
(1982) 12 RAJ CK 0014
In the Rajasthan High Court

Cpl. Gokul Ram

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 14-12-1982

Acts Referred:

Air Force Act, 1950 — Section 102, 109, 110, 111, 124
Army Act, 1950 — Section 124, 125, 126, 127
Constitution of India, 1950 — Article 14, 16, 21, 226, 33
Criminal Procedure Code, 1973 (CrPC) — Section 475
Evidence Act, 1872 — Section 123

Citation : (1983) CriLJ 1223

Hon'ble Judges : S.K. Mal Lodha, J;S.C. Agrawal, J

Bench : Division Bench

Judgement

S.C. Agrawal, J.—By this appeal u/s 18 of the Rajasthan High Court Ordinance, 1949, the petitioner Cpl. Gokul Ram questions the correctness of the order dated Nov. 29, 1982 of the learned single Judge by which his petition under Article 226 of the Constitution was dismissed.

2. A few facts leading to this appeal may briefly be noticed :

The appellant, who was the petitioner before the learned single Judge will be referred hereinafter as "the petitioner." The petitioner was appointed as Airman Corporal in the Indian Air Force on Jan. 18, 1971 and has been serving as such since then. He was posted at 32. Wing Indian Air Force at Jodhpur and was working as Medical Assistant there since Oct. 8, 1979. It is said that on May 27, 1982 there was a section got together with rum and dinner for S S. Q. Staff and their families to bid farewell to Wing Commander T. S. Murti, the outgoing S. M.O. It is said that in connection with the incident detailed in para 4 of the writ petition relating to Sergeant Sripal. the petitioner was placed under a close arrest on May 28, 1982 by N. W. Ajaiyab Singh and was released on May 29, 1982. Thereafter, the petitioner was charge-sheeted by Thakur Y. Medical Assistant Officer. According to the non-petitioners-respondents on May 27, 1982. the petitioner got. drunk and. deliberately threw Rum from his glass at Sergeant

Sripal and as such there was wordy-duel between the two Sergeants and the matter was over then. But subsequently, after the party was over, the petitioner hit Sergeant Sripal with a stick and ran away from the spot and consequently he was put on charge for causing hurt to Sergeant Sripal. The allegation that was levelled by the petitioner against the Sergeant Sripal was enquired by the Court of Enquiry and it arrived at a finding that the allegation made by the petitioner was baseless and the Sergeant Sripal was never involved in the incident of giving slaps to the petitioner. The summary of the evidence was ordered and the Adjutant 32. Wing Air Force informed the petitioner that he was likely to be tried for offences under Sections 40A and 71 of the Indian Air Force Act (No. XLV of 1950) (for short "the Act" herein). Thereafter, the petitioner made representation on June 24. 1982 before the Air Officer Commanding. Indian Air Force 32 Wing giving the details of above harassing tactics. The charge-sheet dated Aug. 20. 1982 was served on the petitioner by the Air Force Commanding 32 Wing Air Force under Sections 66E and 65 of the Act alleging that on Aug. 17, 1982 the petitioner has accepted the amount of Rs. 1,000/- from one Moduram for the purpose of procuring his enrolment in the Indian Air Force and that he received Rs. 1000/- from Moduram for the purpose of helping him for his enrolment in the Air Force. One of the charge was that on Aug. 17, 1982, the petitioner was found in improper possession of Rs. 2020.55-P belonging to Moduram when searched by Flight Lt. Babu, A. D. M. Station Security Officer. Investigation into the charges was made and the evidence was produced on behalf of the prosecution. During the investigation, however, according to the petitioner he was informed vide letter Ex. 3 dated Oct 9. 1982 that in connection with the charge-sheet dated Aug. 20, 1982, the petitioner is likely to be tried by a General Court Martial (hereinafter referred to as "the GCM) and, therefore, he is required to exercise his choice of defence whether he would like to be defended by service defending officer and if so, three names of his choice may be submitted in order of preference so as to arrange their presence as far as possible. The names of the qualified officers who were likely to be available were mentioned in that letter. Another letter (Ex. 4) dated Oct. 29, 1982 was also issued by the Pilot Officer. Station Adjutant to the petitioner in which it was written that in respect of the charge-sheets dated June 3, 1982 and August 20. 1982, the petitioner is likely to be tried by the GCM in the first or second week of Nov. 1982. The petitioner has filed this writ petition on Nov. 6. 1982 praying that the charge-sheet dated June 3, 1982 as well as order Ex. 4 dated Oct. 29, 1982 may be quashed and trial of the petitioner be not conducted by the GCM. A writ of prohibition was also sought against the non-petitioners for restraining them from further proceedings in pursuance of the aforesaid charge-sheets and the directions.

3. A show cause notice was issued to the non-petitioners on Nov. 8. 1982. A preliminary reply to the writ petition was filed on behalf of non-petitioners Nos. 1 to 5 contesting the writ petition on various grounds. A rejoinder to the preliminary reply supported by affidavit was filed on behalf of the petitioner. On November 18, 1982 Mr. J. P. Joshi, learned Counsel for the Union of India

produced the file and submitted that Air Officer Commanding in C has passed the order on Oct 23. 1982 and this order has been passed after the perusal of the report and notes prepared by the Wing Commander. He claimed the privilege u/s 123 of the Evidence Act about the office notes and showed his readiness to give the copy of the relevant part of the order, which was passed by Mr. Basin, A. D.C. Incharge, on Oct. 23, 1982. The Court also directed the learned Counsel for the Union of India to produce the copy of such extract and to supply it to the learned Counsel for the petitioner. learned Counsel for the Union of India was also directed to submit the order constituting the District Court-Martial which is said to be a separate order which can be submitted in the Court and can also be supplied to the learned Counsel for the petitioner.

4. We have heard Mr. M. L. Shree-mali. learned Counsel for the appellant and Mr J. P. Joshi, learned Counsel for the respondents.

5. learned Counsel for the appellant has raised three contentions before us in support of the appeal which are as follows:

(1) that the provisions of Section 124 of the Act are ultra vires and the learned single Judge has erred in holding it (Section 124 of the Act) infra vires.

(2) that the order Ex; 4 dated October 29. 1982 informing that the petitioner was likely to be tried by the GCM in the first or second week of November for the charge-sheets dated June 3. 1982 and Aug. 20. 1982 stands vitiated as no reasons whatsoever have been mentioned for trying the petitioner by the GCM In other words, according to the learned Counsel, the order passed u/s 124 of the Act is bad, for. it is a non-speaking one.

(3) that as the discretion vested in the Officer u/s 124 of the Act has not been exercised before taking the petitioner-appellant into custody, the direction that the petitioner is likely to be tried by the G.C.M. is bad, for the provisions of Section 124 read with Section 102 of the Act make it abundantly clear that the order u/s 124 of the Act must be passed before taking the offender into custody and starting any investigation into the charges. As the petitioner appellant has been taken into Air Force custody much before passing of the order dated Oct 29. 1982 according to the learned Counsel for the appellant, the learned single Judge gravely erred when he held that the order of trying the petitioner by the GCM is according to law.

6. We propose to examine the aforesaid three contentions ad seriatim.

7. We first take up the argument relating.to the vires of. Section 124 of the Act. Section 125 of the Army Act (No XLVI of 1950 is in pari materia with Section 124 of the Act. A contention was raked in Ram Sarup Vs. The Union of India (UOI) and Another, that Section 125 of the Army Act is discriminatory and contravene-the provisions "of Article 14 of the Constitution. Their Lordships of "the Supreme Court considered Section 549 Cr. P.C. (old) which is now equivalent to Section 475 of the Cr. P. C 1973. it was held that the provisions of Section 125 of the

Army Act are not discriminatory and did not contravene the provisions of Article 14 of the Constitution, that the provisions applied to all those persons who are subject to it and that, those persons form a distinct class. As regards, the question that Section 125 of the Army Act does not contain guidelines for the exercise of the discretion of the Officer (Military Officer Concerned) it was held that it is true that Section 125 of the Army Act itself does not contain anything which can be said to be a guide for the exercise of the discretion of the Military Officers concerned in deciding as to which Court should try a particular accused but there is sufficient material in the Act which is to guide for exercising the discretion and that it is expected that the discretion is exercised in accordance with that, it will be useful to excerpt para 22 of the report.

In short, it is clear that there would be a variety of circumstances which may influence the decision as to whether the offender be tried by a Court-Martial or by an ordinary criminal court, and, therefore, it becomes inevitable that the discretion to make the choice as to which court should try the accused be left to responsible military officers under whom the accused be serving. Those officers are to be guided by considerations of the exigencies of the service, maintenance of discipline in the Army, speedier trial, the nature of the offence and the person against whom the offence is committed.

After referring the provisions of Section 549 Cr. P.C. (Old), their Lordships observed in para 27 as follows:

It is clear therefore that the discretion to be exercised by the military officer specified in Section 125 of the Act as to the trial of accused by Court Martial or by an ordinary court, cannot be said to be unguided by any policy laid down by the Act or uncontrolled by any other authority. Section 125 of the Act therefore, cannot, even on merits, be said to infringe the provisions of Article 14 of the Constitution

In *Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others*, while dealing with the procedure prescribed for trial of sessions cases under Chapter XVIII of the Cr. P.C. when compared with the prescribed procedure for trial by the GCM under the Army Act, it was held that there is very little deviation or departure and more or less the procedure appears to be fair, just and reasonable. We are tempted to refer the following observations made by their Lordships in para 45 of the report;

Dr. D.P. Sharma, Judge-Advocate-General, Indian Army in his *Military Law in India* p. 166, after comparing the two procedures observes that the procedure of trial by Court Martial is almost analogous to the procedure of trial in the ordinary Criminal Court. He points out two demerits, viz, a distinct possibility of a successive trial by a Criminal Court and a Court-Martial exposing the accused to the hazards of double jeopardy and the absence of a provision for bail. The horrendous delay of trial in ordinary Criminal Courts, has its counter-part in delay in trial by Court-Martial also. Save and except this deficiency and one or

two of minor character both the procedures are almost identical and this aspect has to some extent influenced our decision." The procedure prescribed for the Court Martial under the Army Act was found not to suffer from any vice. The principles laid down in the aforesaid two Supreme Court cases considering the provisions of the Army Act equally apply to Section 124 of the Act. for. as stated above, Section 125 of the Army Act is identical with Section 124 of the Act.

8. Their Lordships of the Supreme Court in Prithi Pal Singh's case 1983 Cri LJ 6471 in para 15 of the report observed as under:

Hence, every provision of the Army Act enacted by the Parliament, if in conflict with the fundamental rights conferred by Part III. shall have to be read subject to Article 33 as being enacted with a view to either restricting or abrogating other fundamental rights to the extent of inconsistency or repugnancy between Part III of the Constitution and the Army Act. Therefore, a specific provision like Article 21 does not derogate from the generality of power conferred. by Article 33. go viewed the derogation of the rights under Article 21 by the procedure prescribed by the Army Act for Court Martial must be read as the extent to which Article 21 in application to the Armed Forces is modified by enactment of the procedure in the Army Act itself.

9. The learned single Judge has referred to the guidelines contained in para 144 of the Air Force Order dated July 22. 1977. which runs as under:

144 Decisions as to which cases should be tried by civil court:

Unlike trials by courts martial which sit from day to day until the case is disposed of. trials by criminal courts are usually protracted. An officer/airman expects to be given the opportunity of being tried by a court martial if the service courts have jurisdiction to try the offence for which he is charged. Denial of this opportunity is likely to affect his morale and the morale of other Air Force personnel adversely. Thus, persons subject to the Air Force Act should not normally be handed over for trial by the criminal courts unless:

(a) The civil offences alleged to have been committed are of an exceptionally serious nature, or,

(b) It is administratively impracticable to try the person by a court-martial, for example when he is co-accused with other civilians, op

(c) The Central Government has decided that the proceedings against the accused person should be initiated before a Magistrate.

In 1972 All Cri R 145, it was held that the personnel of the Indian Air Force constitute a distinct class and Section 124 is made applicable to them all. There is no discrimination inter se between the members constituting this class. No unguided discretion is conferred on the authorities to decide as to the forum by which an offender may be tried. The section does not contravene Article 14 of the Constitution.

10. Having considered the reasoning of the learned single Judge, the principles laid down by the Supreme Court on the question of validity of Section 125 of the Army Act and the decision in 1972 All Cr. R 145 on Section 124 of the Act, we are of opinion that the learned single Judge was not wrong in holding that Section 124 of the Act is intra vires and does not offend Article 14 of the Constitution. The first contention raised by the learned Counsel for the appellant is therefore, rejected.

11. The second contention of the learned Counsel for the appellant is that the order Ex. 4 dated Oct. 29, 1982 is a non-speaking order inasmuch as no reasons whatsoever have been mentioned as to why the petitioner should be tried by the GCM. learned Counsel elaborated his argument by saying that in the absence of reasons it is difficult to say whether the officer concerned has taken the decision for trying the petitioner-appellant by Court Martial on relevant considerations. He referred to Union of India (UOI) Vs. Mohan Lal Capoor and Others,

12. In *Organo Chemical Industries v. U.O.I* AIR 1979 SC 1803, it was held as under;

Having regard to the punitive nature of the power exercisable u/s 14B and the consequences that ensue therefrom an order u/s 14-B must be a speaking order.

What was laid down in *The Manager, Government Branch Press and Another Vs. D.B. Belliappa*, on which reliance was placed by the learned Counsel for the appellant was that the executive no less than the judiciary is under a general duty to act fairly and indeed fairness founded on reason is the essence of the guarantee epitomised in Articles 14 and 16(1) This contention does not seem to have been raised before the learned single Judge and we have not got the benefit of his view in the matter. Even otherwise, having regard to the scheme of the Act and particularly Section 124 of the Act, we are of opinion that the order Ex. 4 is in substantial compliance with Section 124 of the Act. According to Section 124 of the Act. discretion has been given to the Officer mentioned therein to decide before which Court the proceedings shall be instituted and if that Officer decides that proceedings should be instituted before a Court Martial then to direct that the accused-person shall be detained in Air Force custody. A perusal of the Order Ex. 3 dated Oct 9 1982 shows that in connection: with the charge-sheet dated August 20. 1982 issued to the petitioner-appellant, it was stated that he was likely to be tried by the GCM and, therefore, he was asked to give his choice of defence. So also in the Order Ex. 4 dated Oct. 29, 1982 after referring to the charge-sheets dated June 3, 1982 and Aug. 20, 1982. it was stated that the petitioner-appellant was likely to be tried by the GCM in the first or second week of Nov 1982 for the above charge-sheets issued to him. The Order Ex. 4 dated Oct. 29. 1982 does not stand vitiated and cannot be said to be bad on the ground that it is a non-speaking order as it does not contain reasons.

13. Now. we take up the third and last contention viz.. that the Order Ex. 4 dated Oct 29, 1982 u/s 124 of the Act is invalid, for, it was not passed before taking the

petitioner into custody and starting any investigation into the charges and that discretion u/s 124 of the Act ought to have been exercised before that. Section 102 of the Act runs as follows:

Section 102. Custody of Offenders:

- (1) Any person subject to this Act who is charged with an offence may be taken into Air Force Custody.
- (2) Any such person may be ordered into Air Force Custody by any superior officer.
- (3) Any Officer may order into Air Force Custody any officer, though he may be of a higher rank engaged in a quarrel, affray or disorder. Courts Martial have been dealt with in Chapter X of the Act. Section 109 of the Act provides for different kinds of Court-Martial. Section 110 of the Act provides for power to convene General Court Martial. Section 111 relates to power to convene a District Court Martial. It is correct that the charge-sheets are dated June 3, 1982 and Aug 20, 1982 and the decision that the petitioner should be tried by the GCM was as is evident by the Orders Ex. 3 and Ex. 4 dated Oct. 9, 1982 and Oct. 29, 1982 is of subsequent dates and that no order was passed u/s 124 of the Act before the charge-sheets in question.

14. To appreciate the argument of the learned Counsel for the appellant, we would like to read Section 124 of the Act. is as follows:

Section 124. Choice between criminal court and court-martial. When a criminal court and court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the Chief of the Air Staff, the Officer Commanding any group, wing or Station in which the accused prisoner is serving or such other officer as may be prescribed to decide before which Court the proceedings shall be instituted, and, if that officer decides that they should be instituted before a court-martial to direct that the accused-person shall be detained in Air Force Custody.

Section 125 of the Army Act and Section 549(1) Cr. p. C. (Old) were examined in Delhi Special Police Establishment, New Delhi Vs. Lt. Col. S.K. Loraiya, with particular reference to the word "jurisdiction" used in Section 125 of the Army Act. It was observed as under (Para 11):

The word "jurisdiction" in Section 125 really signifies the initial jurisdiction to take cognizance of a case. It refers to the stage at which proceedings are instituted in a court and not to the jurisdiction of the ordinary criminal court and the court-martial to decide the case on merits. Section 549 (1), Criminal p. C. should be construed in the light of Section 125 of the Army Act. Both the provisions have in mind the object of avoiding a collision between the ordinary criminal court and the court-martial. So both of them should receive a similar construction.

It is clear from this decision that the word "jurisdiction" used in Section 124 of the Act has reference to the stage at which proceedings are instituted in a Court, and not to the jurisdiction of the ordinary criminal court and the court-martial to decide the case, on merits.

15. In *Joginder Singh Vs. State of Himachal Pradesh*, while considering the provisions of Sections 125 and 126 of the Army Act where an offence was triable by the court martial and the ordinary criminal courts, it was held as under (Para 18):

After holding that the Act does not expressly bar the jurisdiction of the criminal court in respect of the Acts or omissions punishable under the Act if they are also punishable under any other law in force in India, this Court held that Sections 125, 126 and 127 excluded any inference about prohibition regarding jurisdiction of criminal courts and those sections in express terms provide not only resolving conflict of jurisdiction between a criminal court and a court-martial in respect of the same Offence, but also provide for successive trials of an accused in respect of the same offence. This Court has further laid down that Sections 125 and 126 provide a satisfactory, machinery to resolve the conflict of jurisdiction having regard, to the exigencies of the situation. This decision in our opinion lays down that there is no exclusion of jurisdiction of the ordinary criminal courts in respect of the offences which are triable" also by the court-martial:

It is thus clear from the aforesaid decision of the Supreme Court referred to above that the discretion u/s 194 of the Act is required to be exercised before institution of the proceedings in a court. The discretion u/s 124 of the Act can be exercised at any stage before instituting the proceedings in Court Martial. The contention that the charge-sheets have been framed prior to the passing of the order u/s 124 of the Act for trial by the Court Martial is bad cannot therefore, be accepted.

16. Having examined the scheme and the relevant sections of the Act. we are disposed to think that the orders Exs. 3 and 4 dated Oct. 9, 1982 and Oct. 29, 1982 do not stand vitiated for the reason that they were made after the issuance of the charge-sheets. The discretion u/s 124 of the Act has been exercised by the officer concerned before instituting the proceedings in the court-martial. The third contention is also overruled.

No other point was pressed for our consideration.

17. The result is that thus special appeal has no merit and it is, accordingly, dismissed summarily.