IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.08.2020

PRONOUNCED ON: 04.09.2020

CORAM:

THE HON'BLE Mr. JUSTICE P.N. PRAKASH

Crl.O.P.No.4993 of 2018 and Crl.M.P.Nos.2485 & 2486 of 2018

Kaliyappan
S/o.Muniyappan
Aanurpatty
Nangavalli Taluk
Salem District
Represented by his father
Muniyappan ... Petitioner

vs.

State represented by
The Inspector of Police
Deevattipatti Police Station
Salem District
(Crime No.126 of 2006) ... Respondent

Criminal Original Petition filed under Section 482 Cr.P.C. to postpone the trial in connection with S.C.No.123 of 2008 on the file of the III Additional District and Sessions Court, Salem, till the accused is capable of entering the defence or mentally sound to face the trial as contemplated under Section 84 IPC and Sections 328 and 329 Cr.P.C.

For petitioner	Mr.S.Sivakumar
For respondent	Mrs.P.Kritika Kamal Government Advocate (Crl.Side)
Amicus Curiae	Mr. Sharath Chandran

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ORDER

This case was taken up through video conferencing.

2. On 12.05.2006, Kaliyappan, who was presumably suffering from some mental illness, was taken by his father Muniyappan, to a native doctor, Varadha Naickar in Mulluchettipatti Forest, Omalur Taluk, Salem, for the purpose of treatment. While he was being examined by the said doctor, Kaliyappan ran away hollering that he does not need any treatment. Muniyappan ran behind his son, accompanied by others, exclaiming "Catch him". Responding to this call, one Kondaiyan, who was grazing his cattle nearby with a billhook in hand, tried to apprehend Kaliyappan. Infuriated at that, Kaliyappan is said to have snatched the billhook from Kondaiyan and attacked him indiscriminately, which eventually proved fatal.

3. On these allegations, a case in Crime No.126 of 2006 was registered for the offence under Section 302 IPC against Kaliyappan. According to the police, they arrested him on 13.05.2006 and sent him to judicial custody. While Kaliyappan was in custody, the District Munsif-cum-Judicial Magistrate, Omalur, passed an order dated 07.07.2006 (D.No.1469 of 2006), directing that Kaliyappan should be examined by specialists in the Institute of Mental Health (IMH), Kilpauk, Chennai – 10. Accordingly,

Kaliyappan was admitted as an in-patient in the IMH, Kilpauk, on 25.08.2006 and was given treatment for his mental illness.

4. Since the police did not file final report within 90 days, the counsel for Kaliyappan filed a petition for statutory bail under Section 167(2) Cr.P.C., in which, the District Munsif-cum-Judicial Magistrate, Omalur, passed the following order on 30.08.2006:

> "Order pronounced.
>
> This petitioner filed the bail application under Section 167(2) Cr.P.C. on the ground that the accused is in judicial custody for more than the statutory period. Charge sheet not yet filed. It is an offence under Section 302 IPC. The accused is in judicial custody from 13.05.2006. Since the accused is under judicial custody for more than 90 days and filed bail application under mandatory provision under Section 167(2) Cr.P.C., bail is granted. The accused is of unsound mind. Hence, the accused will be released on bail on executing a bond by the parent/guardian who undertook to give medical treatment to the accused for a sum of Rs.5,000/- along with two sureties for a like sum, the accused will be enlarged on bail. Since the accused is of unsound mind and is on medical care, no condition is imposed. The parent/guardian has to look after the accused carefully and give proper medical treatment and should produce the accused whenever required by the Court."

5. At this juncture, it may be relevant to extract the observation report dated 08.02.2007 that was submitted by the IMH, Kilpauk, to the District Munsif-cum-Judicial Magistrate, Omalur, as that would clearly throw light on the mental condition of Kaliyappan while he was in judicial custody.

> "Mr. Kaliappan, S/o Muniappan sent with reception order

cited above, was admitted in Ward No.1 and was observed from 25.08.2006.

During observation, the patient has the following symptoms:

1 Decreased psychomotor activity
2 Appeared pre-occupied
3 Avoids eye to eye contact; did not have any emotional expression
4 Apathetic mood
5 Neglected self care

Based upon the above, we are of the opinion that Mr. Kaliappan is suffering from a major mental disorder schizophrenia.

He was treated till 06.10.2006. On 06.10.2006, Mrs. Perathayee and Mr. Irulappan who have executed the bail bond for the patient Kaliyappan, patient's father Muniappan and one more relative has reported. As they were desirous of continuing treatment at Psychiatric OP Government Mohan Kumaramangalam Medical College Hospital, Salem, necessary discharge advice with details were given to them and the patient was discharged on 06.10.2006 and sent with them. The original bail bond was returned to the Superintendent, Central Prison, Salem, *vide* reference No.IP Cr. No.16/W2/2006 dated 06.10.2006 of Institute of Mental Health, Chennai – 10."

6. While so, the police completed the investigation and filed a final report in P.R.C.No.15 of 2017 against Kaliyappan for the offence under Section 302 IPC before the District Munsif-cum-Judicial Magistrate, Omalur. Surprisingly, the Magistrate commenced the proceedings under Sections 207 and 209 Cr.P.C. and committed the case to the Court of Session, by order dated 03.03.2008 in P.R.C. No.15 of 2007. Even during the committal proceedings, the Magistrate did not take any steps to satisfy himself as to whether Kaliyappan was in a sound state of mind to understand the

proceedings.

7. On committal to the Court of Session, the case was taken up on file as S.C.No.123 of 2008 and the Principal Sessions Judge, Salem, framed charges under Section 506(II) and 302 IPC on 18.09.2008, questioned Kaliyappan and recorded his plea as "not guilty".

8. After framing the charges, the Principal Sessions Judge, Salem, made over the case for trial to the Additional District Court (Fast Track Court No.II), Salem. From 2008 to 2011, nothing happened in the case. When the Court decided to commence trial, the counsel for Kaliyappan filed two petitions, *viz.*, Crl.M.P. No. 4 of 2011 under Section 91 Cr.P.C. and Crl.M.P. No.7 of 2011 under Section 45 of the Evidence Act for summoning the medical records of Kaliyappan from the IMH, Kilpauk and for having him examined by a doctor to decide his mental condition, respectively. The prosecution filed a counter opposing the prayers. The trial Judge dismissed Crl.M.P. No.7 of 2011, but, allowed Crl.M.P. No.4 of 2011 and called for the records from the IMH, Kilpauk. Accordingly, the Director, the IMH, Kilpauk, by letter dated 19.10.2012, sent copies of the treatment records of Kaliyappan to the Court. On perusal of the records, the learned Judge wanted to satisfy himself as to whether Kaliyappan was mentally fit to face trial and so, he examined Dr.Sivalingam (C.W.1) on 05.11.2012.

9. Dr.Sivalingam (C.W.1), in his evidence, stated about the mental illness of Kaliyappan while he was under treatment at the IMH, Kilpauk, from 25.08.2006 to 06.10.2006, but, he had nothing to say with regard to the mental condition of Kaliyappan as on 05.11.2012.

10. It appears that the case was transferred from the file of the Additional District Court (Fast Track Court No.II), Salem, to the file of the III Additional District and Sessions Court, Salem, for trial. The III Additional District and Sessions Judge, Salem, passed an order in Crl.M.P.No.59 of 2017 in S.C.No.123 of 2008 on 30.06.2017, directing the production of Kaliyappan before a Medical Board in the Government Hospital, Salem, for medically examining him in order to determine whether he was mentally fit for facing the trial.

11. Accordingly, Kaliyappan was medically examined by Dr.N.Balasubramani, Assistant Professor, Department of Psychiatry, Government Mohan Kumaramangalam Medical College & Hospital, Salem, who submitted a report dated 31.08.2017 to the trial Court, wherein, it is stated as follows:

> "On admission, he was said to be preoccupied and idle, wandering tendency, poor self care and sometimes found to be talking and smiling to himself, on examination, he was calm and poorly communicating and speaks only few words. After 5 days of admission and treatment, his communication is improving. However, he will not be able to understand the court proceedings.

At present, he is not fit to face the trial.

He needs continuous follow up and regular treatment in Psychiatry OP once in 15 days for 3 months and again, he may be sent for re-assessment about fitness to face the trial after 3 months."

12. While so, fearing that the trial Court may resume the trial without ascertaining the mental state of Kaliyappan, the present original petition has been filed by Muniyappan on behalf of his son Kaliyappan.

13. The sequence of events, narrated above, shows that Kaliyappan was suffering from mental illness since the time of his arrest in May 2006 and the situation had not improved till 31.08.2017. We are now in 2020 and this case is hanging fire in the trial Court without any progress. There is no point in keeping this case pending indefinitely. If it is found that Kaliyappan was suffering from mental illness even at the time of commission of the offence, he would have to be given the benefit of the exception under Section 84 IPC and further proceedings dropped. But, how to do it, is the question that stared at this Court.

14. To untangle this legal conundrum, this Court thought it fit to appoint Mr. Sharath Chandran, Advocate as *Amicus Curiae* to assist.

15. Mr. Sharath Chandran assiduously traced the provisions relating to trial of persons of unsound mind from the 1861 Code of Criminal

Procedure, to the present Code and submitted that till 2009, all the Codes contemplated mere postponement of the trial if it was found that the accused was not capable of defending himself, indefinitely and that the anomaly in the procedure came to the fore through **Miss Veena Sethi vs. State of Bihar and others**,[1] wherein, the Supreme Court treated a letter as a public interest litigation and examined the cases of mentally ill persons detained in the Hazaribagh Central Prison in Bihar.

16. What came as a rude shock to the Supreme Court was the case of one Gomia Ho, the facts of which, would be heartrending. Gomia Ho was convicted of the offence under Section 304(II) IPC on 26.03.1945 and was sentenced to undergo three years rigorous imprisonment. While he was undergoing the sentence, he attempted to commit suicide. Therefore, a fresh case under Section 309 IPC (attempt to commit suicide) was registered against him. During the course of enquiry, it came to light that he was of unsound mind and therefore, neither the enquiry nor the trial against him proceeded for 20 years, though he had completed the sentence in the case in which he was convicted of the offence under Section 304 (II) IPC. Had he been tried and convicted of the offence under Section 309 IPC, the maximum sentence would have been one year simple imprisonment. As the Supreme Court started digging in, more skeletons surfaced from behind the brick walls

1 (1982) 2 SCC 583

of the Hazaribagh Central Prison, Bihar.

17. Mr. Sharath Chandran continued his submissions and placed before this Court, the 154th Report of the Law Commission of India, which was then headed by Justice K. Jayachandra Reddy, which addressed this grim issue and suggested a panacea in incorporating several far-reaching amendments in Chapter XXV Cr.P.C. It may be profitable to extract the relevant portion from the said report:

> "7 The Code provides no time limit for which the postponement will subsist and the only safeguard against indefinite confinement is the obligation to send six monthly medical reports on the mental condition of the accused to the State Government. This safeguard in no way protects the accused against needless, if not lifelong, incarceration has been demonstrated by Veena Sethi v.State of Bihar. Veena Sethi unearths from the jails of Bihar cases of individuals whose trials were postponed because they were incapable of defending themselves. Subsequent to postponement of their trials they were lodged in Hazaribagh Central Jail wherein they were detained for periods ranging from 19 to 37 years. This detention continued even after the accused regained sanity.
>
> 8 The confinement of insane undertrials in jail even after they have regained sanity has been held to be an infringement of their constitutional rights under Article 21. Section 428 of the Cr.P.C. provides that time spent by the accused as an undertrial should be set off with the sentence ordered on conviction. This section can be invoked only after the trial is concluded. In Veena Sethi's case when insane undertrial had spent periods in jail longer than the maximum period of sentence that could be ordered against them, the Supreme Court ordered their release invoking this section.
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> 12 The trial of a person of unsound mind who is incapable of defending himself is postponed to promote fair trial. If this postponement operates for periods as long as 10 years then even when the accused regains sanity, he may still be incapable of

defending himself not due to unsoundness of mind but because the evidence has gone stale or witnesses are lost. The right of speedy trial as extended to the insane undertrial mandates that a time limit should be fixed for the period of postponement of trial. Indefinite postponement is an infringement of the personal liberty and rights of insane undertrials.

13 It is the standard of treatability that should provide justification for postponement of enquiry or trial; hence, treatability and not dangerousness should be the guiding force of sections 328 and 329. It is the prospect of recovery alone which explains the postponement of enquiry or trial of persons of unsound mind and the continuance of the proceedings for persons for who are not of unsound mind. The criterion of treatability should be accorded recognition at each stage of the enquiry or trial. At the stage of observation, medical opinion should be sought not only on whether the accused was of unsound mind and incapable of defending himself but also whether the mental condition was amenable to treatment. For the accused whose mental condition is diagnosed as incurable at this stage, a procedure different from postponement needs to be devised. For those categorized as treatable, the time required to regain fitness needs to be inquired. The time needed for treatment should be accorded due cognizance in fixing the period of postponement.

14 All accused categorized as treatable may not respond to treatment. In order that personal liberty is not arbitrarily deprived in the name of therapy, it is essential that the period for which the enquiry or trial can be postponed should be subject to limitation.

15 *For the accused whose condition is treatable and who can be better equipped to defend themselves, postponement of trial furthers fair trial. For incurables, postponement is of little utility and only operates as a mechanism for punishing without trial. It, therefore, seems appropriate that they should be discharged of the charged offence. If their mental condition makes them a danger to themselves or others, i.e., they are incapable of looking after themselves and nobody is available who is willing to look after them, then the procedure for involuntary civil commitment should be initiated to institutionalise these persons.*" *(emphasis supplied)*

18. The suggestions made by the Law Commission resulted in the Code of Criminal Procedure (Amendment Bill) 2006, which was presented

for Parliamentary scrutiny. While that was pending, the Supreme Court came across yet another case from Assam in **News Item "38 Yrs. in Jail Without trial" published in Hindustan Times, in Re.**[2], wherein, the Court took cognizance of a news item published in the Indian Express stating that one Machal Lalung, a resident of Assam, had continued to languish as an undertrial prisoner in a psychiatric hospital for 38 years. Noticing the deficiency in the law relating to the trial of persons with unsound mind, the Supreme Court issued a slew of directions under Article 142 of the Constitution of India prescribing timeline for discharge of such prisoners, except in cases punishable with life imprisonment and death penalty.

19. To continue the narration, in this backdrop, the Parliament enacted the Code of Criminal Procedure Amendment Act, 2009 (Act 5 of 2009) amending Sections 328, 329 and 330 of the Cr.P.C. In Section 328, Clause (1-A) was added, whereas, clause (3) was entirely substituted with new clauses (3) and (4). Section 329 also witnessed near identical amendments *vide* the insertion of Clause (1-A) and substitution of the existing clause (2) with entirely new clauses (2) and (3). Section 328 and Section 329(2) Cr.P.C. read as follows :

"328. Procedure in case of accused being lunatic:

(1) When a Magistrate holding an inquiry has reason to

2. (2007) 15 SCC 18

believe that the person against whom the inquiry is being 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 officer as a witness, and shall reduce the examination to writing.

(1A) If the civil surgeon finds the accused to be of unsound mind, he shall refer such person to a psychiatrist or clinical psychologist for care, treatment and prognosis of the condition and the psychiatrist or clinical psychologist, as the case may be, shall inform the Magistrate whether the accused is suffering from unsoundness of mind or mental retardation:

PROVIDED that if the accused is aggrieved by the information given by the psychiatrist or clinical psychologist, as the case may be, to the Magistrate, he may prefer an appeal before the Medical Board which shall consist of:-

(a) head of psychiatry unit in the nearest government hospital; and

(b) a faculty member in psychiatry in the nearest medical college.

(2) Pending such examination and inquiry, the Magistrate may deal with such person in accordance with the provisions of section 330.

(3) If such Magistrate is informed that the person referred to in sub-section (1A) is a person of unsound mind, the Magistrate shall further determine whether the unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate shall record a finding to that effect, and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if he finds that no *prima facie* case is made out against the accused, he shall, instead of postponing the enquiry, discharge the accused and deal with him in the manner provided under Section 330.

Provided that if the Magistrate finds that a *prima facie* case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the proceeding for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused, and order the accused to be dealt with as provided under Section 330.

(4) If such Magistrate is informed that the person referred to in sub-section (1A) is a person with mental retardation, the Magistrate shall further determine whether the mental retardation renders the accused incapable of entering defence, and if the accused is found so incapable, the Magistrate shall order closure of the inquiry and deal with the accused in the manner provided under Section 330.

329. Procedure in case of person of unsound mind tried before Court:

(2) If such Magistrate or Court is informed that the person referred to in sub-section (1A) is a person of unsound mind, the Magistrate or Court shall further determine whether unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate or Court shall record a finding to that effect and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if the Magistrate or Court finds that no *prima facie* case is made out against the accused, he or it shall, instead of postponing the trial, discharge the accused and deal with him in the manner provided under Section 330.

Provided that if the Magistrate or Court finds that a *prima facie* is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the trial for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused."

20. A close reading of Section 328 Cr.P.C. shows that it deals with (a) persons of unsound mind and (b) persons suffering from mental retardation at the stage of an inquiry. The expression "inquiry" is defined in Section 2(g) to mean every inquiry, other than a trial, under the Code. These may include proceedings relating to remand, bail, taking of cognizance, issuance of process, furnishing of copies, committal proceedings and framing of charges. In this case, though there were sufficient materials to indicate that

Kaliyappan was suffering from mental illness even at the stage of committal, no steps were taken by the committal Court under Section 328 Cr.P.C.

21. The interesting aspect about Section 328 Cr.P.C lies in the different sets of procedure contemplated for inquires against persons of unsound mind and those suffering from mental retardation. The expression "*unsoundness of mind*" occurring in Sections 328 and 329 Cr.P.C has not been defined anywhere. Under the Indian Lunacy Act, 1912, a lunatic was defined under Section 3(5) to mean an idiot or a person of unsound mind. The 1912 Act was repealed by the Mental Health Act, 1987. The definition of "lunatic" was replaced by a definition of mental illness which read as under:

> Section 2(l):
>
> "mentally ill person" means a person who is in need of treatment by reason of any mental disorder other than mental retardation".

22. The Mental Health Act, 1987, has now been repealed by the Mental Healthcare Act, 2017. Section 2(s) contains an expanded definition of the expression "mental illness" which runs as under:

> " "mental illness" means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, <u>but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by sub-normality of intelligence</u>;"
>
> (emphasis supplied)

23. Thus, under the Mental Health Act, 1987 and its successor, the Mental Healthcare Act, 2017, mental retardation was carved out as a separate category aside from other forms of mental illness. The definition of mental illness found in the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short "the Disabilities Act") also maintains the aforesaid distinction. Despite the fact that the Indian Lunacy Act, 1912 was repealed in 1987, the title clause of Section 328 Cr.P.C. still uses the word "*lunatic*" even though the text of Section 328 Cr.P.C. uses the words "unsoundness of mind" and "*mental retardation*". Mental retardation is defined in Section 2 (r) of the Disabilities Act as under:

> "Mental retardation" means a condition of arrested or incomplete development of mind of a person which is specially characterized by subnormality of intelligence."

24. This definition has also been incorporated into Section 2(g) of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999. Thus, in law, there exists a clear distinction between a mentally ill person and a person suffering from mental retardation. In **Suchita Srivastava and another vs. Chandigarh Administration**[3], the Supreme Court held that this distinction can be collapsed for the purpose of empowering these respective classes of

[3] (2009) 9 SCC 1

persons, but, cannot be disregarded so as to interfere with their personal autonomy.

25. Reverting to Section 328 Cr.P.C., the inquiry in respect of persons of unsound mind is governed by Section 328(3) Cr.P.C., whereas, the enquiry in respect of persons suffering from mental retardation is governed by Section 328 (4) Cr.P.C. In either category, the first stage is that, if the Magistrate receives information that the accused is of unsound mind or suffers from mental retardation, he is required to determine whether such condition, *in praesenti*, renders the accused incapable of entering defence. If the answer to this question is in the affirmative, the Code prescribes two different consequences depending on whether the accused is suffering from unsoundness of mind or mental retardation.

26. If the case falls in category one (persons of unsound mind), the Magistrate is required to examine the record of evidence, hear the advocate for the accused, and may discharge the accused if he finds that no *prima facie* case has been made out. If a *prima facie* case is made out, the Magistrate is required to follow the procedure set out in the proviso to Section 328 (3) Cr.P.C. If the case falls in category two (persons suffering from mental retardation), Section 328(4) Cr.P.C. empowers the Magistrate to immediately order closure of the enquiry and direct that the accused be dealt

with under Section 330 Cr.P.C.

27. Section 329 Cr.P.C, on the other hand, operates at the stage of trial. In view of the decision of the Supreme Court in **Hardeep Singh vs. State of Punjab**[4], the expression "trial" is the stage that commences upon charges being framed. Section 329(1) Cr.P.C. is a verbatim reproduction of Section 465 of the Code of Criminal Procedure, 1898. Prior to the 2009 Amendment, if, in the course of trial, it appears to the Magistrate or the Court that the accused is of unsound mind and is incapable of making his defence, the Magistrate or Court was required, in the first instance, to "try" the fact of such unsoundness and incapacity, and on being satisfied of that fact (fact of unsoundness and incapacity), shall record a finding to that effect and postpone further proceedings in the case. Thus, the enquiry in Section 329(1) Cr.P.C. was confined to the factum of unsoundness of mind and incapacity to enter his defence before the trial Court at the stage of trial.

28. *Vide* the 2009 Amendment, clause (2) was substituted and clause (3) was added to Section 329 Cr.P.C. A comparison of Section 329(2) Cr.P.C. and Section 328(3) Cr.P.C. shows that except for the different stages at which these two provisions operate, the text and procedure contemplated therein are exactly the same. The first stage under Section 329(2) Cr.P.C. is that if the Magistrate/Court receives information during trial that the accused

4. (2014) 3 SCC 92

is of unsound mind, the Magistrate/Court is required to determine whether such condition, *in praesenti*, renders the accused incapable of entering defence. If the answer is in the affirmative, the Magistrate/Court is required to examine the record of evidence, hear the advocate for the accused, and may discharge the accused if he/it finds that no *prima facie* case has been made out. If a *prima facie* case is made out, the Magistrate/Court is required to follow the procedure set out in the proviso to Section 329 (2) Cr.P.C.

29. Interestingly, the examination of a *prima facie* case under Section 329(2) Cr.P.C. textually, is confined to persons of unsound mind only. Section 329(3) Cr.P.C. refers to the procedure to be followed if a *prima facie* case is made out and the accused suffers from mental retardation. The twin requirements for clause (3) to apply is that first, the accused must be medically certified to be a mentally retarded person, and secondly, the Magistrate or Court must find a *prima facie* case against such an accused. If these twin conditions are satisfied, then, there is a statutory injunction against the Court from holding trial which is clear from the use of the words "shall not hold the trial" occurring in Section 329(3) Cr.P.C. The mentally retarded accused is then required to be dealt with under the proviso (b) to Section 330 (3) Cr.P.C.

30. The next question is, what is the procedure to be followed by a Magistrate or Court at the stage of trial when he finds that the accused is a mentally retarded person and there exists no *prima facie* case against him. Mental retardation is conspicuously absent in clauses (1-A) and (2) of Section 329 Cr.P.C., whereas, it is expressly alluded to in clauses (1-A) and (2) of Section 328 Cr.P.C. If this Court were to construe Section 329 (1-A) and (2) Cr.P.C. literally, the result would be that these provisions would apply only to persons of unsound mind and not to accused persons who are mentally retarded. Such an interpretation, in the considered opinion of this Court, would lead to several anomalous consequences.

31. In the first place, if clause (1-A) of Section 329 Cr.P.C. is confined to persons of unsound mind alone, then, there would be no provision for medical examination of mentally retarded persons at the stage of trial. Secondly, if Section 329(2) Cr.P.C. is confined to persons of unsound mind alone, it would appear that the avenue of discharge available at the stage of trial is confined only to persons of unsound mind. As noticed supra, Section 329(3) Cr.P.C. applies only if there exists a *prima facie* case against the mentally retarded accused. If Section 329(2) Cr.P.C. is interpreted literally, there would be no provision to discharge a mentally retarded person even if no *prima facie* case exists against him. These anomalous

consequences impel this Court to abandon the literal interpretation of Sections 329(1-A) and (2) Cr.P.C. This is in keeping with the well-recognized rules of interpretation that have been succinctly set out by Das Gupta, J. in **Mahadeolal Kanodia vs. Administrator General of West Bengal**[5]**,** wherein, it was observed as under:

> "... if the strict grammatical interpretation gives rise to an absurdity or inconsistency, such interpretation should be discarded and an interpretation which will give effect to the purpose the Legislature may reasonably be considered to have had will be put on the words, if necessary even by modification of the language used. ."

32. Having regard to the legislative history of these provisions, there appears to be no warrant in adopting a literal construction of Section 329 (1-A) and (2) Cr.P.C. Thus, the omission of mental retardation in these clauses is clearly the draftsman's devil. In the opinion of this Court, the expression "*unsoundness of mind*" occurring in clauses (1-A) and (2) of Section 329 Cr.P.C. must be construed to include cases of mental retardation also. If so construed, the provisions of this section can be harmoniously read in the following manner :

i. If during trial, the Magistrate/Court finds the accused to be of unsound mind, he/it shall refer the accused to a psychiatrist or clinical psychologist for care and treatment. The psychiatrist or clinical psychologist shall report to the

5 AIR 1960 SC 936

Magistrate/Court whether the accused is suffering from unsoundness of mind or mental retardation. In other words, the expression "*whether the accused is suffering from unsoundness of mind"* occurring in Secton 329 (1-A) Cr.P.C. shall be construed to subsume cases of mental retardation also.

ii. If the answer to the above is in the affirmative, the Magistrate/Court will then determine whether the condition of the accused renders him incapable of entering defence. If the answer is in the affirmative, then, the Magistrate/Court is required to record a finding to that effect, and then examine the record of evidence produced by the prosecution, hear the advocate for the accused and, without questioning the accused, decide if there exists a *prima facie* case against the accused.

iii. If there exists no *prima facie* case against the accused, the accused, irrespective of whether he is of unsound mind or is suffering from mental retardation, can be discharged and dealt with under the proviso (a) to Section 330(3) Cr.P.C.

iv. If there exists a *prima facie* case against the accused, and if the accused suffers from unsoundness of mind the course to be adopted is set out in the proviso to Section 329(2) Cr.P.C.

The Magistrate/Court may postpone trial for such a period as may be necessary for the treatment of the accused.

v. If there exists a *prima facie* case against an accused who suffers from mental retardation, the provisions of Section 329(3) Cr.P.C. will have to be followed. The Magistrate/Court is barred from holding a trial in these cases and the accused is required to be dealt with in the manner set out in the proviso (b) to Section 330(3) Cr.P.C.

33. Even though Section 329(2) Cr.P.C. contemplates a discharge, it is necessary to notice that this expression has been used rather loosely. As pointed out supra, Section 329 Cr.P.C. operates only at the stage of trial, *i.e.,* post the stage of framing charges. Under the Code, provisions to discharge an accused from the prosecution are available in Sections 227, 239 and 245 Cr.P.C. These powers are available to the trial Court only prior to the framing of charges. However, Section 329(2) Cr.P.C operates at the stage of trial and contemplates a discharge of the accused even after the framing of charges. *A fortiori*, it would seem incongruous to import the tests evolved by the Supreme Court in **State of Orissa vs. Debendra Nath Padhi**[6] under Section 227/239 Cr.P.C at the stage prior to framing of charges, to the discharge contemplated under Section 329(2) Cr.P.C., which operates at the stage of

6 (2003) 2 SCC 711

trial *i.e.*, post the framing of charges. As pointed out by the Supreme Court in **Ratilal Bhanji Mithani vs. State of Maharashtra and others**[7], the normal rule is that once a charge is framed, the Magistrate/Court has no power under Section 227 Cr.P.C. or any other provision of the Code to reverse the charge and discharge the accused. Section 329(2) Cr.P.C. is an exception to this rule. Another consideration is the fact that an "acquittal" under Section 335 Cr.P.C. on the ground of unsoundness of mind at the time of commission of the act is contemplated only when trial is resumed under Section 331 Cr.P.C. after the accused is mentally fit to stand trial. Thus, a person with incurable mental illness will never be in a position to face trial. Under these circumstances, Section 329(2) Cr.P.C. can be gainfully employed to discharge these persons by permitting their advocates to adduce materials to prove their mental incapacity so as to avail the exception under Section 84 of the IPC. These considerations impel this Court to hold that the expression "*discharge*" cannot be construed as being akin to the tests applied by the Court under Section 227 or 239 Cr.P.C.

34. It will be recalled that the mischief that Section 329(2) Cr.P.C. was intended to address was, to prevent untreatable cases of unsoundness of mind from getting caught in the vicious circle of postponement of trial, for an indefinite period, which was the only course available to the Magistrate or

7. (1979) 2 SCC 179

Court under the unamended Section 329 Cr.P.C. By virtue of the introduction of sub-section (2) to Section 329 Cr.P.C., the Parliament has intended to relieve these persons of their misery of being undertrials for life by empowering the Courts to discharge them from the prosecution, if there is no *prima facie* case. In order to effectuate the purpose of this amendment, it is imperative that the advocate for the accused be permitted to produce materials of sterling quality to establish that the accused would be entitled to the exception under Chapter IV of the I.P.C. In the opinion of this Court, the provisions of Section 329 Cr.P.C, particularly, in the light of the amendments *vide* Act 5 of 2009, must be read purposively. The denial of such an opportunity is likely to whittle down the wholesome power under Section 329 (2) Cr.P.C. into mere verbiage.

35. To recapitulate, till Act 5 of 2009, the Courts were powerless to discharge an accused incapable of entering defence due to incurable mental illness. The Courts had the power only to postpone the trial from time to time. The new provision, *viz*., Section 329(2) Cr.P.C. broke this vicious circle by empowering the trial Court to first determine whether a person was mentally fit to face the trial and if the answer is in the negative, the Court shall record a finding and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused, but, without

questioning the accused, finds that "no *prima facie* case is made out against the accused", it shall, instead of postponing the trial, discharge the accused. The two catch expressions in this provision are (a) "examining the record of evidence produced by the prosecution" and (b) "hearing the advocate of the accused, but, without questioning the accused." The word "evidence" has been used in a very loose sense and not in the sense of evidence that is normally adduced in the trial.

36. The moot question is, what interpretation should be given to the expression "no *prima facie* case is made out against the accused" used in Section 329(2) Cr.P.C.

37. There is one school of thought which says that the aforesaid expression would mean that the materials collected by the police should, *proprio vigore,* be insufficient to connect the accused with the crime *de hors* the probable defence that the accused may take. In other words, this orthodox school is of the opinion that the exceptions under the IPC will have no role to play in the enquiry by the trial Court under the second limb of Section 329(2) Cr.P.C. Per contra, the contemporary school of thought is of the view that the trial Court can legitimately decide the existence of a *prima facie* case not only on the ground propounded by the orthodox school, but also by testing the facts on the anvil of the exceptions under Chapter IV of the IPC.

38. In support of the orthodox school of thought, Mrs. Kritika Kamal placed reliance on the judgment of the Supreme Court in **Subramanian Swamy vs. Union of India, Ministry of Law and others**[8], wherein, the Supreme Court has held that the exceptions in Section 499 IPC can be determined only during trial and not at any stage before it.

39. As a riposte, in support of the contemporary school of thought, Mr. Sharath Chandran placed reliance on the judgment of a Division Bench of the Kerala High Court in **Shibu vs. State of Kerala**[9]**,** the judgment of a learned Single Judge of this Court in **Anuj Jermi vs. State**[10]**,** the Division Bench judgment of the Gauhati High Court in **Abdul Latif vs. The State of Assam**[11] and the judgment of a Full Bench of the Delhi High Court in **Neelam Mahajan Singh vs. Commissioner of Police**[12]**.**

40. This Court carefully studied all the aforesaid five judgments cited on either side.

41. To appreciate the rival contentions, it may not be out of place to discuss certain fundamental legal principles.

8 (2016) 7 SCC 221
9 (2013) 4 KLT 323
10 2012 (3) MWN (Cr.) 161
11 1981 Cri. LJ 1205
12 1994 53 DLT 389 (FB)

42. As rightly contended by Mr. Sharath Chandran, it is a misnomer to say that the "Chapter IV – General exceptions" of the IPC is a defence for the accused. In the opinion of this Court, every act should pass through the prism of Chapter IV of the IPC to graduate into an offence. If an act complained of falls within the net of the exceptions in Chapter IV of the IPC, it is not an offence at all. Before going into the text of Chapter IV of the IPC, it may be apposite to quote Lord Macaulay in this regard:

> "This Chapter has been framed in order to obviate the necessity of repeating in every penal clause a considerable number of limitations. Some limitations relate only to a single provision, or to a very small class of provisions…. Every such exception evidently ought to be appended to the rule which it is intended to modify. But there are other exceptions which are common to all the penal clauses of the Code, or to a greater variety of clauses dispersed over many chapters. It would obviously be inconvenient to repeat these exceptions several times in every page. We have, therefore, placed them in a separate chapter and, we have provided that every definition of an offence, every penal provision, and every illustration of a definition or penal provision, shall be construed subject to the provisions contained in that chapter."[13]
>
> (emphasis supplied)

43. To hit the nail hard, Sections 6 and 84 IPC are extracted hereunder:

Section 6 IPC:

"Throughout this Code every definition of an offence, every penal provision, and every illustration of every such definition or

13 T.B. Macaulay – The Works of Lord Macaulay: Critical & Historical Essays, Longman's Green, 1885 Edn. P.448

penal provision shall be understood subject to the exceptions contained in the Chapter entitled "General Exceptions", though those exceptions are not repeated in such definition, penal provision, or illustration.

Illustrations:

(a) The sections, in this Code, which contain definitions of offences, do not express that a child under seven years of age cannot commit such offences, but the definitions are to be understood subject to the general exception which provides that nothing shall be an offence which is done by a child under seven years of age.

(b) A, a police-officer, without warrant, apprehends Z, who has committed murder. Here A is not guilty of the offence of wrongful confinement; for he was bound by law to apprehend Z and therefore the case falls within the general exception which provides that "nothing is an offence which is done by a person who is bound by law to do it".

Section 84 IPC:

"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."

(emphasis supplied)

44. Therefore, it is beyond a pale of doubt that the framers of the Code had catalogued the exceptions in Chapter IV of the IPC in such a way that every criminal act passes muster the exceptions contained therein to metamorphosize into an offence. At this juncture, it is the duty of this Court to record that the Division Bench of the Kerala High Court, in **Shibu** (supra), has also quoted the above passage of Lord Macaulay in support of the view taken by it.

45. To expatiate further, every Investigating Officer, who is entrusted with the statutory powers to investigate into an offence, should act

fairly and justly and in the course of the investigation, if he comes across materials to show that the case of the accused would fall within the exceptions in Chapter IV of the IPC, he must be bold enough to file a final report saying that, though the accused had committed the act in question, there is no offence made out as his act is excepted under Chapter IV of the IPC. The Investigating Officer, in **Anuj Jermi** (supra), had exactly done this and earned encomiums from this Court.

46. An Investigating Officer's opinion expressed in the final report is not the end of the matter, because, the judicial officer, on appraisal of the materials collected and submitted along with the final report by the Investigating Officer, can either accept it or reject it. Time and again, the Supreme Court has held that the right to a fair investigation is an essential concomitant of Article 21 of the Constitution of India. In this connection, felicitous it is to extract paragraphs 32 and 45 of the judgment of the Supreme Court in **Babubhai vs. State of Gujarat and others**[14]**:**

> "32. The investigation into a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on the part of the accused that investigation was unfair and carried out with an ulterior motive. It is also the duty of the investigating officer to conduct the investigation avoiding any kind of mischief and harassment to any of the accused. The investigating officer should be fair

14 (2010) 12 SCC 254

and conscious so as to rule out any possibility of fabrication of evidence and his impartial conduct must dispel any suspicion as to its genuineness. The investigating officer "is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth". (Vide *R.P. Kapur* v.*State of Punjab* [AIR 1960 SC 866 : 1960 Cri LJ 1239],*Jamuna Chaudhary* v. *State of Bihar* [(1974) 3 SCC 774 : 1974 SCC (Cri) 250 : AIR 1974 SC 1822] , SCC at p. 780, para 11 and *Mahmood* v.*State of U.P.* [(1976) 1 SCC 542 : 1976 SCC (Cri) 72 : AIR 1976 SC 69])

45. Not only fair trial but fair investigation is also part of constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India. Therefore, investigation must be fair, transparent and judicious as it is the minimum requirement of rule of law. The investigating agency cannot be permitted to conduct an investigation in a tainted and biased manner. ....." (emphasis supplied)

47. *Ex consequenti*, this Court is in complete agreement with the summing up words of Mr. Sharath Chandran that what is not an offence does not require a defence. This Court is further fortified in leaning towards the contemporary school of thought by the usage of the expression "after hearing the defence of the accused, but, without questioning the accused" in Section 329(2) Cr.P.C. The legislature was aware that in an enquiry under the second limb of Section 329(2) Cr.P.C., the trial Court is dealing with the case of a person who has been found unfit to defend himself. Nevertheless, the legislature has recognised his legal right to be defended by an advocate who can effectively articulate the case of the accused and place materials of sterling quality before the Court to show that even at the time of commission of the criminal act, the accused was suffering from mental illness of such a

kind so as to bring him within the exception under Section 84 IPC. The expression "hear the advocate" should not be given a pedantic and constricted meaning of merely hearing him without anything more, but, should be given an expansive meaning to give real life to the expression, lest, it should become an empty formality. Applying the Heydon's rule[15], this Court is required to bear in mind the mischief that was sought to be remedied by Section 329(2) Cr.P.C. by ensuring that an accused suffering from a mental illness is relieved of his misery of being an indefinite undertrial.

48. The enquiry under the second part of Section 329(2) Cr.P.C. will commence only after the Court gives a finding that the accused is not mentally fit to face trial. Once such a finding is given, the enquiry under the second part of Section 329(2) Cr.P.C. shall not be adversarial, but the Court should invoke the *parens patriae* principle and give a free hand to both sides to adduce material to show that the accused was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what is either wrong and contrary to law. The doctrine of *parens patriae*, qua persons of unsound mind *etc.*, was explained by the Supreme Court in **Charan Lal Sahu vs. Union of India**[16] in the following words:

> "35. … In the 'Words and Phrases' Permanent Edn., Vol. 33 at p. 99, it is stated that parens patriae is the inherent power and

15 (1584) 76 ER 637
16 (1990) 1 SCC 613

> authority of a legislature to provide protection to the person and property of persons non sui juris, such as minor, insane, and incompetent persons, but the words parens patriae meaning thereby 'the father of the country', were applied originally to the King and are used to designate the State referring to its sovereign power of guardianship over persons under disability. Parens patriae jurisdiction, it has been explained, is the right of the sovereign and imposes a duty on [the] sovereign, in public interest, to protect persons under disability who have no rightful protector. The connotation of the term parens patriae differs from country to country, for instance, in England it is the King, in America it is the people, etc. The Government is within its duty to protect and to control persons under disability."

49. In view of the decision of Mathew, J. in **State of Kerala and another vs. N.M Thomas & others**[17], the Court is also a State within the meaning of Article 12[18]. This leeway is essential, because, the accused is not mentally participating in the enquiry on account of his mental illness and his advocate is fighting his cause. Even if the advocate fails to persuade the Court to discharge the accused in the Section 329(2) enquiry, the finding should not prejudice the accused at a later stage when he becomes mentally fit to face the trial.

50. This Court called for the records from the trial Court and pored over them. It is the case of the police that Kaliyappan was taken by his father Muniyappan and his brother Venkatachalam for treatment, to Varadha

17 (1976) 2 SCC 310

18 See also Aruna Ramachandra Shanbaug v. Union of India (2011) 4 SCC 454

Naickar, a native doctor, on 12.05.2006; Varadha Naickar asked Muniyappan and his three assistants, *viz.*, Settu, Murugesan and Ayyavoo, to hold Kaliyappan tightly so that he could administer medicine; while they were holding so, Kaliyappan forcibly wriggled out from their clutches and started running saying that he needs no treatment; he was pursued by all of them who were shouting "Catch him, catch him"; seeing Kaliyappan being chased by some persons who were wanting him to be apprehended, the deceased Kondaiyan, a good Samaritan, tried to intercept Kaliyappan and lost his life. The facts being so, there is absolutely no whisper in the final report filed by the police for what ailment, Kaliyappan was taken to Varadha Naickar. This Court perused the Section 161(3) Cr.P.C. statements of Kaliyappan's father Muniyappan, his brother Venkatachalam, Varadha Naickar, Settu, Murugesan and Ayyavoo and in none of their statements, is there any mention of the ailment for which Kaliyappan required treatment, except saying that he would get angry frequently and abuse everyone. It does not require horse's sense of Sherlock Holmes to ask these witnesses as to what was Kaliyappan's actual ailment. It requires nothing more than common sense to expect that these witnesses would have told the police about the ailment of Kaliyappan, which the police have burked in the final report. The police statement of one Pachaimuthu shows that at 7.00 a.m. on 13.05.2006,

a man with a bloodstained billhook came to the temple where he was worshipping and asked for food and water; he gave him water; after drinking, that person asked for money; when he refused, that person brandished the billhook and threatened him; later, he was told by the police that the said person was Kaliyappan. If the view of the orthodox school is adopted and if the final report and the Section 161(3) Cr.P.C. statements filed by the police are to be accepted as gospel truth, the very objective of Section 329(2) Cr.P.C. to provide speedy relief for the mentally ill will stand negated. Therefore, it is imperative to expand the scope of the enquiry so as to permit the advocate for the accused to produce materials of sterling quality to show to the Court that the accused would be entitled to the exception under Chapter IV of the IPC. Denying this opportunity would result in gross injustice to the accused and would make Section 329(2) Cr.P.C. meaningless.

51. What should the Court do after it discharges the accused either under Section 328(3) Cr.P.C. or under Section 329(2) Cr.P.C.? The Court should proceed under the proviso (a) to Section 330(3) Cr.P.C. by handing over custody of the accused to someone after getting sufficient security from him that he will ensure that the accused does not harm himself or anyone.

52. Coming to the contention of Mrs. Kritika Kamal in support of the orthodox school of thought, in **Subramanian Swamy** (supra) relied on

by her, the Supreme Court was not dealing with the exceptions in Chapter IV of the IPC, but was dealing with the exceptions adumbrated in Section 499 I.P.C. and therefore, the said judgment is clearly distinguishable.

53. It is trite that the burden cast by Section 105 of the Evidence Act, to bring the case within Chapter IV of the IPC, will rest on the accused during trial and not any time before it. Since an enquiry under Section 329(2) Cr.P.C. is during trial, the advocate of the accused should be permitted to discharge the burden by adducing materials to establish that the case of the accused falls within the General Exceptions in the IPC. This also reinforces the reasoning of this Court that the expression "hearing the advocate of the accused" occurring in Section 329(2) Cr.P.C. should be given an expansive meaning.

54. In fine, this Court issues the following directions:

i. the trial Court shall conduct enquiry under the first part of Section 329(2) Cr.P.C., to find out if the accused in this case is capable of entering into his defence *in praesenti;*

ii. if the trial Court finds that the accused in this case is mentally fit to face the trial, the trial shall be commenced and completed within 3 months from the date of such determination;

iii. in the event of the trial Court holding that the accused is not mentally fit to face the trial, the trial Court shall conduct an

enquiry under the second part of Section 329(2) Cr.P.C. and afford an opportunity to the family of the accused to engage a lawyer and if the family is not in a position to engage a lawyer, the trial Court shall appoint a senior lawyer of the local bar with not less than 20 years of standing and with rich experience in criminal law, to take up the case of the accused in the enquiry, for whom, remuneration shall be paid by the local Legal Services Authority;

iv. in the enquiry, it is open to the trial Court to examine any witness, including the doctors who had treated the accused prior to the incident; the native doctor to whom the accused was taken on the fateful day, can also be examined;

v. the trial Court may also enquire the doctors who treated the accused after his arrest while he was in judicial custody;

vi. the counsel for the accused may also be permitted to place materials before the Court in support of the case of the accused;

vii. at the conclusion of the enquiry, if the trial Court is of the opinion that the criminal act fell within the contours of Section 84 IPC, it will then be open to the trial Court to discharge the accused and follow the procedure set out in the proviso (a) to Section 330(3) Cr.P.C.;

viii. In the event of the trial Court not discharging the accused, it shall proceed under the proviso (b) to Section 330(3) Cr.P.C. In that case, the finding arrived at by the trial Court against the accused shall, in no manner, be binding on the accused in the trial against him after he is certified as mentally fit to face the

trial in the future. In other words, it will be open to the accused to establish once again before the trial Court that his case would fall within Section 84 IPC, because, what was done when the accused was mentally absent in the Court, cannot be put against him when he is mentally stable subsequently.

55. At this juncture, this Court is impelled to exhort the trial Judges to get themselves thoroughly acquainted with the provisions in Chapter XXV of the Code of Criminal Procedure, because, as per the W.H.O. predictions, there is going to be a huge spike in our country in the number of people with mental illness, as a sequel to which, there is bound to be a paradigm shift in the nature of crimes in the near future, to tackle which, our legal system should gear up. In this context, it may be worthwhile to quote Mr.G.P.Pilania, M.P., from his speech in the Parliament on 18.12.2008 when the 2009 amendments were introduced:

> "The sixth point pertains to inquiry and trial of persons of unsound mind, who cannot look after themselves, and who are persons who have been betrayed by God and society. A special provision to take care of those who are of unsound mind has been made, which is laudable." (emphasis supplied)

The Courts must, therefore, act and discharge their constitutional obligations as ever-vigilant sentinels of the rights of these persons.

56. Before parting, this Court places on record its profound appreciation to Mr. Sharath Chandran, learned *Amicus Curiae,* for the

extensive research done by him and for expounding the law; Mrs. P. Kritika Kamal, for her effective assistance to this Court; and Mr. Sivakumar for bringing up this sordid case to the notice of this Court.

This criminal original petition stands disposed of in the above terms. Connected Crl.M.Ps. stand closed.

04.09.2020

cad

To

1. The III Additional District and Sessions Judge
   Salem

2. The Inspector of Police
   Deevattipatti Police Station
   Salem District

3. The Public Prosecutor
   Madras High Court
   Chennai – 600 104

4. The Deputy Registrar (Crl. Side)
   Madras High Court
   Chennai 600 104

with a direction to send the original records to the trial Court immediately

P.N. PRAKASH, J.

Crl.O.P.No.4993 of 2018

04.09.2020