

(1998) 12 J&K CK 0028

In the Jammu And Kashmir High Court

Case No : No. 75 Of 1997 u/s 561-A Cr. P. C

General Officer Commanding

APPELLANT

Vs

State of J&K through Advocate General

RESPONDENT

Date of Decision : 01-12-1998

Acts Referred:

Army Act, 1950 — Section 125

Citation : (1999) KashLJ 689

Hon'ble Judges : O.P.Sharma, J

Bench : Single Bench

Advocate : S.Singh, B.S.Salathia, Advocates appearing for the Parties

Judgement

1. The petitioner challenges the order virtue of which Judicial Magistrate 1st Class Gandoh has declined to deliver the accused per together with

the statement of offence to t Commanding Officer, who has exercised the op to try them by a Court Martial under the Army, The facts of the case

in brief are that a case under section 302 RPC was registered against M Virinder Malik and Major S. K Chadha in Po Station, Gandoh. The

Investigating Officer submitted report under section 174 Cr. P. charging both the officers for having committed offence of murder.

2. Since both the officers are subject to Ai Act, the General Officer Commanding requested for the custody of both the officers together v the

statement of offence after having decide* try them by a Court Martial. This letter dated 061997 reads as under:

From Maj Gen Vinod Bhanot, V General Officer Commanding, HQ Delta Force.

To: Judicial Magistrate 1st Cla Gandoh (Bhalessa) District Doda. Discipline: IC49206F Capt Virin(Singh of No.5DET.ECUJ(Ex8 Maratha

Exercise of Jurisdiction.

Sir,

1. 1C 49206F Capt Virinder Singh No.5 DET, ECLU (Ex 8 Maratha LI) has been charged before you for offence/s under RPC Sec 302/404. I, as

competent military authority by virtue of the power vested in me under Army/Sec 125 and Rule 5 of the Criminal Courts and Court Martial

Adjustment of Jurisdiction Rules, 1978, have decided that the accused shall be tried by court martial and shall be detained in Military custody.

2. You are, therefore, requested to hand over the case against the above said accused officer, together with the statement of the offence/s to the representative of the Commanding Officer of 17RRBn, who has been directed to approach you for the purpose.

Yours faithfully, Sd/

(Binod Bhanot) Maj General Officer Commanding

This request was rejected by the learned Magistrate himself on 30/7/1997 holding that he has no power to revise his earlier order dated 31/1/96, by

virtue of which it was held that since the accused were not an "active service" at the time of commission of offence, therefore, their custody cannot

be delivered to the Commanding Officer. The operative portion of the order dated 31/1/1996 reads as under:

The accusation leveled against the said accused is that they have committed the offence of murder in respect of a person not subject to military

Naval and Air force Law.

It cannot further more be said that the offence of murder was committed by the accused while on active service or outside the India or while on

frontier post. As Active Service has been defined by Section 3 of the Army Act Sec 3 of the said act provides thus:

In this act unless the context otherwise requires.

(1) 'Active Service' as applied to a person subject to this act means the time during which such person

is attached to or forms part of a force which is engaged in operations against an enemy; or

is engaged in military operation in or is on the line of march to a country or place wholly or partly occupied by an enemy, or

is attached to or forms part of a force which is in the military occupation of a foreign country.

So keeping in consideration the definition of 'active service' it cannot be said that the said two accused committed the offence while on active

service, clauses (b) and (c) of Army Act from their plain language have absolutely no relevance to the instant case.

3. The question involved is whether the officers were on active service. The learned Magistrate, it appears was not aware of SRO 17E dated

05091977 issued under section 9 of the Army Act which reads as under:

S. R. 0.17(E). In exercise of the powers conferred by section 9 of the Army Act, 1950 (46 of 1990) and in super session of the notification of the

Government of India in the Ministry of Defense, No. SRO6E, dated the 28th November 1962, the Central Government hereby declares that all

persons subject to that Act who are not on active service under clause (1) of section 3 thereof shall, while serving in the areas specified below, be

deemed to be on active service within the meaning of that Act for the purpose of the said Act or any other law for the time being in force.

(1) The States of

(2) (a) Jammu and Kashmir.

Since both the officers were posted in the State of Jammu and Kashmir, therefore, they were deemed to be on active service and as such, section

125 of the Army Act is attracted. This section mandates that when a criminal court and a Court Martial have each jurisdiction in respect of offence,

it shall be in the discretion of the Officer Commanding the Army to decide before which court he proceedings shall be instituted and once it is

decided by the Officer Commanding that the offender shall be tried by a court martial, the court has no option but to deliver the accused person to

military custody as noticed above.

5. It is time now to notice section 125 of the Army Act. It reads :

125. Choice between criminal court and Courtmartial when a Criminal court and a court partial have each jurisdiction in respect of an offence, it

shall be in the discretion of the officer commanding the army, army corps, division or independent brigade in which the accused person 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 courtmartial, to direct that the accused person shall be detained in military custody.""

Since the alleged offence has been committed when the accused were on active service it is the discretion of the commanding officer to decide

before which court the proceedings shall be instituted. He has expressed this option and the Magistrate had no option but to stay his hands off and

hand over the proceedings to the Commanding Officer. The Magistrate also erred in holding that acceding to the request of the commanding officer

would tantamount to reviewing his earlier order because the order dated 3111996 had been passed before the commanding officer had exercised

the option under section 125 of the Act. It is obligatory for him to pass the order after receiving the communication from the Officer Commanding.

However, he felt constrained to do so because according to him the offence was not committed while on active service. This view being incorrect

and against law, the order is liable to be quashed. Accordingly this petition is allowed. The order impugned is quashed and the Judicial Magistrate

1st Class, Gandoh is directed to deliver the statement of offence to the Commanding Officer for further necessary action I make the order

accordingly.