
(2003) 04 AP CK 0108
In the Andhra Pradesh High Court
Case No : Writ Petition No. 14501 of 2000

G.M. Rao

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 04-04-2003

Acts Referred:

Army Act, 1950 — Section 125, 126, 191, 69, 80
Army Rules, 1954 — Rule 22, 23
Penal Code, 1860 (IPC) — Section 300, 304A

Citation : (2003) 1 ALD(Cri) 886 : (2003) 3 ALT 407 : (2003) CriLJ 4028

Hon'ble Judges : G. Yethirajulu, J; Bilal Nazki, J

Bench : Division Bench

Advocate : K.M. Saxena, for the Appellant; T. Suryanarayan Reddy, S.C. for C.G., for the Respondent

Final Decision : Dismissed

Judgement

Bilal Nazki, J.—The petitioner filed this writ petition challenging the order of punishment awarded to him by Summary Court-Martial. He was reduced in rank from Naik (DS) to Sepoy (DS). According to the petitioner, he was "enrolled in the Indian Army in the month of April, 1981 in the Corps of Air Defence as a driver and he rose to; the rank of Naik (Driver). The petitioner was driving a motor vehicle TATA 1210 SD make from Balasore, Orissa to Hyderabad, Andhra Pradesh on 10-9-1998. At about 1930 hours the petitioner crossed Hayathnagar market area and was approaching L.B. Nagar when his vehicle had been stopped by certain scooter riders who alleged, that he had hit a cyclist on the road who was injured. Meanwhile the police from PS Hayatnagar came who took the Vehicle into their custody. The petitioner and his co-driver Sarvan Kumar were taken to police station. Thereafter the person who was allegedly injured in the accident died. The petitioner along with his co-driver Sarvan Kumar were taken into custody and later produced before the Magistrate. The Magistrate granted them bail on 11-9-1998 in a crime registered under Crime No. 224/98 u/s 304-A of I.P.C, On 17-2-1999 at the instance of the 9th respondent the learned

Magistrate transferred the case to the Army authorities for trial by Court-Martial. The 10th respondent ordered summary of evidence to be recorded by 8th respondent and thereafter 10th respondent ordered trial by " a Summary Court-Martial. The 10th respondent constituted the Court whereas the 9th respondent was acting as friend of the accused. The petitioner was, thereafter given two punishments by order dated 12-4-2000. He was reduced to the rank from Naik to Sepoy. He was also awarded one month's rigorous imprisonment in Military prison. The punishment awarded is challenged on various grounds. The learned counsel for the petitioner contended that right from the stage of the First Information Report to the stage of awarding of punishment neither the rules of natural justice nor the statutory provisions were followed by the respondents.

2. Before coming to the arguments advanced by the learned counsel for the petitioner it would be necessary to refer to the counter-affidavit filed by the respondents. The respondents in their counter-affidavit have stated that the writ petitioner was entrusted with the duty of driving of the truck belonging to the Army. On 10-9-1998 he collided with a cyclist resulting in death of the cyclist. The petitioner was apprehended by the local police and a case was registered against him. It is further contended that the offence committed by the petitioner was civil in nature within the scope of Section 69 of the Army Act. He was tried in the Summary Court-Martial in accordance with the provisions of the Army Act. Each and every step as laid down by the law was scrupulously followed during the trial. The petitioner was provided with a friend of the accused as requested by him. After taking into account evidence on record and facts and circumstances of the case the Court passed the sentence of reduction of the petitioner in rank and also ordered imprisonment of one month. While awarding the punishment the past conduct of the petitioner was also taken into consideration. The petitioner submitted a representation on 22nd May, 2000 to the General Officer of Commanding, Headquarters, Andhra, Tamil Nadu, Kerala, Karnataka and Goa (ATNKK and G) area who considered the representation of the petitioner and rejected his request. The petitioner had already been reduced in rank, therefore, he was liable to retire on 30th September, 2000 on completion of 14 years of service. The writ petitioner has filed the writ petition suppressing certain facts. The contention of the petitioner that the offence committed by him comes within the ambit of Section 70 of the Army Act and, therefore, it could not be tried by the Court-Martial is not correct. The offence falls within Section 69 of the Army Act. There has been no violation of any statutory provision and, therefore, the writ petition was liable to be dismissed.

3. The first contention raised before this Court by the learned counsel for the petitioner was that, since a Criminal Court had taken cognizance of the matter and a charge-sheet had been filed before the Criminal Court therefore the case could have not been transferred at the instance of the respondents to the Army for the purpose of Court-Martial. In this regard reliance has been placed by respondents on Section 125 of the Army Act. Section 125 reads :

"125. When a Criminal Court and a Court-martial 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 proceeding shall be situated, and, if that officer decides that they should be instituted before a Court-martial, to direct that the accused person shall be detained in military custody."

Section 125 of the Army Act gives a discretion to Officers specified in the section to decide whether a particular accused has to be tried by a Court-Martial or by a Criminal Court. The matter attracted the attention of the Supreme Court on various occasions and in a case reported in *Ram Sarup Vs. The Union of India (UOI) and Another*, which was decided by a Constitutional Bench of Supreme Court even the vires of Section 125 of the Army Act was under challenge on the ground of discrimination. There is a mechanism u/s 125 with regard to transfer of cases from ordinary Criminal Court to the Court-Martial at the instance of the authorities mentioned in Section 125 and the Magistrate can differ with the opinion of the Army Officers mentioned in Section 125 and in such cases the matter would be decided by the Government as to where a person has to be tried, by Court-Martial or by ordinary Criminal Court. Since the vires of Section 125 of the Army Act has been upheld by the Supreme Court, therefore, we do not see any point in the argument that once the Magistrate had taken cognizance the case could have not been transferred to the Army authorities for conducting Court-Martial. In this connection, Section 126 of the Army Act also may be referred to. Section 126 lays down;

"126. (1) When a Criminal Court having jurisdiction is of opinion that proceedings shall be instituted before itself in respect of any alleged offence, it may, by written notice, require the officer referred to in Section 125 at his option, either to deliver over the offender to the nearest Magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the Central Government. (2) In every such case the said officer shall either deliver over the offender in compliance with the requisition or shall forthwith refer the question as to the Court before which the proceedings are to be instituted for the determination of the Central Government, whose order upon such reference shall be final."

If Sections 125 and 126 are read together, these two sections make it clear that an offender who is subject to Army Act can either be tried by a Criminal Court or by a Court-Martial and if the authorities mentioned in Section 125 makes a request to Magistrate, the Magistrate has either to deliver the offender to the Army authorities or refer the matter to the Central Government. Reference would only be there where the Magistrate is of the opinion that the offender could not be handed over to the Army authorities. Sections 125 and 126 do not make any difference between the cases where charge-sheet is filed and where charge-sheet is not filed. Therefore, this argument of the learned counsel for the petitioner

cannot be accepted.

4. The learned counsel for the petitioner has, however, relied on a judgment of Supreme Court in *Major E.G. Barsay Vs. The State of Bombay*, . This case was altogether in different circumstances. The judgment lays down that the Army Act does not expressly or impliedly bar jurisdiction of criminal Courts in respect of acts punishable both under the Army Act and other laws. It only says that, if the designated officer u/s 125 does not make a requisition the criminal Court can proceed with the matter. There is no factual basis laid down in the present writ petition to the effect that the Army had not made any requisition in terms of Section 125 of the Army Act. Therefore, this judgment is not going to help the petitioner.

5. The learned counsel also referred to *Som Datt Datta Vs. Union of India (UOI) and Others*, . This judgment is also not in favour of the petitioner, as a matter of fact, goes against the petitioner because it lays down that, even if the police had started investigation, order by authority u/s 125 for trial by Court-Martial would not be illegal.

6. Now coming to the second question which was argued before this Court, the learned counsel for the petitioner submitted that summary of witnesses was not recorded separately with regard to the two accused. He referred to Rules 22 and 23 of the Army Rules. We have not been able to appreciate the argument advanced on this count by the learned counsel for the petitioner. If two persons were involved in the same offence, the eye-witnesses to the occurrence would obviously state the facts with regard to both the accused at the same time. It is not conceivable that a person who is an eye-witness to an offence which was committed by two persons would give two separate statements with regard to the involvement of each of the accused separately. The argument itself is misconceived and; therefore, is rejected.

7. Then the learned counsel for the petitioner contended that the summary of evidence was not signed by the accused. In this connection the learned counsel has not referred to any rule which makes it obligatory for the accused to sign the statements recorded in summary of evidence.

8. The last arguments which was made was that the Summary Court-Martial was not competent to try the petitioner. The learned counsel for the petitioner submits that u/s 70 of the Army Act the offence is not triable by Court-Martial. Section 70 of the Army Act lays down;

"70. A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a Court-Martial, unless he commits any of the said offences

(a) while on active service, or

(b) at any place outside India, or

(c) at a frontier post specified by the Central Government by notification in this behalf."

On the basis of this Section the learned counsel for the petitioner submitted that the allegations involved related to death of a human being and, therefore, in terms of Section 70 there was a prohibition for Court-Martial to try a civil offence involving an unnatural death. He submitted that since the allegations were of homicide it had to be established at the trial by a Criminal Court. In order to appreciate this contention Section 69 has also to be kept in mind. Section 69 reads as under;

"69. Subject to the provisions, of Section 70, any person subject to this Act who at any place in or beyond India commits any civil offence shall be deemed to be guilty of an offence, against this Act,, and if charged therewith under this section, shall be liable to be tried by a Court-martial and, on conviction, be punishable as follows, that is to say--

(a) if the offence is one which would be punishable under any law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and Such less punishment as is in this Act mentioned; and

(b) in any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned."

Section 69 creates an exception to Section 70. What Section 70 takes away from the jurisdiction of the Court-Martial is murder, culpable homicide and rape with certain conditions. Whether those conditions were available or not would not be pertinent in the present case because admittedly the petitioner was not charged either with murder or culpable homicide not amounting to murder or rape. Every unnatural death of human being is not either murder or culpable homicide. There is a specific offence of causing death by doing any rash or negligent act which is neither culpable homicide not amounting to murder nor murder. The learned counsel for the petitioner wants this Court to hold that even the death caused in an accident by rash and negligent driving is in a way either murder or culpable homicide not amounting to murder. These are three altogether different offences as mentioned in Indian Penal Code. Therefore, the offence u/s 304-A, I.P.C. could be treated as a civil offence in terms of Section-69 of the Act. Therefore, on this ground also we cannot agree with the learned counsel for the petitioner.

9. For all these reasons, we do not find merit in this writ petition which is accordingly dismissed.

10. We understand that the petitioner continued to be in service as Sepoy from March, 2000 to till date. Since he worked for this period in pursuance of the

orders of this Court, therefore, this period shall be regularized as Sepoy and no monetary recoveries shall be made from the petitioner as it would be harsh to him as he had worked for this period.