



PLEA OF INSANITY AS A DEFENCE

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ABSTRACT

The incentive of this research paper is to divulge both, the substance and the procedure, of insanity as a defense and the most common exhortation for its abolition or reform. Defence of Insanity has been in existence since many centuries; however, it took a legal position only since the last three centuries. We surmise that insanity as a defense ought to be perpetuated the reason being that it is basically just and that fair and sensible reforms can nostrum most of the plight's kindred with it. Our chore as a society is to set one's sight on whether "the insanity defense is morally vital". If we emphasize on the facet that it is morally vital, then furthermore we will have to clinch that insanity defense trials are orchestrated rationally, dubious verdicts are curtailed, and that the disposition of those acquitted by reason of insanity leads to the protection of society and the bona fide treatment of persons acquitted.

This paper addresses the origin of the defense and briefs the statistical analysis of this defense throughout the country. It considers an array of criticisms that are often made, but that are insubstantial. It cites few watersheds of the defense and winds up the paper by reaching on an apropos termination.

KEYWORDS: *McNaughton Rule; Insanity as Defence; Indian Penal Code-Section 84; Legal Insanity; Criminal Liability*

INTRODUCTION

"I think insanity is the hardest thing to play."

Richard C. Armitage

Plea of Insanity as a defense lays its fundamentals on the assumption that the defendant is suffering from a mental illness which makes him incapacitated of discerning the depth of the crime or differentiating right out of wrong, therefore holding him legally not accountable for crime. It being a legal concept, chiefly used in criminal cases, merely suffering from insanity is not enough, you are required to prove it via a "preponderance of the evidence", which is pretty hard to determine as well as defense.

The first known recognition of insanity as a defense to criminal charges was recorded in a 1581 English legal treatise stating that, "If a madman or a natural fool, or a lunatic in the time of his lunacy" kills someone, they can't be held accountable. British courts came up with the "wild beast" test in the 18th Century, in which defendants were not to be convicted if they understood the crime no better than "an infant, a brute, or a wild beast." Besides the fact that courts no longer use the terms "lunatic" or "wild beast," current laws allowing for the insanity defense follow a similar logic. The legal basis for insanity was codified into British law in the mid-19th Century with the McNaughton Rule, which is



used in a majority of U.S. states and other jurisdictions around the world today.¹

The Supreme court of India provides a number of judgements decipher the scope of “Unsoundness of mind under” under section 84 of the Indian Penal Code. To forestall false acquittals and convictions the burden of proving the commission of an offence beyond reasonable doubt is without exception on the prosecution. Withal, the burden to prove the existence of insanity would be on the accused. He has to prove by presenting material in front of the court which may include expert evidence, oral and other documentary evidence, presumptions, admissions or even the prosecution evidence that would satisfy that he was incompetent of knowing the nature of the act committed or having knowledge that it was contrary to law. Insanity defense remains a vexed affair though is rarely invoked in criminal trials. The use of insanity defense by John Hinckley after shooting President Ronald Reagan only to impress his then girlfriend and actress, Jodie Foster, caused a public outcry. Legal and medical commentators have divided opinions about the need for the insanity defense.

GENESIS

March 1995: Colin Ferguson, convicted for crimes cognate with a massacre in Long Island, New York, December 7, 1993. Killing six persons and injuring nineteen by opening fire with an automatic pistol on a crowded commuter train was the crime committed by him. Ferguson’s trial was marked with

controversy. He was licensed by the judge to act as his own attorney, the reason being him discharging his court appointed attorneys, who believed him to be mentally incompetent to stand a trial. Ferguson repudiated insanity defense concocted by his attorneys and argued on the fact that another enigmatic gunman had committed the shootings. His outlandish behavior in the court room appeared to gainsay the judge’s coda that Ferguson was competent to stand trial. He also asserted during his trial that he had been charged with ninety-three counts only because the crime occurred in 1993. William M. Kunstler and Ronald L. Kuby, Ferguson’s attorneys whom he discharged, had asked the judge before the trial to find that Ferguson’s paranoid and delusional state made him mentally incompetent to stand trial. But Ferguson resisted to be examined by prosecution or defense psychiatrists, weening he was not insane. Though the judge sanctioned him to stand trial, reckoning that he could decipher the nature of charges laid against him and succor in his own defense.

By 1840, most jurisdictions had refined the wild beast test to cognitive insanity and supplemented that with irresistible impulse insanity. However, in 1843, a well-publicized assassination attempt in England caused Parliament to eliminate the irresistible impulse defense. Daniel M’Naghten, operating under the delusion that Prime Minister Robert Peel wanted to kill him, tried to shoot Peel but shot and killed Peel’s secretary instead. Medical testimony indicated that M’Naghten was psychotic, and the court acquitted him by reason of insanity (M’Naghten’s Case, 8 Eng. Rep. 718 [1843]).

¹ <https://criminal.findlaw.com/criminal-procedure/insanity-defense.html> (last visited 9/10/2019, 4:55 pm)



In response to a public furor that followed the decision, the House of Lords ordered the Lords of Justice of the Queen's Bench to craft a new rule for insanity in the Criminal Law. What emerged became known as the M'Naghten Rule. This rule migrated to the United States within a decade of its conception, and it stood for the better part of the next century. The intent of the M'Naghten rule was to abolish the irresistible-impulse defense and to limit the insanity defense to cognitive insanity. Under the M'Naghten rule, insanity was a defense if at the time of the committing of the act, the party accused was laboring under such a defect of reason, from a 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. Through the first half of the twentieth century, the insanity defense was expanded again. Courts began to accept the theories of psychoanalysts, many of whom encouraged recognition of the irresistible-impulse defense. Many states enacted a combination of the M'Naghten rule, supplemented with an irresistible-impulse defense, thereby covering both cognitive and volitional insanity. The insanity defense reached its most permissive standard in *Durham v. United States*, 214 F. 2d 862 (D.C. Cir. 1954). The Durham rule excused a defendant "if his unlawful act was the product of mental disease or mental defect." The Durham rule was lauded by the mental health community as progressive because it allowed psychologists and psychiatrists to contribute to the judicial understanding of insanity. But it was also criticized for placing too much trust in the opinions of mental health professionals. Within seven years of its

creation, the rule had been explicitly rejected in 22 states. It is used only in New Hampshire.²

HISTORICAL DEVELOPMENT OF INSANITY DEFENSE IN INDIA

In ancient India, legal and moral derelictions were intermixed. The Hindu philosophy expounds that the consequences of the violation of a duty are to be borne by the person guilty of such violation. Whether the action be voluntary or involuntary, the perpetrator has to reap the consequences of his deeds without exception. The Order of Nature is self-operative against every breach or violation. Thus, whether the wrong is done in sanity or insanity, by an adult or an infant, in normal or abnormal circumstances, the perpetrator has to suffer for it. Further, one may suffer for his misdeeds either in the current life or in subsequent lives as his fate decrees. The complicated theories of fate, karma (action), regeneration and samskara, it appears, played an important role in the formulation of the theory of absolute liability. However, we find that one could amend his misdeeds by undergoing proper atonement or penance known as prayaschitta. In case where a wrong has been committed by a child who is unable to know the nature of his act and also too young to undergo any penance, the duty of atonement is cast upon his parents or guardians.³

Therefore, the available literature in ancient Indian law does not make clear whether or not the insane person is fully absolved of his criminal liability. It appears that the concept

² <https://legal-dictionary.thefreedictionary.com/Criminal+insanity> (last visited 9/10/2019, 5:25 pm)

³ Defense of Insanity in Indian criminal law, K.M. Sharma; The Indian Law Institute



of sin and the theory of absolute liability of each individual for acts committed by him did not admit of such exception. However, it is apparent that great consideration is shown in the ancient literature for the purposes of allotment of danda (punishment) or prayaschitta (penance) to an insane violator of social or moral order.

In Muhammadan law no responsibility appears to be attached to insane or imbecilic persons. Their Insanity in Muhammadan Law legal capacity, except as to acts done in lucid intervals, is affected in the same way as that of an infant without determination.⁴ The law holds such persons to be incapable of understanding and so it gives them an exemption from liability. As in the case of minority, insanity also should be pleaded on the same day; otherwise there will be no favorable presumption. This is subject to conditions that the criminal should take an oath, and his real mental state should not be incompatible with his notorious madness. Abu Yusuf taking into consideration such lack of understanding said that “the had cannot be imposed on the accused after his confession, unless it is made clear that he is not insane, or mentally troubled .. If he is free from such deficiency, he should then be submitted to the legal punishment.”⁵ It was himself of the sanity of the criminal before pronouncing judgment.

In 1971, there was an attempt by the Law Commission of India to revisit the Section 84 in their 42nd report, but no changes were made. Section 84 of IPC deals with the “act

of a person of unsound mind.”⁶ “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.” On analysis of the Section 84 IPC, the following essential ingredients can be listed. For the sake of easy understanding, the Section 84 IPC can be divided into two broad categories of, major criteria (medical requirement of mental illness) and minor criteria (loss of reasoning requirement). Major criteria (mental illness requirement) mean the person must be suffering from mental illness during the commission of act. Minor criteria (loss of reasoning requirement) mean the person is: Incapable of knowing the nature of the act or Incapable of knowing his act is wrong or Incapable of knowing it is contrary to law. Both major (mental illness) and minor (loss of reasoning) criteria constitute legal insanity. Section 84 IPC, clearly embodies a fundamental maxim of criminal jurisprudence that is, (a) “Actus non facit reum nisi mens sit rea” (an act does not constitute guilt unless done with a guilty intention) and (b) “Furiosi nulla voluntas est” (a person with mental illness has no free will).⁷

This implies that an act does not constitute a crime unless it is done with a guilty intention i.e. “mens rea.”

Hence, Section 84 IPC fastens no culpability on persons with mental illness because they

⁴ Abdur Rahim, Muhammadan Jurisprudence 244 (1958)

⁵ Abu Yusuf, Al-igrar; quoted in Qadri, Islamic Jurisprudence in the Modern World 270 (1963)

⁶ Ranchhoddas R, Thakore DK, Manohar V. Ratanlal & Dhirajlal's the Indian Penal Code. Gurgaon: LexisNexis; 2013.

⁷ Bapu @ Gajraj Singh vs State of Rajasthan. Appeal (crl.) 1313 of 2006. Date of Judgement on 4 June, 2007.



can have no rational thinking or the necessary guilty intent.⁸

STATISTICAL ANALYSIS

The data was collected from the websites of 23 High Courts of India from the official link <http://indiancourts.nic.in/>. The information was collected only from those High Courts which offered an option of free text search in their websites. The websites were searched using the keywords 'mental illness' and 'insanity', and the judgments delivered between 1.1.2007 and 31.08.17 were retrieved. Judgments delivered for criminal cases were reviewed in detail to check of its eligibility for inclusion in this study. All judgments where the perpetrator was alleged to have mental illness, and insanity defense was raised were included. Only the final judgments were included. Interim orders and bail appeals were excluded from this study. A semi-structured *pro forma* was used to gather details regarding the nature of the crime, diagnosis provided by the psychiatrist as an expert witness, documents used to prove mental illness, and the judgment pronounced by the High Court. In addition, information pertaining to the gender of the accused, the relationship of the victim to the accused, the duration between the crime and the psychiatric evaluation, and the duration between the crime and the judgment were also retrieved. Statistical analysis was done using Statistical Package for Social Sciences (SPSS) version 20 (IBM Corp, Armonk, NY, USA). Categorical data were summarized in terms of frequencies and percentages. The

verdict of the lower court, availability of documentary evidence of mental illness in the accused prior to the crime, and psychiatrists' opinion were considered to be factors that could influence the decision of the High Court. Chi-square test of independence and Fisher's exact test were performed between each of the above factors and the verdict of the High Court to assess the relationship between these variables. Out of the 23 High Courts in India, data was available for recovery from the websites of 13 High Courts. The information about a total of 102 cases which fulfilled the inclusion criteria were retrieved for detailed analysis. Kerala (31), Madras (15) and Himachal Pradesh (20) High Courts contributed 66 out of the 102 cases (approximately 65%), retrieved for evaluation. Rajasthan and Karnataka High Courts contributed nine cases each. Madhya Pradesh (Seven cases), Delhi (Five cases), Punjab (Three cases), Chhattisgarh (Two cases) and Andhra Pradesh (One case) contributed the remaining 18 cases (17% of the cases). No cases in the Hyderabad, Jammu and Kashmir or Orissa High Courts were retrieved in which the insanity plea was raised in the preceding ten years. The option of free text search for judgments was not available for Allahabad, Bombay, Calcutta, Guwahati, Gujarat, Jharkhand, Manipur, Meghalaya, Sikkim, and Uttarakhand High Courts.⁹

THE INSANITY DEFENSE PRODUCES "WRONG" VERDICTS

⁸ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4676201/#ref15> (last visited 10/10/2019, 5:50 pm)

⁹ <http://www.ijpm.info/article.asp?issn=02537176;year=2019;volume=41;issue=2;page=150;epage=154;au=Ramamurthy> (last visited 10/10/2019, 6:47 pm)



Unlike many other criteria for criminal liability, the insanity defense tests do not raise strictly factual questions. Rather, the judgment made about the defendant's mental state at the time of the crime is primarily a legal, moral, and social judgment. For example, whether the defendant fired the fatal bullet and intended to kill the victim, thus satisfying the elements of murder, are factual questions with determinate, albeit often difficult to determine, answers. By contrast, the insanity defense tests ask indeterminate questions, such as how much lack of knowledge of right and wrong or how much lack of capacity to conform one's conduct to the law a defendant must have in order to be acquitted. Of course, the legal judgment must be based on facts, but the legal test is not itself factual. The insanity defense tests prescribe the relevant behavioral continuum, but drawing the line between guilt and innocence is the task of the factfinder as the moral representative of the community. Except at the extremes, there are rarely determinate answers to such moral questions.

If there is no substantial error in the presentation of the evidence or the instructions to the jury, most insanity verdicts are presumptively reasonable. The question is one of applying community standards in light of legal precedents and there are few determinate, objectively correct, clear cases that reach the jury. The factfinder can be swayed by prejudice, or might willfully refuse to apply the test properly in the rare clear case, however this is possible with all indeterminate, morally-based criteria, and there is no reason to believe it happens disproportionately typically in insanity defense cases. Moreover, even if it could be said that an insanity verdict is wrong in some ultimate, objective sense, "wrong" verdicts

are possible in all areas of law, but they do not always lead to intemperate attempts to change fundamentally just laws. For instance, juries must occasionally acquit defendants claiming the indeterminate justification of self-defense because jurors wrongly accept the defendants' false claims that they honestly and reasonably believed their lives were in danger, yet no one consequently calls for the abolition of self-defense as a defense. The wrong or unpopular verdict argument is far too weak conceptually and proves far too much to be a legitimate reason for abolishing the insanity defense.

Some critics try to demonstrate that the insanity defense is an historical accident and thus does not deserve the veneration it receives. Although the historical evidence supports retention of the defense, its history is irrelevant in determining if the defense is morally necessary and practically workable: only ethical and sensible counterarguments can the arguments for the existence of the defense. The place of insanity and its manner of adjudication in the past criminal process is not dispositive of what its place should be and whether it can be workable today.

There are number of objections to defense of insanity which are raised frequently, (1) it produces "wrong" verdicts; (2) defendants use it to "beat the rap"; (3) it deflects attention and resources from the treatment needs of the disordered persons in jail and prison who did not raise or failed with the defense; (4) it is a historical accident; (5) it is a "rich person's defense"; (6) it is used too infrequently to justify retaining it; and (7) it requires an assessment of the defendant's past mental state, a task that is too difficult. However these objections are insubstantial. That is, either they are based on false empirical assumptions and incorrect logic or they prove



too much and thus fail to provide objections specific to the insanity defense.

BURDEN OF PROOF

Devidas Loka Rathod v. State of Maharashtra, The Supreme Court of India, in this neoteric case, ventilated the law pertaining to plea of insanity under section 84 of the Indian Penal Code, furthermore mentioned some germane judgements accentuating the law. Under section 302 and 324 of the Indian Penal Code the appellant assailed his conviction, whereby his defense was rejected by the trial court that he was of unsound mind, bringing up skimpy evidence relying on the evidence of Dr. Sagar Srikant Chiddalwar, that the appellant wasn't mentally sick and fit to face trial. The two-judge bench of the supreme court, in notion of the facts and circumstances of the case, ruled that the appellant was enfranchised to the benefit of the exception under section 84 of the Indian Penal Code in view of the fact of the preponderance of his medical condition at the time of occurrence. *"An act will not be an offence, if done by a person, who at the time of doing the same, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or what he is doing is either wrong or contrary to law."*¹⁰ Carves out as an exception under section 84 of the Indian Penal Code.

Doctrine of burden of proof in the context of the plea of insanity— That the law undoubtedly presumes that every person committing an offence is sane and liable for

his acts, though in specified circumstances it may be rebuttable. While elaborating on the doctrine of burden of proof in the context of the plea of insanity, the Apex Court made reference to the case of *Dahyabhai Chhaganbhai Thakkar v. State of Gujarat*¹¹, in which the court observed that *there is a rebuttable presumption that the accused was not of unsound mind, when he committed the crime, in the sense laid down by Section 84 of the IPC: the accused may rebut it by placing before the court all the relevant evidence oral, documentary or circumstantial, but the burden of proof upon him is no higher than that rests upon a party to civil proceedings*¹². That the onus of proof is on the accused, under Section 105 of the Evidence Act and it is not as stringent as on the prosecution to be established beyond all reasonable doubts. The accused has only to establish his defense on a preponderance of probability, after which the onus shall shift on the prosecution to establish the inapplicability of the exception.

Test to be Legal Insanity and not Medical Insanity— Legal insanity equips a good ground of defence from criminal liability while medical insanity does not. In order to establish legal insanity, the necessary elements as provided by section 84 of the Indian Penal Code must be proved. If there are sufficient medical grounds to hold that a person is suffering from insanity, it is a case of medical insanity. Legal insanity (unsoundness of mind) for the purposes of section 84, Indian Penal Code means that the defence must prove that at the time of

¹⁰ <https://www.vakilno1.com/legal-news/sc-burden-of-proof-plea-of-insanity.html> (last visited 10/10/2019, 7:15 pm)

¹¹ 1964 AIR 1563

¹² <https://www.vakilno1.com/legal-news/sc-burden-of-proof-plea-of-insanity.html> (last visited 10/10/2019, 7:15 pm)



commission of crime with which the accused is charged, because of unsoundness of mind, he did not know the nature of his act or that he was doing what was either wrong or contrary to law. The incapacity of the accused must be caused by some disease of mind and must exist at the time of commission of crime. Medically a person may be certified sane or insane as the case may be, but legally he will be held insane (of unsound mind) only if he successfully proves the requirements of the law under section 84, Indian Penal Code which will entitle him to be acquitted of the charge. If he fails to prove that, the law presumes him sane at the time of commission of the crime by him, even though medically he may have been insane at that time.¹³ The irresistible impulse test is used to establish whether, as an outcome of a mental disease or defect, the defendant was unable to control or resist his or her own impulses, thus leading to a criminal act. If so, the defendant is not guilty because of insanity. Criminal Law only punishes a man for his fault not for his misfortunes.

The Courts of India has provided many judgements explaining the scope of Unsoundness of mind according to section 84. There were various controversies regarding the ambit of defence of insanity and Courts from Time to Time have tried to interpret it.

➤ *Baswantrao Bajirao vs Emperor on 1 April, 1947*¹⁴

“All this evidence is, therefore, only relevant (if it at all suffices) to prove a mild case of medical insanity but the law makes a distinction between medical and

legal insanity. In Section 84, which summarizes the law on the subject as found in India "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." The accused has to prove this fact under Section 108, Evidence Act, and the burden is on him of proving that he did not know the nature of his act or that the action which he did was wrong or contrary to law. According to Mayne by the first is meant the prisoner's consciousness of the bearing of his act on those affected by it and by the second the prisoner's consciousness, in relation to himself, it is an admirable summary of the tests to be applied in cases of insanity. In connection with cases of homicide the special relevance of these two tests are brought out by Mayne thus: In dealing with cases involving a defense of this kind distinction must be made between cases in which insanity is more or less proved and the question is only as to the degree of irresponsibility and cases in which insanity is sought to be proved in respect of a person who for all intents and purposes appears sane. In all cases where previous insanity is proved or admitted certain considerations have to be borne in mind. Mayne summarizes them as follows: Whether there was deliberation and preparation for the act; whether it was done in a manner which showed a desire to concealment; whether, after the crime, the offender showed consciousness of guilt, and made efforts to avoid detection; whether, after his arrest, he offered false excuses and made false statements. All facts of this sort are material, as bearing on the test which

¹³SN Mishra Prof.; Indian Penal Code; Central Law Publication; 20th Edition; 2016; 200

¹⁴ 1949 CriLJ 181



Bramwell, B. submitted to a jury in such a case: "would the prisoner have committed the act if there had been a policeman at his elbow? It is to be remembered that these tests are good for cases in which previous insanity is more or less established."

➤ Kamala Singh v State on December, 1954¹⁵

"M'Naughton's case, stands by itself. It is the famous pronouncement on the law bearing on the question of insanity in cases of murder. It is quite exceptional and has nothing to do with the present circumstances. In M'Naughton's case, the onus is definitely and exceptionally placed upon the accused to establish such a defense. See -- 'Rex v. Oliver Smith', (1910) 6 Cr App R 19 (F), where it is stated the only general rule that can be laid down as to the evidence in such a case is that insanity, if relied upon as a defense, must be established by the defendant. But it was added that all the Judges had met and resolved that it was not proper for the Crown to call evidence of insanity, but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel to be used by him if bethought fit".

➤ Hari Singh Gond v. State of Madhya Pradesh¹⁶

The Supreme Court observed that Section 84 sets out the legal test of responsibility in cases of alleged mental insanity. There is no definition of 'mind soundness' in IPC. However, the courts have mainly treated this expression as equivalent to insanity. But the

term 'insanity' itself does not have a precise definition. It is a term used to describe various degrees of mental disorder. So, every mentally ill person is not ipso facto exempt from criminal responsibility. A distinction must be made between legal insanity and medical insanity. A court is concerned with legal insanity, not medical insanity.

➤ Surendra Mishra v. State of Jharkhand¹⁷

"Every person suffering from mental illness is not ipso facto exempt from criminal liability." was highlighted.

➤ Srikant Anandrao Bhosale v. State Maharashtra¹⁸

In determining the offence under section 84 of the Indian Penal Code, the Supreme Court held that, "it is the totality of the circumstances seen in the light of the recorded evidence' that would prove that the offence was committed". Also "the unsoundness of mind before and after the incident is a relevant fact" was added. At the time of the commission of the crime unsoundness of mind must exist. The foremost thing that the court should consider is the fact that while the crime was being committed the accused was of unsound mind and it is the duty of the accused to establish it. Section 84 of the Indian Penal Code does not use the word "insanity".

➤ Rattan Lal v. State of M. P¹⁹

It was well established by the court that the crucial point of time at which the unsound mind should be established is the time when the crime is actually committed and whether the accused was in such a state of mind as to

¹⁵ AIR 1955 Pat 209, 1955 CriLJ 825

¹⁶ AIR 2009 SC 31

¹⁷ (2011) 11 SCC 495

¹⁸ 26 September, 2002

¹⁹ 1971 AIR 778, 1971 SCR (3) 251



be entitled to benefit from Section 84 can only be determined from the circumstances that preceded, attended and followed the crime. In other words, it is the behavior precedent, attendant and subsequent to the event that may be relevant in determining the mental condition of the accused at the time of the commission of the offense but not those remote in time.

➤ *Kamala Bhuniya v. West Bengal State*²⁰

The accused was tried for her husband's murder with an axe. A suit was filed against the accused, she alleged to be insane at the time of the incident, the investigating officer recorded at the initial stage about the accused's mental insanity. The prosecution's duty was to arrange for the accused's medical examination, it was held that there was no motive for murder. The accused made no attempt to flee, nor made any attempt to remove the incriminating weapon. Failure on the part of the prosecution was to discharge his initial responsibility for the presence of mens-rea in the accused at the time of the commission of the offence. The accused was entitled to benefit from Section 84. And hence accused was proved insane at the time of the commission of the offence and was held guilty of Culpable Homicide and not of Murder.

CONCLUSION

Plea of insanity has always been a part of the fabric of criminal law. It is sporadically used, but success is even more rare, and its victorious use predominantly brings with it, obtrusive costs to the pleader, both in terms

of stigma and length of institutional stay. Insanity defense still remains a prisoner both behavioral as well as empirical myth, albeit these myths bear virtually no resemblance to reality these exemplify the public's perception of the defense as well as the plea. As of now it is pretty dithering if any other area of criminal law is more abysmally understood.

If we hate and fear crazy criminals too much and mistrust the release decisions of both mental health professionals and lay factfinders, we might decide to abolish the insanity defense or never to release those judged insane because we cannot be sure they are no longer disordered or dangerous (assuming the constitutionality of such a practice). If so, let us openly confront the injustice of the convictions or of the unnecessary and massive preventive detention of individuals wrongly held that will inevitably occur. If the real reason we do not wish to release those judged insane is an underlying desire to punish them, let us confront our hypocrisy and abolish the defense.

The cost to our society of valuing liberty so highly is that it increases the danger to us all, but we believe that the benefits of our freedom are worth the costs. Some released insanity acquitters', like many released convicts, will commit awful crimes again, but the number of the former will be small and their recidivism often will not be linked to mental disorder. We do not mean to minimize the difficulties in deciding whom to acquit or release, or the outrages that may be perpetrated by some released insanity acquitters. But the insanity defense is not responsible for the ghastly crime rate in our society, and, as a group, released insanity

²⁰ 2006 (1) CHN 439, 2006 CriLJ 998



acquitters probably are not a substantial danger to society. Convicting and imprisoning not responsible, insane persons, or keeping all persons acquitted by reason of insanity incapacitated for life, will not make anyone appreciably safer. Societal safety will be enhanced far more if a higher percentage of those convicted of serious crimes serve the prison time that they deserve. Unlike insanity acquitters', these dangerous criminals account for a very high proportion of social danger, which their increased incapacitation would substantially reduce.

We should not abolish the insanity defense unless we truly believe that every perpetrator of a criminal act deserves to be punished, no matter how crazy. If we do not believe this, and we do not see how we can, then we must retain the defense.

