

(2007) 04 BOM CK 0126
In the Bombay High Court
Case No : Criminal W.P. No. 610 of 2006

Harikant Ramnarayan Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 05-04-2007

Acts Referred:

Army Act, 1950 — Section 125, 126, 126(1)

Army Rules, 1954 — Rule 125

Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952 — Rule 3, 4, 5

Criminal Procedure Code, 1973 (CrPC) — Section 192, 209, 240, 246(1), 252

Citation : (2007) 5 MhLj 419

Hon'ble Judges : D.D. Sinha, J;A.P. Lavande, J

Bench : Division Bench

Advocate : S.A. Jaiswal, for the Appellant; S.B. Ahirkar, for the Respondent

Final Decision : Dismissed

Judgement

D.D. Sinha, J.—Heard Shri S.A. Jaiswal, learned Counsel for the petitioner and Shri S.B. Ahirkar, learned Counsel for the respondents.

2. Rule. Heard forthwith by consent of the learned Counsel for the parties.

3. The question which arises for our consideration in the present writ petition is, "When the offence alleged to have been committed by the Army Officer/Personnel and cognizance thereof has already been taken by the competent Criminal Court, whether the Officer Commanding in view of Section 125 of the Army Act is legally entitled to make a request to the Criminal Court to hand over the custody of the accused to the Army Authority as well as record of the criminal trial for conducting Court martial proceedings as per the procedures prescribed in this regard."

4. Mr. Jaiswal, the learned Counsel for the petitioner has contended that in the instant case the petitioner is a military personnel. At the relevant time, the petitioner was attached to 333 Missile Brigade Military Cantonment, Kamptee,

District Nagpur. It is submitted that on 8-12-2005 the Petitioner alleged to have committed the offence of murder and, therefore, after the First Information Report was lodged in the Police Station, Kamptee, the petitioner came to be arrested by the police. It is further contended that the cognizance was taken by the competent Criminal Court. It is further contended that the charge-sheet was also filed against the petitioner in the competent Criminal Court on 23-12-2005. Mr. Jaiswal, learned Counsel for the petitioner, therefore, contended that once the cognizance is taken by the Criminal Court, it is not open for the Officer Commanding in view of Section 125 of the Army Act or under any Rules applicable in this regard, to make a request to the Criminal Court for transfer of record of the case as well as handing over of the custody of the accused to the Military Authority for holding Court martial proceedings.

5. It is contended that in the instant case the request is made by the Officer Commanding after the cognizance is taken by the Criminal Court of the offence charged against the appellant and, therefore, at such a belated stage the Criminal Court should not have allowed the said request by passing the impugned order and, therefore, the same is unsustainable in law. In order to substantiate the contentions reliance is placed on the decision of the Supreme Court in the case of Union of India (UOI) Vs. Major S.K. Sharma, as well as in the case of Joginder Singh Vs. State of Himachal Pradesh, .

6. The learned Counsel for the Union of India supported the impugned order passed by the Criminal Court. It is contended that in view of Section 125 of the Army Act read with Scheme of Section 475 of the Code of Criminal Procedure, the Officer Commanding has made a request to the Criminal Court to transfer the record of the criminal trial as well to hand over the custody of the petitioner who is an army personnel for conducting the Court martial proceedings. It is contended that in view of the said provision the Officer Commanding is entitled to make such request and, therefore, the order impugned is sustainable in law. In order to substantiate his contention, reliance is placed on the decision of the Rajasthan High Court in the case of Murari Lal Vs. K.C. Aneja, .

7. We have given conscious thought to the various contentions canvassed by the respective counsel. In the instant case, it is more or less not in dispute that the petitioner is alleged to have been involved in a criminal case and cognizance is taken by the Criminal Court.

8. The question involved needs to be considered in the light of the provisions of Section 475 of the Code of Criminal Procedure, Section 125 of the Army Act as well as in view of the Rules i.e. Criminal Code and Court Martial (Adjustment of Jurisdiction) Rules, 1952 for trial of personnel subject to Military, Naval or Air Force Law. It will be appropriate to re-produce the relevant provisions for ready reference. Section 475 of the Code of Criminal Procedure reads as under:

475. Delivery to commanding officers of persons liable to be tried by Court-martial - (1) The Central Government may make rules consistent with this Code

and the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957), and the Air Force Act, 1950 (45 of 1950) and any other law, relating to the Armed Forces of the Union, for the time being in force, as to cases in which persons subject to military, naval or air force law, or such other law, shall be tried by a Court to which this Code applies or by a Court-martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit to which he belongs, or to the commanding officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by a Court-martial.

Rule 125 of the Army Act, 1950 reads as under:

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 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 military custody.

Rules 3, 4 and 5 for Trial of Persons subject to Military Naval or Air Force Law are reads as under:

3. Where a person subject to military, naval or air force law, or any other relating to the Armed Forces of the Union for the time being in force brought before a Magistrate and charged with an offence for which he is also liable to be tried by a Court-martial, such Magistrate shall not proceed to try such person or to commit the case to the Court of Session, unless

(a) he is moved thereto by a competent military, naval or air force authority; or

(b) he is of opinion, for reasons to be recorded, that he should so proceed or to commit without being moved thereto by such authority.

4. Before proceeding under Clause (b) of Rule 3, the Magistrate shall give a written notice to the Commanding Officer or the competent military, naval or air force authority, as the case may be of the accused and until the expiry of a period of fifteen days from the date of service of the notice, he shall not;

(a) convict or acquit the accused u/s 252, Sub-sections (1) and (2) of Section 255, Sub-section (1) of Section 256 or Section 257 of the Code of Criminal Procedure, 1973 (2 of 1974) or hear him in his defence u/s 254 of the said Code, or

(b) frame in writing a charge against the accused u/s 240 or Sub-section (1) of Section 246 of the said Code; or

(c) make an order committing the accused for trial to the Court of Sessions u/s 209 of the said Code; or

(d) make over the case or inquiry or trial u/s 192 of the said Code.

5. Where a Magistrate has been moved by the competent military, naval or air force authority, as the case may be, under Clause (a) of Rule 3 and the commanding officer of the accused or the competent military, naval or air force authority, as the case may be, subsequently gives notice to such Magistrate that, in the opinion of such officer or authority, the accused should be tried by a Court-martial, such Magistrate, if he has not taken any action or made any order referred to in Clauses 9(a), (b), (c) or (d) of Rule 4, before receiving the notice, shall stay proceedings and, if the accused is in his power or under his control, shall deliver him together with the statement referred to in Sub-section (1) of Section 475 of the said Code to the officer specified in the said Sub-section.

9. So far as Section 475 of the Code of Criminal Procedure, 1973 is concerned, it deals with the delivery to Commanding Officers of persons liable to be tried by Court martial. The Act empowers the Central Government to make rules consistent with this Code and Army Act, 1950 as well as any other law relating to the Armed Forces of the Union, for the time being in force, as to cases in which persons subject to military, naval or air force law or such other law, shall be tried by a Court to which this Code applies or by a Court martial, and when any person is brought before the Magistrate and charged with an offence for which he is also liable to be tried either by a Court to which this Code applies or by a Court martial, such Magistrate shall have regard to said rules, and shall in proper cases deliver him, together with a statement of offence of which he is accused, to the commanding officer of the Unit to which he belongs or to the Commanding Officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by a Court-martial.

10. The Central Government framed Rules known as Rules for Trial of Persons subject to Military, Naval or Air Force Law and Rule 3 of the said Rules (referred hereinabove) contemplates that a person subject to military, naval or air force law brought before a Magistrate and charged with an offence for which he is also liable to be tried by a Court martial, such Magistrate shall not proceed to try such person or to commit the case to the Court of Sessions or unless the Magistrate is moved by the competent military, naval or air force authority or the Magistrate is of the opinion for the reasons to be recorded, that he should so proceed or to commit without being moved hereto by such authority. It is evident that the Magistrate in such situation is not entitled to proceed to try the person or to commit the case to the Court of Sessions unless he is moved thereto by the competent military, naval or air force authority. Similarly, the Magistrate also cannot proceed with the trial unless there are reasons to be recorded by the Magistrate to proceed with the criminal proceedings.

11. Similarly, so far as Rule 4 is concerned, the Magistrate is required to give

written notice to the commanding officer before proceeding under Clause (b) of Rule 3 against the accused and until the expiry of a period of fifteen days from the date of service of such notice, the Magistrate shall not do any of the acts mentioned in Sub-clauses (a), (b), (c) and (d) of Rule 4.

So far as the Rule 5 is concerned, it is evident that if the Magistrate has been moved by the competent military, naval or air force authority, as the case may be, under Clause (a) of Rule 3 and the commanding officer of the accused subsequently gives notice to such Magistrate that in the opinion of such officer, accused should be tried as per Court-martial procedure, in such situation, if the Magistrate has not taken any action or made any order under Clauses (a), (b), (c) and (d) of Rule 4 before receiving such notice from the commanding officer, is required to stay the proceedings and is further required to deliver the custody of the accused if it is in his power together with the statement referred to in Sub-clause (1) of Section 475 of the Code to the officer specified in the said Sub-section.

12. In the instant case, it is not disputed that the Magistrate has not given any written notice to the officer commanding/competent authority of the accused as required under Rule 4 before proceeding with the criminal proceeding initiated against the petitioner for the offence charged nor the Magistrate has given any reason in writing to proceed with the criminal proceedings as required under Rule 3(b) and in the absence thereof the framing of charges by the Criminal Court against the petitioner cannot be sustained since the same is done without following the procedure prescribed under Rules 3 and 4. It is in such situation the order impugned cannot be held to be bad in law though otherwise it would not have been open to transfer the proceedings to the military authority in view of the provisions of Rule 5 after framing of charge against the petitioner.

13. So far as Section 125 of the Army Act is concerned it contemplates that though the Criminal Court and the Court martial have jurisdiction in respect of the offence, it shall be in the discretion of the officer commanding of the accused to decide before which Court, proceedings shall be instituted and if that officer decides to conduct Court martial proceeding the accused shall be detained in military custody.

14. The observations of the Apex Court in para 22 in Joginder Singh's case (cited supra) are relevant in this regard which reads thus:

22. It is further clear that in respect of an offence which could be tried both by a Criminal Court as well as a Court-martial, Sections 125, 126 and the Rules, have made suitable provisions to avoid a conflict of jurisdiction between the ordinary Criminal Courts and the Court-martial. But, it is to be noted that in the first instance, discretion is left to the officer mentioned in Section 125 to decide before which Court the proceedings should be instituted. Hence, 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 will have to

exercise his discretion and decide u/s 125 in which Court the proceedings shall be instituted. It is only when he so exercises his discretion and decides that the proceeding should be instituted before a Court-martial, that the provisions of Section 126(1) come into operation. If the designated officer does not exercise his discretion and decide that the proceedings should be instituted before a Court-martial, the Army Act would not obviously be in the way of a Criminal Court exercising its ordinary jurisdiction in the manner provided by law.

15. It is further clear that an offence which could be tried both by a Criminal Court as well as a Court martial, Sections 125 and 126 and the Rules, have made suitable provisions to avoid a conflict of jurisdiction between the ordinary Criminal Courts and the Court martial. But it is to be noted that in the first instance, discretion is left to the officer commanding in Section 125 to decide before which Court the proceedings should be instituted. Hence, the officer commanding of the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed will have to exercise his discretion and decide u/s 125 in which Court the proceedings shall be instituted. It is only when he so exercises his discretion and decides that the proceeding should be the Court martial proceeding, the provisions of Section 126(1) come into operation. If the designated officer does not exercise his discretion and decide that the proceedings should be instituted before a Court-martial, the Army Act would not obviously be in the way of a Criminal Court exercising its ordinary jurisdiction in the manner provided by law.

16. The observation of the Apex Court makes it implicitly clear that the jurisdiction of the military authorities to conduct Court-martial proceedings as well as the Criminal Court to try the offence is parallel. However, in view of the Scheme u/s 125 of the Army Act, in the first instance, discretion is left to the officer commanding to decide before which Court proceedings should be instituted. In the instant case, the Officer Commanding decided to hold the Court-martial proceedings against the petitioner for the offence charged and, therefore, was justified in making request to the Criminal Court for transfer of papers and documents along with the custody of the accused to the military authorities and, therefore, the order impugned passed by the Criminal Court, in our opinion, is sustainable in law.

17. The policy of law is clear. Once the Criminal Court determines that there is a case for trial and pursuant to the aforesaid Rules delivers the accused to the Commanding Officer or the competent military, naval or air force authority, the law intends that the accused must either be tried by a Court-martial or some other effectual proceedings must be taken against him. In view of the above referred observations made by the Apex Court, it is difficult to appreciate as to how the said observation made by the Apex Court helps the case of the petitioner. On the other hand, these observations are consistent with the law laid down by the Apex Court in Joginder Singh's case (cited supra).

18. The learned Counsel for the petitioner has placed reliance on the decision of

the Apex Court in Joginder Singh's case. As already observed, the law laid down by the Apex Court in Joginder Singh's case does not support the contentions canvassed by the learned Counsel for the appellant in view of the scheme provided u/s 125 of the Army Act.

19. The perusal of the impugned order would demonstrate that the competent authority has forwarded the letter dated 31st May, 2006 to Judicial Magistrate, First Class, Kamptee for delivering the petitioner and case papers to the said authority for conducting Court-martial proceedings against the petitioner. The said letter was forwarded by the Magistrate to the District and Sessions Judge, Nagpur. The District and Sessions Judge after taking into consideration the pros and cons passed the impugned order whereby the case papers and documents of Sessions Trial No. 28/2006 as well as custody of accused (petitioner) was directed to be handed over to the Lt. Colonel A.S. Chauhan of 333, Missile Brigade, Kamptee for further trial as per Military Court-martial.

For the reasons stated above, we answer the question in affirmation.

20. In the backdrop of the above referred legal provisions as well as the ratio laid down in the decision of the Apex Court, in our considered view, the impugned order is just, proper and does not require interference. The Criminal Writ Petition is dismissed.