

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

MONDAY, THE 26TH DAY OF JUNE 2023 / 5TH ASHADHA, 1945

CRL.MC NO. 428 OF 2023

AGAINST THE ORDER DATED 4.1.2023 IN CMP.NO.93/2022 IN SC NO.

789/2018 OF FAST TRACK SPECIAL COURT, (POCSO) KUNNAMKULAM

PETITIONER/PETITIONER/ACCUSED:

XXXXXXXXXX
XXXXXXXXXX XXXXXXXXXXXX

BY ADVS.SRI.JOSEPH GEORGE
P.K.HASSANKUTTY
P.A.REJIMON

RESPONDENT/COMPLAINANT (STATE):

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM PIN - 682031.

BY PP.SRI.G SUDHEER

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 26.06.2023, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

"C.R."

ORDER

The order dated 4.1.2023 passed by the Special Judge, Fast Track Special Court, Kunnamkulam in C.M.P.No.93/2022 in S.C.No.789/2018, an application filed under Section 328 of Cr.P.C., is under challenge in this Crl.M.C. The petitioner is the accused in the Sessions Case. He faces charges under Section 377 of IPC and Sections 9(m) & 9(n) r/w Section 10 of the Protection of Children from Sexual Offences Act.

2. The petitioner filed the application under Section 328 Cr.P.C. through his wife stating that he is suffering from Bi-polar Disorder with depression and suicidal tendency and, therefore, he is incapable of making his defence. The petitioner relied on Annexures 3 to 6 medical documents to substantiate his contentions. The petitioner also pleaded that as he was undergoing treatment for demyelination from 2014 onwards, he is not fit to stand for trial.

3. The Special Judge, after considering the material placed before it, found that the petitioner failed to establish that he is of

unsound mind and consequently incapable of making his defence. The Court held that he has been prosecuting the case properly and there is no requirement for conducting an inquiry under Section 328 of Cr.P.C.

4. Heard Shri.Joseph George, the learned counsel appearing for the petitioner, the learned Public Prosecutor and Shri.V.Ramkumar Nambiar, the learned Amicus Curiae.

5. The learned counsel for the petitioner submitted that the Court below had not perused the material to prove the mental illness and the incapacity of the petitioner to make his defence placed before it. It is further submitted that the learned Special Judge ought to have referred the petitioner for examination by a Civil Surgeon as contemplated in Section 328 of Cr.P.C. The learned counsel for the petitioner contended that the Court was not an expert in determining the mental status of the accused and analysing the medical reports pertaining to the mental illness produced from the side of the defence. The learned counsel also relied on Section 105 of the Mental Healthcare Act, 2017, to contend that the matter should have been referred to the Board concerned.

6. The learned Amicus Curiae, relying on Section 105 of the Mental Healthcare Act, 2017, submitted that it was mandatory on the

part of the Court to refer the matter for further scrutiny to the Board concerned and based on the opinion of the Board or the Committee of the experts, as the case may be, the Court should decide whether the trial of the person could be proceeded or not and on the manner of protection, care and treatment that should be afforded to such persons. The learned Amicus Curiae submitted that apparently such an exercise has not been undertaken by the Court below, and therefore, interference of this Court is warranted.

7. The learned counsel for the petitioner relied on Annexures 3 to 6 medical records in support of the contention of the petitioner that he is incapacitated to make his defence due to mental illness. The trial Court had considered Annexures 3 to 6 medical records while disposing of the petition filed under Section 328 Cr.P.C. In the discharge summary dated 20.1.2015 (Annexure 3) issued from Jubilee Mission Medical College & Research Institute, Thrissur, the summary of the treatment given to the petitioner is stated as follows:-

"47 year old male, a suspected c/o demyelination/ gliomatosis cerebri, presented with h/o weakness of right lower limb, difficulty in walking, visual disturbances of 3 days duration. Was previously admitted with similar complaints of right side and slurring of speech in October 2014-MRI then showed lesions in right thalamus internal capsule and splenium of corpus callosum ? Demyelination / ? gliomatosis cerebri. Repeat MRI taken during this admission showed clearance of right sided lesions, fresh lesions in left thalamus

pons and gangliocapsular area. Lumbar Puncture was done-send for routine investigations-normal. CSF Oligoclonal bands, Sr.Anti NMO antibody sent-report awaited. Was treated with pulse methyl prednisolone for 5 days. Showed improvement. Patient is being discharged on tapering dose of steroids."

8. In the discharge summary dated 1.11.2024 (Annexure 4) , issued from Jubilee Mission Medical College & Research Institute, Thrissur, the summary of treatment given to the petitioner is stated as follows:-

"This 47 year old male admitted with complaints of slurring of speech since 2 weeks, weakness of Left upper and lower limbs since 1 week. Clinical improvement and possibly related to alcoholic. Neurosurgery opinion obtained. To report back if any problems. He was treated with supportive measures and symptomatically. Now the conditions improved and discharged."

9. In the treatment records marked as Annexure 5, it is stated that the petitioner is preoccupied with thoughts, sadness, fatiguability, lack of confidence, lack of interest in going for job. Annexure 6 treatment records show that he has been expressing suicidal ideas and that he is always preoccupied with thoughts, gloomy and not doing anything at home. In Annexure 6, it is further reported that he has been consulting a Psychiatrist.

10. The statutory scheme (Sections 328 and 329 of Cr.P.C.) contemplates the procedure to be followed when the Court deals with an accused person of unsound mind. Section 328 of the Code provides

the procedure to be followed in case of the accused being a lunatic. Under Sub-section (1), when a Magistrate holding an inquiry has reason to believe that the person, against whom the inquiry is to be held is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness of mind, and shall cause such person to be examined by the civil surgeon of the district or such other medical officer as the State Government may direct, and thereupon shall examine such surgeon or other officers as a witness, and shall reduce the examination to writing. Sub-section (2) provides that pending such examination and inquiry, the Magistrate may deal with such person in accordance with the provisions of Section 330 of Cr.P.C. Sub-section (3) provides that if the Magistrate is of the opinion that the person referred to in Sub-section (1) is a person of unsound mind and consequently, incapable of making his defence, he shall record a finding to that effect and shall postpone further proceedings in the case. Section 329 of Cr.P.C. provides the procedure in case of a person of unsound mind tried before Court. Under sub-section (1), if at the trial of any person before a Magistrate or Court of Session, it appears to the Magistrate or Court that such person is of unsound mind and, consequently, incapable of making his defence, the

Magistrate or Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Magistrate or Court, after considering such medical and other evidence as may be produced before him or it is satisfied of the fact, he or it shall record a finding to that effect and shall postpone further proceedings in the case. Section 331 provides the procedure for resumption of inquiry. If the accused is found not fit for trial under Section 328 or 329, under Sub-section (1), whenever an inquiry or a trial is postponed under Section 328 or Section 329, the Magistrate or Court, as the case may be, at any time after the person concerned has ceased to be of unsound mind, resume the inquiry or trial, and require the accused to appear or be brought before such Magistrate or Court. Under Sub-section (2), when the accused has been released under Section 330, and the sureties for his appearance produce him to the officer whom the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence. Therefore, when in the committal proceedings, the learned Magistrate finds materials or circumstances to doubt the capacity of the accused to stand for trial, he is bound to proceed as provided under Section 328. If the Magistrate has reason to believe that the accused produced before

him is of unsound mind, and consequently, is incapable of making his defence, the Magistrate shall cause that accused to be examined by the civil surgeon or such Medical Officer as the State Government directs. The Magistrate shall inquire into the fact of such unsoundness of mind and shall examine the said surgeon or Medical Officer. If, on such inquiry, the Magistrate is satisfied that the accused is of unsound mind and therefore incapable of making his defence, he shall record a finding to that effect. He shall then postpone the further proceedings in the case. The Magistrate can proceed with the case only if, on conducting the inquiry, he is satisfied that the accused is not of unsound mind and consequently not incapable of making his defence. If he records a finding under sub-section (3), that the accused is incapable of making his defence consequent to the unsoundness of mind and postpones the further proceedings in the case, he shall then proceed as provided under section 331 of the Code. [vide: **Ajit Kumar v. State of Kerala (Crl.A.No.957/2008) (2013 (1) KLT SN 55 (C.No.46))**].

11. Section 105 of the Mental Healthcare Act, 2017 deals with the procedure to be followed in a judicial process where any proof of mental illness of a person is produced. Section 105 reads thus:-

"105. Question of mental illness in judicial process.- If during any judicial process before any competent Court, proof of mental illness is produced and is challenged by the other

party, the Court shall refer the same for further scrutiny to the concerned Board and the Board shall, after examination of the person alleged to have a mental illness either by itself or through a committee of experts, submit its opinion to the Court.”

12. In **Vivian Rodrick v. State of West Bengal [(1969) 3 SCC 176]**, the Supreme Court observed that if a doubt arises in the mind of the Court that there is something in the demeanor of the accused which would suggest that he is of unsound mind and consequently incapable of making his defence, it is obligatory on the Court to try the fact of such unsoundness of mind and incapacity of the accused. Whenever a counsel raises a point before a Sessions Judge regarding the unsoundness of mind, he does not always have to hold an elaborate inquiry into the matter. If, on examining the accused, it does not appear to him that the accused is insane, it is not necessary that he should go further and send for and examine medical witnesses and other relevant evidence. Of course, if he has any serious doubt in the matter, the Sessions Judge should hold a proper inquiry [Vide: **I.V.Shivaswamy v. State of Mysore (AIR 1971 SC 1638)**].

13. In **Prakash Nayi alias Sen v. State of Goa (2023 SCC OnLine SC 93)**, the Apex Court held thus:-

“15. Chapter XXV of the [Code of Criminal Procedure 1973](#) (hereinafter ‘Cr.P.C.’), though procedural in nature, also becomes substantive when it deals with an accused person of

unsound mind. A well-laid procedure is contemplated under Sections 328 to 339 of Cr. P.C. There is not even a need for an application under Section 329 of Cr. P.C. in finding out as to whether an accused would be sound enough to stand a trial, rather it is the mandatory duty of the Court. Under Section 330, the Court can even go to the extent of discharging such a person if his inability to stand trial continues with a rigid chance of improvement. As per Section 334 of Cr. P.C., the judgment of the Court shall include a specific finding that the act was committed due to unsoundness of mind, though it was actually done. The reason is simple as there cannot be an acquittal on the ground of unsoundness of mind unless the act is actually done.

16. The whole idea under the provisions discussed is to facilitate a person of unsound mind to stand trial, not only because of his reasoning capacity, but also to treat him as the one who is having a disability. The role of the Court is to find the remedial measures and do complete justice."

(emphasis supplied)

14. In **Babu Valleriyan v. State of Kerala (2019 (1)**

KHC 852), this Court, while dealing with the salutary intention to follow the provisions of Sections 328 and 329 of Cr.P.C. held thus:-

"9. The primary objective of the law of Criminal procedure is to ensure that accused persons are granted a fair trial. The right to be informed of the accusation and an opportunity to prefer defence is granted to the accused by the Code. The accused is also having a right under Section 303 of the Code to be defended by a pleader of his choice.

10. An accused, who is of unsound mind at the time of the enquiry or trial, may not be able to comprehend the gravity of the charges levelled against him. He certainly would not be in a position to explain the alleged criminal conduct. The accused being the alleged perpetrator of the crime would be the person having the best knowledge of his own activities in relation to the incriminating circumstances. If, due to unsoundness of mind, he is unable to provide this vital information to his counsel, his defence cannot be conducted to his best advantage. If the inquiry or trial is proceeded with in his absence, the accused will not be in a position to impart

instructions to his counsel to enable him to effectively cross examine the witnesses. He would also not be in a position to explain the incriminating circumstances which emanates from the prosecution evidence when he is questioned under Section 313 of the Code. It is for these reasons that provisions have been incorporated in the Code which lays down that the inquiry proceedings or trial of a person, who is incapable of defending himself due to unsoundness of mind, be postponed till he is able to understand the proceedings. The salutary intention being to ensure that an accused incapacitated due to unsoundness of mind is not denied his basic human right to a have a fair trial."

15. In **Sanjay Singh v. State of Uttarakhand (2022 SCC OnLine Utt 560)**, a Division Bench of the Uttarakhand High Court highlighted the mandatory requirement to follow Section 105 of the Mental Healthcare Act, 2017.

16. The petitioner had produced medical reports before the Court below to substantiate that he was incapable of making his defence due to mental illness. Under Sections 328 and 329 of Cr.P.C. the Sessions judge had the onerous responsibility to hold an inquiry regarding the soundness of the accused's mind and his consequent incapacity to make his defence. Under Section 105 of the Mental Healthcare Act, if any proof of mental illness is produced and is challenged by the other side, the Court shall refer the same for further scrutiny to the Board concerned, and the Board shall, after examination of the person alleged to have a mental illness, either by itself or through a committee of experts, submit its opinion to the Court. The

opinion of the Board referred to in Section 105 of the Mental Healthcare Act shall form the foundation of the decision of the Court on the question whether the trial in respect of the person could be proceeded with or not. In the present case, apparently, the learned Sessions Court neither has followed the provisions of Section 328 or Section 329 Cr.P.C. nor the mandate of Section 105 of the Mental Healthcare Act.

17. The concept of “fair trial” is an insegregable facet of Article 21 of the Constitution. Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism. Fair trial is the main object of criminal procedure, and such fairness should not be hampered or threatened in any manner as it entails the interest of the accused, the victim, and of society (Vide: **Rattiram v. State of M.P. [(2012) 4 SCC 516]**,).

18. A fair trial demands the matter be reconsidered by the trial Judge. Therefore, the order dated 4.1.2023 in C.M.P.No.93/2022 in S.C.No.789/2018 is set aside. The trial Court shall reconsider the matter and proceed further in accordance with law, strictly following the

procedure contemplated in Chapter XXV of the Code of Criminal Procedure and Section 105 of the Mental Healthcare Act, 2017.

19. The Crl.M.C. is allowed as above.

20. This Court places on record its appreciation to the learned Counsel Sri.V.Ramkumar Nambiar, for his valuable assistance as Amicus Curiae.

Before parting with this case, I would wish to consider the suggestion of the learned Amicus Curiae to direct the competent authorities to impart training to the Police Officers in the Mental Healthcare Act. The State Police Chief will ensure that the Police Officers in all the Police Stations in the State are sensitized to the relevant provisions of the Mental Healthcare Act, 2017 so as to ensure proper, prompt and effective compliance with the provisions, which would pave the way for ameliorating the grievances of the mentally ill persons.

Sd/-
K.BABU
Judge

TKS