

In Re: Saji

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Court : Kerala

Decided On : May-28-2009

Reported in : 2009(2)KLJ410

Judge : Thottathil B. Radhakrishnan, J.

Acts : Indian Penal Code (IPC) - Sections 302 and 307; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 334, 335, 335(1), 335(2), 335(3), 339, 362, 397, 401 and 482; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 470, 471 and 475; [Constitution of India](#) - Articles 226 and 227

Appeal No. : O.P. No. 16667 of 1996

Appellant : In Re: Saji

Advocate for Def. : T.G. Sunil, G.P.

Advocate for Pet/Ap. : Ramkumar Nambiar, Amicus Curiae

Judgement :

ORDER

Thottathil B. Radhakrishnan, J.

1. Heard Sri. Ramkumar Nambiar, learned Amicus Curiae and learned senior Government Pleader Sri.T.G. Sunil.

2. Accused of having committed offences punishable under Sections 302 and 307 of the Indian Penal Code, the person, in relation to whom this order is being passed, was found to have committed that act, but was acquitted on the ground of unsoundness of mind. With such finding and judgment in terms of Section 334 of the Code of Criminal Procedure, 1973, it was ordered that he be detained in safe custody in the Mental Health Centre, until ordered to be delivered to any relative or friend. Thereafter., his mother applied to the court below that he be delivered to her care and custody, That is refused on the ground that it having had issued an order for his detention in safe custody in the Mental Health Centre in terms of Clause 'a' of Sub-section 1 of Section 335, the court could not further issue an order under Clause 'b' of that subsection that he be delivered to the care and custody of a relative or friend and that only the government could so order, in view of Section 339 of the Code.

3. Following a report of the Member Secretary, Kerala State Legal Services Authority, to this Court in O.P. No. 16667 of 1996,. registered in terms of the directions of the Apex Court in Sheela Barse v. Union of India : (1995) 5 SCC 654, the records in relation to the aforesaid order and case have been called for and examined to ensure that the said order is jurisdictionally and legally firm and not unjust and for the purpose of being satisfied as to the correctness., legality and propriety of that order passed by the court below refusing to order delivery of the detained person to the care and custody of his mother, on her application.

4. The short issue for consideration is whether., it having issued an order for detention in safe custody under Clause 'a' of Sub-section 1 of Section 335 of the Code, while delivering a judgment in terms of Section 334, is the court precluded from later issuing an order under Clause 'b' of that sub-section, thereby compelling a relative or friend to move only the government and not the court.

5. Section 334 of the 1973 Code requiring the court to specifically state in the judgment of acquittal on the ground of unsoundness of mind, as to whether the person committed the act or not, is in part materia with Section 470 of the 1898 Code, thought the word 'lunacy' was then used in the title to the section instead of the term 'unsoundness of mind', now employed. Section 339 of the 1973 Code and

its in part mater/a provision in the 1898 Code, namely, Section 475 thereof, dealing with 'delivery of lunatic to care of relative or friend', provide for opportunity to the relative or friend to apply to the State Government for delivery of the detained person to the applicant's care and custody. But, unlike in the 1898 Code, the 1973 Code provides in Clause 'b' of Sub-section 1 of Section 335 thereof, that the court may order the person to be delivered to any relative or friend of such person., while the corresponding Section 471 in the 1898 Code contained no such provision,

6. In terms of the 1898 Code, an order of Court delivering the accused to the custody of his relatives was illegal - see Superintendent and Legal Remembrancer v. Srish Chandra : ILR 56 Cal 308 : AIR 1928 Cal 653 & Public Prosecutor v. Kandaswami ILR 52 Mad 485 : AIR 1953 Mad 355.

7. In the process of making its Report on the Code of Criminal Procedure, 1898. The Law Commission of India, in its 41' Report dealt with Section 471 of the 1898 Code, Paragraph 34.5 of that Report records that it was noticed that it had been suggested that if the person found guilty is sane at the time of acquittal, his friends and relatives should be allowed to keep him, after executing a bond with suitable condition for keeping the peace for five years thereafter. Though it was noticed that in the 1898 Code, in terms of Section 475 thereof, delivery of the convicted person to the relatives is a matter which could be dealt, with only by the State Government the Commission opined that under that law, even if the accused is sane throughout the trial, he cannot be released under Section 471, The Commission also noticed that the Criminal Law Revision Committee of England, in their third report, 'Criminal Procedure (Insanity)' had opined that the court should have discretion not to make an order for detention if it considers it safe for the public to order the immediate release of the accused. Taking note of that also., the Law Commission stated thus in its 41 st Report:

We feel that the recommendations of the English Committee are applicable to Indian conditions also. At least, the mandatory provision in Section 471 should be replaced by a provision which would leave some discretion to the Court The primary object of the detention order under Section 471 is rehabilitation of the

accused (now acquitted) and to prevent any trouble if he should relapse into insanity, It cannot be denied that the accused will receive more personal attention and care from his own relatives and friends than in a public lunatic asylum: and where his relatives or friends are ready to look after him and also undertake to ensure that he causes no injury to himself or others, there seems no reason why the accused should not be released to their custody- It can, no doubt, be said in favour of the present provision that if it is found after observation in the hospital that the person concerned is not a danger to others, he would be released under Section 475. Even then, there should be no objection to a discretion being given to the Court.

8. It was accordingly that the Law Commission recommended that Section 471 of the 1898 Code, as it then stood, should be revised and amplified by making the provisions as they now stand in Section 335 of the 1973 Code, It needs to be noticed that by including Sub-section (2) in Section 335 all precautionary steps as are required for the exercise of power by the Government under Section 339 of the 1973 Code are incorporated to regulate the exercise of power by the courts under Section 335 of the 1973 Code,

9. With the aforesaid in view, it needs to be remembered that after We, the People of India, came to be governed by the [Constitution of India](#), the Government is only one of the limbs, through which, the Sovereign Nation exercises its sovereign power and there is no constitutional reason why the power to deliver a lunatic or a person acquitted on grounds of unsoundness of mind to care of relative or friend should be exercised exclusively by the Government and not by the courts, unlike in the pre-republican days when there was no democratic repository of the sovereign power. The courts are even empowered, entitled and duty bound to exercise *parens patriae* jurisdiction in relation to persons of unsound mind, including lunatics, who are to be treated at par with minors. In view of the spread of authority provided by different legislations regulating the field of custody of, and care for, the mentally challenged, there is no reason to isolate the courts off from exercising the power to order delivery of a person who is acquitted on grounds of unsoundness of mind to any relative or friend of such person, So much so,, there is no intelligible reason to read the power to deliver a lunatic or a person acquitted

on grounds of unsound mind to care of relative or friend,, to be exclusively with the Government.

10. The principle enunciated above inheres as wisdom in the making of Section 335(1)(b) of the 1973 Code. The exercise of such power under Section 335(1)(b) is conditional on the satisfaction of the stipulations in Sub-section (3) of Section 335, The exercise of the power to order detention in safe custody in terms of Clause (a) of Section 335(1) is one of the modalities of dealing with a person acquitted on grounds of unsoundness of mind. The exercise of such power under Section 335(1)(a) does not extinguish or preclude the alternative mode by which he could be delivered to any relative or friend. There is nothing in Section 335 of the 1973 Code to conclude that the court cannot pass an order of delivery to any relative or friend under Section 335(1)(b) merely because it had early issued an order under Section 335(1)(a), for detention in safe custody in a mental health centre, as in the case in hand. All that has to be ensured is that the court is satisfied,, upon an application by the relative or friend,, that an order is to be made and that the conditions stipulated in Section 335(3) are satisfied.

11. The order under Clause 'a' of Sub-section 335 is issued on considerations not identical to those relevant to an application under Clause 'b' of that sub-section. The consideration and the making of an order under Clause 'b' of Sub-section 335 in relation to a person as regards whom an order was earlier made under Clause 'a' of that sub-section, would not amount to altering or reviewing a judgment or final order disposing a case, to be hit by the provisions of Section 362 of the Code.

12. The court below has, however, taken the view that no application under Section 335 of the Code was filed by any relative or friend when the judgment was passed and therefore, the application for delivery of the accused is to be filed before the State Government under Section 339 of the Code since the accused had already been ordered to be retained in safe custody in a mental health centre. This decision has been rendered on the assumption that once a court, exercises power under Section 335(1)(a) and orders that a person be detained in safe custody under that provision, no further order could be passed by the court under Section 335(1)(b) and the person could be released to a relative or friend only by

the Government, By the issuance of the order under Section 335(1)(a), the court below is not precluded of the authority to further act under Section 335(1)(b) on an application in terms of Section 335(3). The court is empowered to order the delivery of the detained person to the care and custody of the relative or next friend from out of detention in safe custody already made- The application by the mother of the person in question was,, therefore,, well founded and within jurisdiction of the court below., which ought to have considered the same by obtaining necessary opinion of the Superintendent of the Mental Health Centre on the health status of the person and if found fit,, he could have been released on such terms as could be in accordance with Section 335(3), With the passage of time,, it stated that the doctors have reported that the person is cured, I am., therefore., satisfied that sufficient grounds exist for vacating the order of the court below.

13. For the aforesaid reasons, the order dated 15.1.2008 in Crl.M.P. No. 3298/07 in S.C. No. 698/05 of the III Additional Sessions Judge (Adhoc) Fast Track-1, Thrissur is hereby suo motu revised and set aside in exercise of authority under Articles 226 & 227 of the [Constitution of India](#) and Section 482 and Section 397 read with Section 401 of the Code of Criminal Procedure. The learned Additional Sessions Judge is requested to re-consider Crl.M.P. No. 3298/07 in terms of Section 335(3) and in the light of what is stated above, with notice to the applicant therein and after obtaining a report of the Superintendent of the Mental Health Centre regarding the health status of the person., unless the Government has already-released him under Section 339 Cr.P.C. The Office will retransmit the lower court records with copy of this order and communicate this order to the Member Secretary, KELSA and the Superintendent.. Mental Health Centre, Thrissur.