanity at short intervals or that he was subject to epileptic fits and there was abnormal behavior or the behavior is queer are not sufficient to attract the application of section 84 of the Indian Penal Code.

20. From the above-stated principles, it is clear that a person alleged to be suffering from any mental disorder cannot be exempted from criminal liability ipso facto. **The onus would be on the accused to prove by expert evidence that he is suffering from such a mental disorder or mental condition that he could not be expected to be aware of the consequences of his act.** (bold added)

32. In essence the petitioners husband's case is that he was suffering from the mental illness/disease of Biopolar at the time when he committed the offense and as such was incapable of knowing the nature of the act, or that what he was doing was either wrong or contrary to law due to this mental impairment.

33. In support of his contention learned counsel for the petitioner's husband placed reliance on a Report of under trial prisoner Fawad Ahmed (the petitioner's husband) **dated 01-04-2010 by Prof Syed Haroon Ahmed** which in essence stated that the petitioner's husband had been suffering from mental illness since 1979 and in 1991 was **tentatively diagnosed as suffering from, "Biopolar Disorder and OCD with suicidal ideation"** He was proscribed appropriate medication for his illness and followed up in 1991, 1992, fewer visits in 1993 and more visits in 1994. He was next seen in 2001 approximately 7 years later and then in 2007 approximately 6 years later and lastly in 2009 after the petitioner's husband was arrested by NAB. It was largely on the basis of this report that the petitioner's husband was granted bail on medical grounds by this court as referred to earlier in this order.

34. The medical report of Prof Syed Haroon Ahmed is set out in below in full for ease of reference.

PSYCHO-SOCIAL CENTRE

Prof. Syed Haroon Ahmed
MD. FRC Psych. (Lond) DPM
(Eng)

CONFIDENTIAL
April, 2010

Report of under trial prisoner

Mr. Fawad Ahmed (our ref # K-756)

Referred by Hon. High Court Sindh

Mr. Fawad Ahmed was examined in detail by me and psychometric test were introduced by our psychologist today.. He was first seen on 17th November 1991 with history of depression and obsessive compulsive disorder from 1979. Earlier he has had three major depressive episodes and in 1987 a manic attack for the first time. He was tentatively diagnosed as suffering from "Bipolar Disorder and OCD with suicidal ideation".

The presenting symptoms on first intake were profound depression (crying) irritability, dryness of mouth, impulse to tear off clothes and pessimistic thought, guilt about past and fear from future.

He was treated with a mood stabilizer (lithium carbonate) and antidepressant (Clomfranil).

He was regularly followed up in 1991 and 1992, fewer visits in 1993 but more frequent in 1994. At this stage he was maintained on mood stabilizer (Lithium) and anti-depressant Prozac (Fluoxetine). Regular tests for serum lithium level, kidney function (creatinine) and thyroid function (T3, T4, TSH) were carried out.

He was seen after a gap of several years on 31st August 2001 and last time on 6th March 2007 when he was taking medicine rather erratically. Besides depression he was a serious suicidal risk. Admission was advised but they disappeared.

It was 6th July, 2009 when Mrs. Fawad approached and complained her husband was arrested by NAB and he is severally depressed.

Mr. Fawad is 3rd in birth order of four siblings. After graduation he joined Habib Bank, married with children and positive family history of depression.

He was also evaluated by our psychologist and conclusion is as under:

"Mr. Fawad Ahmed Batra is a 52 years old married male, come with the Court order from jail.

After detail background history SA-45 was administered. His overall level of psychological distress or disturbance was found significant. Significant elevation ($T > 60$) were noted on Depression, Anxiety, Phobia, OCD, Somatization and Psychoticism scales.

The evaluation was consistent with clinical presumption (Major Depression Disorder)".

On current mental state examination he was found to be anxious, speaking incessantly about his depression, insomnia, negative rumination and restlessness. He complained of having several black outs. Suicidal impulses were much more severe than reported earlier.

Mr. Fawad was also very upset about the delay in trial and that he does not foresee any in near future. Hopelessness was profound.

A diagnosis of Bipolar Depressive Disorder currently in Major Depressive phase with Suicidal ideation was made. In his current mental state, and separation from family, the hopelessness is likely to damage his personality.(bold added)

Sd- 21.4.2010

Prof. S. Haroon Ahmed M.D.

35. The trial court also constituted a medical board consisting of five eminent doctors in the relevant field (Chaired by Prof Mohammed Iqbal Afridi (Head of Dept of Psychiatry JPMC) which also included Prof Syed Haroon Ahmed (who had previously treated the petitioner's husband as noted above) to examine the petitioners husband medical condition as at 18-04-2015 which was when the board was held. **The board in essence opined that the petitioner's husband had mental impairment (unsound mind) which will hinder his capability to plead before the court.**

36. The Report of the Medical Board is set out in full below for ease of reference

**Medical Board of accused Fawad Ahmed Batra
Reference No.09 of 2009.**

A meeting of the Medical Board accused Fawad Ahmed Batra was held on 18.4.2015 at 12.30 pm in the committee Room NO.1 Administration Block, JPMC, Karachi. The following consultants attended the meeting.

| | |
|--|-------------------|
| Prof. Muhammad Iqbal Afridi. Head of Department Psychiatry. | Chairman. |
| Prof. S. Haroon Ahmed M.D. Hilal-e-Ahmer Clifton, Karachi. | Member. |
| Prof. S. Masroor Ahmed Incharge Department of Medicine W-7. | Member. |
| Dr. Khalid Sher. Incharge Department of Neurology W-28. | Member |
| Dr. S. Zafar Haider. Associate Prof. Department of Psychiatry. | Member/Secretary. |

57 years Mr. Fawad Ahmed Batra smoker, non diabetic, obese was examined by the Board. He was accompanied by his wife, **came with history** of weeping spells, ideas of suspiciousness, decreased, attention and concentration, **there is history of his previous Psychiatric treatment.** There is also history of loud noises during sleep and recurrent day time attacks of sleep. There is also previous history of Alcohol use, which he left in 2006. On General examination he was found with morbid obesity, his height was 5 feet 7 inches, weight 150 kg. and his BP 160/100. There was pitting edema both lower limbs; pigmentation was found around the neck. Ophthalmoscopy was unremarkable. There was Bilateral frozen shoulders. On chest examination he was having bilateral polymorphic wheezes. **On Mental State Examination mood was depressed and there was ideas of suspiciousness against wife. He has been diagnosed as case of Bipolar Affective Disorder currently Depressed with Psychotic feature. Hypertension, sleep apnea, frozen shoulders and decreased concentration.**

Board has the opinion that the person is having mental impairment (unsound mind) which will

hinder his capability to plead before the Court.(bold added)

Sd/-
Prof. Muhammad Iqbal Afridi
Chairman

Sd/-
Prof. S. Haroon Ahmed
Member.

Sd/-
Prof. S. Masroor Ahmed
Member

Sd/-
Dr. Khalid Sher
Member

Sd/-
Dr. S. Zafar Haider
Member/ Secretary

37. Prof Mohammed Iqbal Afridi who chaired the Medical Board gave evidence as a court witness in connection with the Report of the Medical Board who confirmed the contents of the Board's medical report and its unanimous opinion.

38. During his cross examination by the learned counsel for the NAB he stated in relevant part as under;

"It is correct to suggest that accused Fawad Ahmed Batra was patient of Bipolar Affective Disorder from 1979 till 18.4.2015. It is correct to suggest that the medical board diagnoses the accused as patient of Bipolar Affective Disorder whereas Prof. Syed Haroon Ahmed in his report (Exh. 18/2) diagnoses him as patient of Bipolar Depressive Disorder. Vol. says that in our report the diagnoses were with psychotic feature. It is correct to suggest that no time duration can be fixed for the cure of Bipolar Affective Disorder and Bipolar Depressive Disorder. **It is possible that the accused Fawad Ahmed Batra would be out of symptoms of Bipolar Affective Disorder at the time of this incident.** Vol. says that can be a temporarily phase. It is incorrect to suggest that Bipolar Affective Disorder or Bipolar Depressive Disorder are not curable. Vol. says that it can be controlled by treatment. It is correct to suggest that according to the previous history of accused his disease is not completely curable but it was controlled by treatment. It is correct to suggest that Bipolar Affective Disorder is not caused by germs, bacteria and fungus of brain. It is incorrect to suggest that Bipolar Affective Disorder is caused if a person faces or receives any sudden difficulty or problem. Vol. says that this is not the only cause, this disease is also linked to the genetic factors and other environmental factors. It is correct to

suggest that Bipolar Affective Disorder is a hereditary disease. It is correct to suggest that no test of parents of accused was brought before use to determine that such disease was also found in his parent. It is incorrect to suggest that Bipolar Affective Disorder is a minor disease. **Vol. says that Bipolar Affective Disorder is a major disease of mind. It is correct to suggest that no treatment of Electro Convulsive Therapy. Anti-psychotic Depot injection and psycho surgery were detected in the previous history of accused. It is correct to suggest that the psycho patient of major disease can be provided these treatment. It is correct to suggest that the patient of Bipolar Affective Disorder can live normal life with proper treatment. It is correct to suggest that the treatment of Bipolar Affective Disorder is the same which is mentioned in Ex.18/2. There is possibility that a patient after taking these medicines/treatment can understand the matters and participate in other activities.** It is incorrect to suggest that we opined falsely that accused Fawad Ahmed Batra is a patient of Bipolar Affective Disorder. It is incorrect to suggest that I have not attached the notes of Members of the Board with the opinion produced at Ex.18/1 malafidely. **It is correct to suggest that we have not performed the forensic psychiatric assessment test of accused.** It is incorrect to suggest that our report is false and baseless"(bold added).

39. During cross examination by learned counsel for the petitioner he stated in relevant part as under;

"It is correct to suggest that without proper treatment people with Hypomania may develop severe Mania or Depression. It is correct to suggest that Simon test is the test to check intelligence of a person. Vol. says that I have never carried out such test in my department. **It is correct to suggest that the Bipolar Affective Disorder is a chronic disease and continued till death.** It is correct to suggest that Lunacy Act 1925 has been repealed by Mental Health Ordinance 2001. It is correct to suggest that word "lunatic" has been repealed by the Mental Health Ordinance 2001. It is correct to suggest that Mental Health Ordinance 2001 is broader in approach to the comprehension toward the mental illness. It is incorrect to suggest that Hallucination, loss of memory and loss of self-control are the symptoms of Bipolar Affective Disorder. Vol. says that some of them can be the symptoms of Bipolar Affective Disorder. **It is correct to suggest that the Board formed an opinion that the person (accused Fawad Ahmed Batra) having mental impairment, unsound mind which will hinder his**

capability to plead before the Court. Vol. says that keeping in mind the many disease of accused such as bipolar affective disorder with psychiatric feature, hypertension, sleep apnea, obesity frozen shoulder and decreased concentration can lead to mental impairment. **I cannot give opinion that at the time of offence what sort of mental conditions he had as we have given the opinion on examination of accused and on the basis of history and current condition.** A person with Bipolar Affective Disorder can have change of motion in his emotional and mental status depending on the treatment he is receiving. There are possibilities that a patient of Bipolar Affective Disorder can decide wrongly. It is correct that there are possibilities that a patient of Bipolar Affective Disorder continues doing an act which comes in his mind or instructed by any other person during the phase of bipolar affective disorder.”(bold added)

40. **Apart from the above referred reports and court witness no other evidence or material was placed before the trial court** whilst determining the question of whether the petitioner's husband was of unsound mind **at the time of commission of the offense.**

41. The petitioner's husband joined Habib Bank Limited (HBL) after graduation which means since he is 57 years of age as of 2015 he has been working for HBL for at least 25 years over which period he also received achievement awards. According to Dr. Haroon's report the petitioner's husband had been suffering from mental health issues, sometimes severe in nature, including tentatively a diagnosis of Biopolar Disorder (not Biopolar Affective disorder), from 1979 and was receiving appropriate medication in respect of the same right up to his arrest by the NAB and even in his after arrest report he is found by Dr. Haroon as suffering from Biopolar depressive disorder and **not** Biopolar Affective disorder.

42. There is no evidence that during his approximately 25 years service at HBL that the petitioner's husband was either hospitalized or took considerable time off work during his service at the HBL on account of his mental health problems. In fact he received performance awards and rose to the position of branch manager at HBL Garden where the offense for which he has been charged was committed. No material was produced that during his career at HBL he had acted in an unusual, bizarre or weird manner or had been warned of any late coming or early leaving which may be attributed to the effect of medication which he was taking. Even Prof. Mohammed Iqbal Afridi has admitted in his cross examination that a person having the same mental condition can lead a normal life if they are receiving the appropriate medication and treatment. It appears from Dr. Haroon's report that the petitioner's husband was receiving the appropriate medication and treatment around the time the offense was committed and that throughout his illness he was regularly attending work and carrying out his required functions and was in effect for all intents and purposes leading a normal life. Furthermore, Prof. Afridi in his cross examination stated that,

"I cannot give opinion that at the time of offence what sort of mental conditions he had as we have given the opinion on examination of accused and on the basis of history and current condition." (bold added) and

"It is possible that the accused Fawad Ahmed Batra would be out of symptoms of Bipolar Affective Disorder at the time of this incident. Vol. says that can be a temporarily phase. It is incorrect to suggest that Bipolar Affective Disorder or Bipolar Depressive

Disorder are not curable. Vol. says that it can be controlled by treatment. It is correct to suggest that according to the previous history of accused his disease is not completely curable but it was controlled by treatment".(bold added)

43. It is also relevant in our view that the petitioner's husband was involved in a complex financial fraud which caused a loss of millions of rupees over a period of time involving parallel banking and over 60 accounts which in our view tends to suggest that this was a planned and calculated act **motivated by greed** and he was not of unsound mind **at the time of commission of the offense** in 2005 at HBL where he continued working for another 4 years without any noticeable mental health problems (which indicates that his mental health problems were being kept under control through his medication and treatment) until this scam was uncovered and he was arrested by the NAB. Even a brief peep at some of the evidence recorded indicates that he was arranging with other co-accused to pay back the embezzled money and thus prima facie must have known that his acts were illegal especially as he was a seasoned banker and the fraud could not have taken place without his active involvement over a period of time.

44. Thus, taking into account the medical reports and the evidence of Prof. Mohammed Iqbal Afridi with great respect to Prof. Mohammed Iqbal Afridi, despite him being an expert falling under A.59 of the Qanun-e-Shahadat Order 1984, we do not see how it was possible for him or the medical board to independently conclude (especially as the petitioner's husband appears to have been examined by the Medical

board on only one occasion and then only for a period of approximately 1 hour and 30 minutes without any long term observation or forensic psychiatric assessment or production of notes taken at the time which seems to us a very casual approach by Dr's of such eminence bearing in mind the potential importance and significance of their opinion) that the petitioner's husband had been suffering from Biopolar affective disorder since 1979 to date since this opinion was not in the report of Prof. Haroon dated 01-04-2010 **and there is no other evidence on record to support this contention (medical or otherwise). Thus, there is no evidence on record to prove that at the time of commission of the offense the petitioner's husband by reason of unsound mind was incapable of knowing the nature of his act or that what he was doing was either wrong or contrary to law.**

45. In this respect the case of **Irfan Ul Haq V The State** (2012 P.Cr.LJ P.1328) is relevant at P.1330 Para 5 and 6 which held as under;

5. **"The learned trial court had called for the report and according to Consultant Psychiatrist, the petitioner is suffering from "Bipolar affective disorder".** This ailment connotes two different conditions of the patient. In one condition, he is a normal person but in the other, when he is under fit, loses control over his mind and may become dangerous for himself and others. Such person under fit cannot defend himself but once he is out of it, he behaves normally and rationally. In this condition he becomes conscious of his gains and losses. May be at the time of examination, he was in manic phase but his statement dated 04.11.2011 before the learned Magistrate clearly reveals that he was mentally fit and fully understood the nature of the statement made by him. He had categorically stated that with the intervention of the

respectable of the locality, the matter has been patched up and he has forgiven the accused persons of the private complaint in the name of Allah Almighty. The contention of the learned counsel for the petitioner that this statement was got recorded by the wife of the petitioner from him has no force and appears to be a lame excuse tailored to avoid the impact of the same. Under section 465 Cr. P.C. the opinion of the trial court has its own significance and it is required to try the fact of unsoundness or incapacity only if it arrives at the conclusion that the accused is of unsound mind and is incapable of making his defence.

6. The learned Additional Sessions Judge after observing the accused in the court has made observations, which cannot be brushed aside merely due to the fact that the Psychiatrist had given a different opinion as the opinion of the learned trial Court is confirmed from the sane and rational statement made by the accused. In these circumstances, the impugned order does not suffer from any illegality or infirmity. The revision petition is without merits and the same is hereby dismissed. However, if the learned trial Court at any stage of the trial is satisfied that due to recurrence of the ailment, the accused has become incapable to make his defence, it may refer him to the Punjab Institute of Mental Health, Lahore for examination by a competent board and then decide the matter afresh".(bold added)

46. It was also found in the case of **Noor uddin V State** (2014 P.Cr.LJ 113) which was a case involving schizophrenia that the initial burden of proof of the defense of insanity fell on the defense in the following terms at P.120 Para 11 which is set out as under;

"It is true that the onus of proof always remains on the prosecution and the accused is only required to show that there is a reasonable possibility of his case falling within the exception clause and the standard of proof of a plea bringing the case of an accused within the exception clause need not be similar to the degree of proof as expected of the prosecution, **yet, it is equally true that if an accused raises a defence falling within the exceptions, the burden of proving the existence of the Pakistan Penal Code is upon him and the court shall presume the absence, of such circumstances, as contemplated under Article 121 of the Qanun-e-Shahadat Order, 1984.** Reference can also be made to the above noted citation i.e. in the case

of Khizar Hayat v. The State 2006 SCMR 1755, wherein it was observed as under:--

"It is settled maxim in law, until the, contrary is proved every man is presumed to be sane and possessed of a sufficient decree of reasons to be responsible for his actions. This clearly following from Article 121 of the Qanun-e-Shahadat Order, 1984 which provides that the burden of proving that the case, of an accused person falls within an exception is on him"

12. Medical and legal standards of sanity are not identical. From the medical point of view, it is probably correct to say that act of murder by itself denotes an unhealthy and abnormal state of mind of the murderer, but from the legal point of view, he is sane as long as he can understand that his act is contrary to law. **The mere fact that at the time of examining the appellant, the Medical Standing Board found the appellant suffering from Paranoid Schizophrenia, is not sufficient to hold the appellant of unsound mind within the meaning of section 465 of the Cr.P.C. or under section 84 of the P.P.C., because queerness above is not sufficient to hold the appellant of unsound mind and incapable of making defence. In this regard, reference can be made to the case of Aurangzeb v. the State, 1971 PCr.LJ 1285, wherein it was held as under:-**

"If benefit was to be had from section 84, P.P.C. it was necessary for the appellant to establish legal insanity in the context of reasonable doubt at the time of committing the offence. There is no material on record to establish that by reason of unsoundness of mind he was incapable of knowing the nature of his own acts or that what he had done was either wrong or contrary to law. All that appears on record is queer behavior before the occurrence. This by itself; even if we were to accept that he acted in that manner, would not throw light on his mental imbalance at the time he had committed the offence in the context of legal insanity." (bold added)

47. Thus we find that there is no evidence that **at the time of the commission of the offense** the petitioner's husband was of unsound mind and as such we find that S.84 PPC will not be applicable to him and he will not stand acquitted on that count and in this respect the impugned order is upheld.

Turning to the second issue as to whether the petitioner is *now* of unsound mind so that he is unable to understand the nature of the proceedings and thereby is incapable of making a defense.

48. It may be that at the time when the offense was committed the petitioner's husband was not of unsound mind as we have already found. However, the offense was committed in 2006 and it is now 2017 so it may well be possible that over a period of 11 years the petitioners husband's mental health may have deteriorated to the extent that he is now of an unsound mind and is unable to understand the nature of the proceedings and thereby is incapable of making a defense.

49. There are some mental illnesses such as advanced vascular dementia and advanced Alzheimer's disease which are permanent and incurable and where the accused/patient's condition gets progressively worse over the passage of time not with standing treatment and the best medication available so that the accused/patient would not be able to understand the nature of the proceedings and/or plead his defense. In such cases on a positive report to this effect from a medical board consisting of experts in the relevant field it may be that the trial needs to be postponed on account of the patient not being able to make a defense.

50. There are also cases such as this where the mental illness i.e. Bipolar Affective disorder may be permanent but may also be treated with proper medication so that the effects

of the illness/disease can be controlled so that a person can lead a normal life and would be in a position at some stage of being capable of making a defense. As stated by Prof Afridi in cross examination.

"It is correct to suggest that the patient of Bipolar Affective Disorder can live normal life with proper treatment. It is correct to suggest that the treatment of Bipolar Affective Disorder is the same which is mentioned in Ex.18/2. There is possibility that a patient after taking these medicines / treatment can understand the matters and participate in other activities"

51. Even in the recent case recent case of **Mst Safia Bano V Home Department Government of Punjab** (PLD 2017 SC 18) although concerning a stay of execution so that a person convicted of murder who was suffering from Schizophrenia could write his will the Hon'ble Supreme Court dismissed the petition, which was considered in the light of Mental health Ordinance 2001 and held as under at P.28 Para 12

"12. In the light of above discussion, we have been again perused the material placed on record, which reveals that indeed right from the stage of trial Imdad Ali, husband of the petitioner, took such plea in defence, but all the Courts discarded his plea of mental illness of the nature, which could be made basis to term him as Lunatic. **Even the medical record produced before us reveals that husband of the petitioner was all along considered as psychiatric patient suffering from paranoid schizophrenia.** Learned Division Bench in its impugned order has aptly taken into account all these relevant facts and circumstances in the light of Prison Rules, 1978 and thus rightly rejected the plea of petitioner and dismissed her petition".(bold added)

52. Indeed, in our view as was significantly mentioned in **Mst Safia Bano's case** (Supra) much would depend on the **"extent"** of the mental illness bearing in mind, in this case, the ability of the petitioners husband's to understand the

nature of the proceedings and his capability of making his defense especially keeping in view the fact that the petitioner's husband's mental state/condition can be managed through appropriate medication and treatment.

53. In this particular case, on the one hand we have a categorical report from 5 renowned experts in the relevant field which has opined that that the petitioner's husband had mental impairment (**unsound mind**) which **will hinder** his capability to plead before the court as of 18-04-2015 and a background of mental illness of the petitioner's husband stretching back to 1979. Whilst on the other hand we have evidence under oath from the Chairman of the Medical Board that a person with the mental disorder which the petitioner's husband is suffering from can lead a normal life if he is provided with the appropriate treatment and medication and there is a **possibility that a patient after taking these medicines/treatment can understand the matters and participate in other activities**. We also note that the petitioner's husband appears from a fleeting glance of the evidence to be well represented by his counsel at trial. The impugned order also indicates that on 26-10-2010 the petitioner's husband entered his plea and was present and personally instructed his counsel from time to time whilst the first 4 PW's gave evidence and is still regularly attending the proceedings and is not causing any concern/disturbance to the trial court in connection with his conduct (and he is not being kept in a psychiatric hospital) which tends to indicate that the petitioners husband at least at that time i.e. 26-10-

2010 (7 years ago) and even now was not, and is not at this point in time, of an unsound mind and was/is capable of making his defense. Thus, even if we take into account the broader approach to the definition of mental illness as set out in **Mehran alias Muna** (Supra) the severity of the petitioners husband's illness which appears to be a fluctuating condition may not prevent him from making a defense

54. We are also mindful of A.10 (A) of the Constitution, which in essence provides the right to a fair trial and is reproduced as under for ease of reference, and the need for S.465 and 466 only being pressed into service in genuine cases and not on account of feigned illnesses in order to avoid criminal liability as alleged by the prosecution in this case.

"A.10 (A). Right to fair trial. For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process."

55. Whilst fully appreciating that it is the decision of the trial court based on the medical reports and conduct and demeanor of the accused in court to make the final determination as to whether the accused is of unsound mind and understands the nature of the proceedings against him and is capable of making a defense we also note that the words used by the medical board are, "will **hinder** his capability to plead" rather than, "will **prevent** his capability to plead." And that Prof. Afridi in his cross examination has conceded that if a person takes the appropriate medication for an illness such as the petitioner's husband he can lead a

normal life and understand matters and participate in other activities.

56. In the **Concise Oxford English Dictionary** (12th Ed)

"hinder" is defined as under;

"make it **difficult** for (someone) to do something or for something to happen" (bold added)

57. In **Blacks Dictionary** (6th Ed) "hinder" is defined as;

"to obstruct or impede"

58. Thus, in terms of the "**nature and extent**" of the petitioner's husband illness in our view, and keeping in mind the findings in **Irfan ul Haq's case** (Supra) which also concerned Biopolar Affective disorder and the fact that the petitioner is not presently confined as a patient in a psychiatric Hospital on account of his illness and is in fact on the contrary regularly attending the trial proceedings and as per the trial judge seems to be understanding the nature of those proceedings, at this point in time since the petitioner's illness is being controlled through medication it has **not** reached the extent that it will **prevent** him from understanding the nature of the proceedings or **prevent** him from being incapable of making his defense which is a requirement of S.465 Cr.PC. Thus taking into account the discussion in this order from para 48 onwards this aspect of the impugned order is also upheld. Namely, that at this point in time the petitioner's husband is not of such an unsound mind so as to make it incapable for him to make his defense.

59. Thus, this petition stands dismissed however it is made clear that if in the opinion of the trial court the petitioner's husband is becoming incapable of making his defense due to a deterioration in his medical condition or another application to this effect is made to the trial court by the petitioner the trial court **may** consider seeking a medical boards opinion on whether the medical condition of the petitioner at the relevant time is **preventing him** from having the capability of making his defense. In addition since the trial of the petitioner's husband appears to be at an advanced stage with only a few witnesses left and the petitioner's husband is now the only accused we hereby direct the trial court to decide this matter within 3 months of the date of this order. A copy of this order shall be sent to the concerned trial court for compliance.

60. The petition stands disposed of in the above terms.