

No.V-17014/4/2007-PR
GOVERNMENT OF INDIA/BHARAT SARKAR
MINISTRY OF HOME AFFAIRS/GRINH MANTRALAYA

Dated the 13th December, 2007

To

The Principal Secretary/
Secretary In-charge of Prisons
Of all States and Union Territories.

Subject: Detention of mentally ill undertrial prisoners – Guidelines issued by
the Supreme Court – regarding.

I am directed to draw your kind attention to the judgment of the Supreme Court dated 2nd November, 2007 in the case of Shri Machal Lalung, Criminal Writ Petition No.296 of 2005 and Criminal Writ Petition No.18 of 2006 wherein the Hon'ble Supreme Court had issued guidelines regarding detention and treatment to be given to the mentally ill undertrial prisoners in various psychiatric Hospitals/Nursing Homes. A copy of the said judgment of the Supreme Court along with the directions issued is enclosed for your ready reference. The Supreme Court has given three month's time for filing a compliance report indicating the steps taken in the matter, whereafter the matter shall be listed for directions.

You are requested to take urgent suitable action for implementing the orders of the Supreme Court in your State/UT. A copy of the Action Taken Report filed in the Supreme Court may also kindly be made available to this Ministry for information.

Encl : As above.

Yours faithfully,

Sd/-
(Rita Acharya)
Director (CS-II)
Tel: 2309 2933

S U P R E M E C O U R T O F I N D I A

RECORD OF PROCEEDINGS

WRIT PETITION (CRL.) No(s), 296 OF 2005

RE: ILLEGAL DETENTION OF MACHAL LALUNG

WITH

WRIT PETITION (CRL.) NO 18 OF 2006

RE: NEWS ITEM "38 YRS. IN JAIL WITHOUT TRIAL" PUBLISHED IN HINDUSTAN TIMES DT. 8.2.2006.

Versus

UNION OF INDIA Respondent
(With appln. For directions and office report)

Date: 24/10/2007 These Petitions were called on for hearing today.

CORAM:

HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE R.V. RAVEENDRAN
HON'BLE MR. JUSTICE DALVEER BHANDARI

For Petitioner (s) Mr. P.K. Goswami, Sr.Adv. (A.c.)
Mr. Rajiv Mehta, Adv.
Mr. A. Henry, Adv.
Mr. B. Aggrawal, Adv.

Mr. Vijay Hansaria, Sr.Adv. (A.c.)
Ms. Sneha Kalita, Adv.
Mr. P.I. Jose, Adv.

For Respondent (s)
State of Assam: Mr. K.K. Venugopal, Sr.Adv.
Mr. Ng. J.R. Luwang, Adv.
Mr. Riku Sharma, Adv.

UPON hearing counsel the Court made the following

ORDER

A news item was published on 14th October, 2005 in the Indian Express, New Delhi stating that one Machal Lalung, a resident of Assam continued to languish as

an undertrial prisoner in a psychiatric hospital for a period of 38 years even after he was declared fit by the Hospital in 1967. This news item was brought to the notice of this Court and a series of orders were passed. The said Machal Lalung was directed to be released from the psychiatric hospital. The High Courts' Registries were required to collect and furnish the particulars of undertrial prisoners lodged in mental asylums. The reports received from the High Courts show that there are several other cases where mentally ill persons who have allegedly committed various offences are kept as undertrial prisoners in various psychiatric hospitals/nursing homes in various States. It appears that there are no periodic reports from these hospitals as to whether these mentally ill persons are fit enough to face trial for the offences for which they had been charged and the respective courts are also not keeping track of the cases and there has been no regular posting of the cases for long periods. Consequently, several mentally ill undertrial prisoners have remained in the psychiatric hospitals for long periods.

2. In one case in Kerala, an undertrial prisoner has been in psychiatric hospital for 38 years. In another case in Uttar Pradesh, an undertrial prisoner has been in psychiatric hospital for more than 34 years, though the maximum punishment for the offence alleged against him is seven years. There are several undertrial prisoners who have been in psychiatric hospitals for more than 15 years. Whether these persons have been subjected to periodic medical check-up is not known. The nature of their ailments are also not very clear. In some cases, it has been vaguely stated that they suffer from 'mental abnormality'. Many of these undertrial prisoners have been charged with offences of trifle nature, for which maximum sentence prescribed is hardly six months. We find that in many of these cases, the undertrial prisoners have been confined to a psychiatric hospital for more than the period of maximum sentence. It is clear that in such cases, the trial courts have not considered whether the undertrial prisoners could be released pending investigation or trial under Section 330(1) of the Code of Criminal Procedure (for short, the Code). It is also possible that no friend or relative of the prisoner came forward with sufficient security and seek release under the said provision.

3. There are also several cases where the undertrial prisoners have been charged for offence under Section 302 IPC. In such cases also, it appears that there is no periodic medical check-up, nor periodic consideration by the court as to whether they would be in a position to face trial.

4. Chapter XXV of the Code deals with the accused persons of unsound mind. Section 328 prescribes the procedure in case of accused being a mentally ill person. When a Magistrate has reason to believe that an accused against whom an enquiry is being held, is of unsound mind, he 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, and pending such examination and inquiry, if the Magistrate is of the opinion that the accused is of unsound mind, he shall record a finding to that effect and shall postpone further proceedings in the case. Section 329 provides that if at the trial of any person, it appears to the Magistrate or Court that the person tried is of unsound mind, the Magistrate or Court shall in the first instance, try the fact of such unsoundness and incapacity, and if satisfied on such

evidence that the accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall record a finding to that effect and shall postpone further proceedings in the case.

4.1 Section 330 of the Code provides for the release of the mentally ill person pending investigation or trial. The said section is extracted below:

- 1) Whenever a person is found, under Section 328 or 329, to be of unsound mind and incapable of making his defence, the Magistrate or Court, as the case may be, whether the case is one in which bail may be taken or not, may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance, when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf.
- 2) If the case is one in which, in the opinion of the Magistrate or Court, bail should not be taken, or if sufficient security is not given, the Magistrate or Court, as the case may be, shall order the accused to be detained in safe custody in such place and manner as he or it may think fit, and shall report the action taken to the State Government:

Provided that no order for the detention of the accused in a lunatic asylum be made otherwise than in accordance with such rules as the State Government may have made under the Indian Lunacy Act, 1912 (4 of 1912).

Section 331 provides for resumption of inquiry or trial when the person concerned cases to be of unsound mind.

4.2 Section 337 of the Code describes the procedure where a prisoner of unsound mind is reported capable of making his defence. It provides that if the Inspector General of Prisons (in case where prisoner is in jail) or two visitors of an asylum (where the prisoner is in a lunatic asylum) certify that the prisoner is capable of making his defence such certificate shall be received as evidence and the Court/Magistrate will deal with such persons as provided under Section 332 by proceedings with the inquiry or trial. Section 338 provides the procedure where a person of unsound mind detained, is declared fit to be released. The said Section provides that if a person of unsound mind is detained under the provisions of sub-section (2) of Section 330 and the Inspector General or visitors certify that, in his or their judgment, he may be released without danger of his doing injury to himself or any other person, the State Government may order him to be released, or to be detained in custody, or to be transferred to a public lunatic asylum if he has not already been sent to such an asylum, in case it orders him to be transferred to an asylum, may appoint a Commission, consisting of a judicial and two medical officers. Sub-section (2) of Section 338 provides that such Commission shall make a formal inquiry into the state of mind of such person, take such evidence as is necessary, and shall report to the State Government, which may order his release or his detention as it thinks fit.

4.3 Section 339 of the Code provides for delivery of the person of unsound mind to the care of relative or friend and is extracted below:

- (1) Whenever any relative or friend of any person detained under the provisions of section 330 or section 335 desires that he shall be delivered to his care and custody, the State Government may, upon the application of such relative or friend and on his giving security to the satisfaction of such State Government, that the person delivered shall –
 - (a) be properly taken care of and prevented from doing injury to himself or to any other person;
 - (b) be produced for the inspection of such officer, and at such times and places, as the State Government may direct;
 - (c) in the case of a person detained under sub-section (2) of Section 330, order such person to be delivered to such relative or friend.

(2) If the person so delivered is accused of any offence, the trial of which has been postponed by reason of his being of unsound mind and incapable of making his defence, and the inspecting officer referred to in clause (b) of sub-section (1), certifies at any time to the Magistrate or Court that such person is capable of making his defence, such Magistrate or Court shall call upon the relative or friend to whom such accused was delivered to produce him before the Magistrate or Court, and, upon such production the Magistrate or Court shall proceed in accordance with the provisions of Section 332, and the certificate of the inspecting officer shall be receivable as evidence.

5. Section 30 of the Prisoners Act, 1900 provides how prisoners of unsound mind are to be dealt with. Sub-sections (1), (2) and (3) of Section 30 are extracted below:-

“ 30: Lunatic prisoners how to be dealt with -

- (1) Where it appears to the State Government that any person detained or imprisoned under any order or sentence of any Court is of unsound mind, the State Government may, by a warrant setting forth the grounds of belief that the person is of unsound mind, order his removal to a lunatic asylum or other place of safe custody within the State there to be kept and treated as the State Government directs during the remainder of the term for which he has been ordered or sentenced to be detained or imprisoned or, if on the expiration of that term it is certified by a medical officer that it is necessary for the safety of the prisoner or others that he should be further detained under medical care or treatment, then until he is discharged according to law.
- (2) Where it appears to the State Government that the prisoner has become of sound mind, the State Government shall, by a warrant

directed to the person having charge of the prisoner, if still liable to be kept in custody, remand him to the prison from which he was removed, or to another prison within the State or if the prisoner is no longer liable to be kept in custody, order him to be discharged.

- (3) The provisions of Section 9 of the Lunatic Asylums Act, 1858 shall apply to every person confined in a lunatic asylum under sub-section (1), after the expiration of the term of which he was ordered or sentenced to be detained or imprisoned and the time during which a prisoner is confined in a lunatic asylum under that sub-section shall be reckoned as part of the term of detention or imprisonment which he may have been tried or sentenced by the court to undergo.

[Note: Section 9 of Lunatic Asylum Act, 1958 (now repealed) referred to in sub-section (3) provided that it shall be lawful for three of the visitors of any asylum, of whom one shall be medical officer, to order the discharge of any person detained in such asylum; and when such order is given, if the person is detained under the order of any public officer, notice of the order of discharge shall be immediately communicated to such officer. The said Section corresponds to Section 40 of the Mental Health Act, 1987]

While Section 330 of the Code deals with accused of unsound mind in custody pending investigation or trial, Section 30 of Prisoners Act deals with convicted persons in jail, who become mentally unsound.

6 We may also refer to the relevant provisions of the Mental Health Act, 1987 (for short the 'Act') which repealed the Indian Lunacy Act, 1912.

6.1 Section 27 of the Act provides that an order under Section 30 of the Prisoners Act, 1900 or an order under Section 330 of the Code directing the reception of a mentally ill prisoner into any psychiatric hospital/nursing home shall be sufficient authority for the admission of such person in such hospital/nursing home.

6.2 Section 37 requires the concerned government to appoint not less than five visitors to each psychiatric hospital/nursing home. Section 38 provides for monthly inspection by the visitors and authorizes them to make remarks in regard to the management and condition of the psychiatric hospital/nursing home and of the in-patient thereof. Section 39 of the Act provides that where any person is detained under Section 330 of the Code, Inspector General of Prisons (where such person is detained in a jail), and all or any three of the visitors (where such person is detained in a psychiatric hospital/nursing home), shall once in every three months visit such person at the place where he is detained in order to assess the state of mind of such person and make a report thereon to the authority under whose order such person is no detained. Sub-section (2) authorizes the State Government to empower any of its officers to discharge the functions of the Inspector-General of Prisons under Section 39(1). Sub-section (3) provides that the medical officer in charge of a psychiatric hospital/nursing home where any person is detained under the provisions of Section 330 shall once in six months, make a special report regarding the mental and physical conditions of such persons, to the authority under whose order such person

is detained. Sub-section (4) provides that every person who is detained in jail under Section 330 of the Code, shall be visited at least once in every three months by a psychiatrist or where a psychiatrist is not available, by a medical officer empowered by the State Government, and such psychiatrist/medical officer shall make a special report regarding the mental and physical conditions of such persons to the authority under whose order such person is detained.

6.3 Part II of Chapter V of the Act deals with discharge. Section 40 of the Act empowers the medical officer in charge of a psychiatric hospital/nursing home to discharge any mentally ill prisoner, on recommendation of two medical practitioners one of whom shall preferably be a psychiatrist in the manner provided in Section 30 of Prisoners Act, 1900 or in any other relevant law.

7 From the reports filed by the Registries of various High Courts it is evident that the monthly, quarterly and half-yearly inspection/examination are not regularly being carried out as required under Sections 38 and 39 of the Act and the magistrates/courts authorizing the prisoners to be detained are not receiving the quarterly/half-yearly reports under sub-sections (1), (3) and (4) of Section 39. It is unfortunate that the provisions of Sections 38 and 39 of the Act are not being implemented effectively.

8 As there are large number of mentally ill under-trial prisoners in various psychiatric hospitals/nursing homes, we consider it just and proper to issue some general directions to avoid such mentally ill persons languishing in psychiatric hospitals for long periods:

- (i) Whenever a person of unsound mind is ordered to be detained in any psychiatric hospital/nursing home under Section 330(2) of the Code, the reports contemplated under Section 39 shall be submitted to the concerned Court/Magistrate periodically. The Court/Magistrate shall also call for such reports if they are not received in time. When the reports are received, the Court/Magistrate shall consider the reports and pass appropriate orders wherever necessary. In regard to prisoners covered by sub-section (1) of Section 30 of the Prisoners Act, 1900, the procedure prescribed by sub-sections (2) and (3) of that Section read with Section 40 of the Mental Health Act, 1987 shall be followed.
- (ii) Wherever any undertrial prisoner is in jail for more than the maximum period of imprisonment prescribed for the offence for which he is charged (other than those charged for offences for which life imprisonment or death is the punishment), the Magistrate/Court shall treat the case as closed and report the matter to the medical officer in charge of the psychiatric hospital, so that the Medical Officer incharge of the hospital can consider his discharge as per Section 40 of the Act.
- (iii) In cases where, the under trial prisoners (who are not being charged with offence for which the punishment is imprisonment for life or death penalty), their cases may be considered for release in accordance with

sub-section (1) of Section 330 of the Code, if they have completed five or more years as inpatients.

- (iv) As regards the undertrial prisoners who have been charged with grave offences for which life imprisonment or death penalty is the punishment, such persons shall be subjected to examination periodically as provided in sub-sections (1), (3) and (4) of Section 39 of the Act and the officers named therein (visitors, medical officer in charge of the hospital and the examining medical officer respectively) should send the reports to the court as to whether the under trial prisoner is fit enough to face the trial to defend the charge. The Sessions Courts where the cases are pending should also seek periodic reports from such hospitals and every such case shall be given a hearing atleast once in three months. The Sessions Judge shall commence the trial of such cases as soon as it is found that such mentally ill person has been found fit to face trial.

9 Copy of this order is directed to be sent to the Registrars General of various High Courts and the Chief Secretaries of the State Governments/Union Territories to take necessary steps and follow up action, and submit report to this Court as to the steps taken in pursuance of this order.

10 The matters are adjourned by three months.

(N.Annapurna)
Court Master

(Vijay Aggarwal)
Court Master