
(1970) 05 CAL CK 0018

In the Calcutta High Court

Case No : Criminal Revision Case No. 360 of 1969

Maha Singh Rikh, Brigadier

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 13-05-1970

Acts Referred:

Army Act, 1950 — Section 125, 126, 126(1), 3, 63
Constitution of India, 1950 — Article 226, 227
Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952 — Rule 8
Criminal Procedure Code, 1898 (CrPC) — Section 435, 439, 549, 561A
Penal Code, 1860 (IPC) — Section 302, 304, 307, 34

Citation : 76 CWN 450 : (1970) 2 ILR (Cal) 390

Hon'ble Judges : Sankar Prasad Mitra, J; R.N. Butt, J; Banerjee, J

Bench : Full Bench

Advocate : S.D. Banerji and Bijoy Bhose, for the Appellant; R.C. Deb, A.K. Basu and Samar Banerjee for Union of India, Banamali Das, General and D.P. Chowdhury, for State, for the Respondent

Judgement

Sankar Prasad Mitra, J.—This is an application under Sections 435, 439 and 561A of the Code of Criminal Procedure and under Article 227 of the Constitution. The Gun and Shell Factory at Cosipore (hereinafter called "the factory") is administered by the Director-General of Ordnance Factories, under the Ministry of Defence, Government of India. This factory manufactures guns and shells or components thereof being ammunitions for the Indian Army. Besides executive and other staff, about 8,000 people (hereinafter referred to as "the workers") were or are employed in the factory. The workers are divided into two shifts. The security of the factory and the property lying therein of the Government of India was and is entrusted with the Indian Army. At all material times commissioned and non-commissioned officers as well as officers belonging to other ranks under the command of Major P. Bhagat have been serving in the eastern Command of the Indian Army and have been manning the factory. On April 8, 1969, sentries were posted at the factory gate under orders of Major P. Bhagat, and Army personnel including Major Bhagat were stationed in or about the factory. At 7-30

a.m., on April 8, 1969, amongst others, (i) L/Naik B. Karioel, (ii) Sepoy Mohan Singh and (iii) Sepoy Potappa Banne were on sentry duty in the factory. All the three sentries were enrolled personnel of the regular Indian Army and, as such, were governed, it is alleged, by the provisions of "the Army Act. The three sentries are hereinafter referred to as "the Army personnel" and they were attached to the Offence Security Force, a part of the Indian Army. The Petitioner contends that the Army personnel were and are deemed to be on "active service" within the meaning of Army Act.

2. On April 8, 1969, the Army personnel were posted as sentries on guard duty at the gate of the factory. The allegation against them is that at about 7-30 a.m. when the workers were entering the factory the Army personnel unlawfully fired on them, as a result of which some of the workers were killed and some others injured.

3. The Detective Department of the Calcutta Police took up investigation and with the assistance of local Police Station arrested four civilian personnel of the factory and on April 9, 1969, produced them before Shri R. K. Ganguly, Police Magistrate, Sealdah.

4. On April, 10, 1969, Colonel-in-charge, Administration, communicated the order of the General Officer Commanding, Bengal Area, to the Petitioner, the Sub-Area Commander, Calcutta Sub-Area, wherein the G.O.C. directed (a) that proceedings shall be instituted before a Court Martial in respect of the following persons of units as mentioned against each of them, who were alleged to have been involved in a shooting incident at the Gun and Shell Factory, Cossipore, on April 8, 1969, under Sections 63 and 69 of the Army Act, 1950, read with Sections 302, 304, 307 and 34 of the Indian Penal Code:

(a) No. 1306383 I/Nk. B. KARIOYAN of 144 DSC PI. "(b) No. 3341613 Sep. MOHAN SING of 144 DSC PI. (c) No. 8821012 Sep. SETAPPA BAMTE of 87 DSC PI.

(b) and that during the aforesaid proceedings the persons named above shall be detained in Military custody.

5. The directions contained in the letter aforesaid were carried out according to the Petitioner on April 10, 1969.

6. On April 10, 1969, a Court of Enquiry under the Army Act and the rules thereunder was convened under the orders of the G.O.C, Bengal Area. The Court of Enquiry assembled on April 11, 1969, and commenced its sittings on the following day which, the Petitioner states, have been going on from day to day. On April 11, 1969, the appropriate Military authorities wrote to the Chief Secretary, Government of West Bengal, and to the Police Magistrate, Sealdah, that the work of the Court of Enquiry was progressing and requested them to afford all assistance to this Court.

7. On April 16, 1969, Inspector D. P. Mukherjee, as Investigating Officer, prayed

ex parte to the Police Magistrate, Sealdah, for issue of warrants of arrest against the Army personnel. The Police Magistrate, Sealdah, acceded to the prayer and issued the usual warrants of arrest directed to the Sub-Area Commander, Calcutta Sub-Area, Fort William. The Military authorities received the warrants on April 17, 1969.

8. In this application the Petitioner has asked, inter alia, for the issue of a Rule on the District Magistrate, 24-Parganas, to show cause why the order of the Police Magistrate, Sealdah, dated April 16, 1969, directing issue of warrants of arrest of the Army personnel should not be quashed. The Petitioner moved the application on April 22, 1969, and Talukdar J. made the following order:

Let the record be sent for and a Rule issue calling upon the District Magistrate 6f 24-Parganas to show cause why the order complained of in the petition should not be quashed or set aside or such order or further orders made as to this Court may seem fit and proper.

9. His Lordship was also pleased to grant an interim stay. We are told on September 3, 1969, a Court Martial was ordered for trial of the Army personnel. On September 10, 1969, D. P. Mukherjee, the Investigating Officer aforesaid, was served with summons to attend the proceeding before the Court Martial on September 18* 1969. On September 17, 1969, at the instance of the State Government this Court in its appropriate jurisdiction was moved for a Rule under Article 226 of the Constitution, The Rule was issued and certain interim orders were also made staying, inter alia, the attendance of D. P. Mukherjee pursuant to the summons served on him.

10. Eventually, the present Special Bench was constituted to hear both this application and the application under Article 226 of the Constitution.

11. Mr. B. Das, appearing for the State Government, submitted to us that he had instructions not to proceed with the application under Article 226. That application has, accordingly, been disposed of. In the present application, Mr. Das has stated to us on behalf of the State Government that he did not intend to urge the points raised in the affidavit-in-opposition by Nirupam Sen on behalf of the State of West Bengal affirmed on May 16, 1969; but it is the desire of the State Government that the legal propositions involved should be laid down in our judgment. In these premises, we have heard counsel for the Petitioner, Mr. Banerji. Mr. Deb, counsel for the Attorney-General of India, told us that he did not think he could add anything useful to what Mr. Banerji had submitted. Mr. Das, counsel for the State Government, thereafter told us that he did not want to make any submission except that he placed certain Government records before us for our consideration.

12. Now, Section 70 of the Army Act, 1950, provides, inter alia, that 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, 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 these offences while on active service.

13. In other words, a trial by a Court Martial is permissible when a person is charged with murder or culpable homicide only if he is on "active service". Active service, as applied to a person subject to this Act, means the time during which such person (a) is attached to, or forms part of, a force which is engaged in operations against an enemy, or (b) is engaged in military operations in, or is on the line of march to a country or place wholly or partly occupied by an enemy, or (c) is attached to or forms part of a force which is in military occupation of foreign country.

14. The Army personnel referred to in this application do not come within the scope of this definition ; but Section 9 of the Army Act, 1950, has provided that notwithstanding anything contained in Clause (i) of Section 3, the Central Government may, by notification, declare that any person or class of persons subject to this Act shall, with reference to any area in which they may be serving or with reference to any provision of this Act or of any other law for the time being in force, be deemed to be on "active Service" within the meaning of this Act.

15. In para. 22 of the petition it is stated that by a notification dated November 28, 1962, the Army personnel mentioned in this petition have been declared as "deemed to be on active service". A copy of that notification has been annexed to the petition and marked "D\\ The notification runs thus:

In the exercise of the power conferred by Section 9 of the Army Act, 1950 (46 of 1950), the Central Government hereby declares that all persons subject to that Act who are not on active service under Clause (i) of Section 3 thereof, shall, wherever they may be serving, be deemed to be on active service within the meaning of that Act for the purpose of the said Act or of any other law for the time being in force.

16. In view of the notification u/s 9 of the Army Act which has not been challenged in any manner before us we must hold that the Army personnel against whom warrants of arrest were issued must be deemed to have been on "active service" on the relevant date.

17. We have now to analyze, in the context of the provisions discussed above, the effect of some of the sections of the Army Act. In Section 125 it is prescribed that 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.

18. In the instant case we find from annex. "B" to the petition that the General Officer Commanding, Bengal Area, directed on April 10, 1969, that proceedings would be instituted before a Court Martial in respect of the Army personnel herein. It is not disputed that the G.O.C., in the instant case, was the Officer Commanding within the meaning of Section 125. Annexure "B" to the petition therefore indicates, in our opinion, that the Officer Commanding in the exercise of his discretion decided in favour of the trial not by a Criminal Court but by Court Martial. Annexure "B" shows further that he directed, in accordance with the provisions of Section 125, that during the proceedings before the Court Martial the Army personnel would be detained in Military custody.

19. We now come to the most important section of the Army Act, relevant for our purposes, in the present application. It is Section 126 of the Act which runs thus:

126. Power of Criminal Court to require delivery of offender.

(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.

20. There are similar principles laid down under the Code of Criminal Procedure as well. Section 549 of the Code gives power to the Central Government to make Rules consistent with the Code and, inter alia, the Army Act. The Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952, were framed by the Central Government u/s 549 of the Code. Rule 8 provides:

Notwithstanding anything in the foregoing rules, where it comes to the notice of a Magistrate that a person subject to Military, Naval or Air Force Law has committed an offence, proceedings in respect of which ought to be instituted before him and the presence of such persons cannot be procured except through Military, Naval or Air Force authorities, the Magistrate, may by a written notice require the Commanding Officer of such person either to deliver such person to a Magistrate to be named in the said notice for being proceeded against according to law or to stay the proceedings against such person before the Court Martial, if since instituted, and to make a reference to the Central Government for determination as to the Court before which proceedings should be instituted.

21. In view of the provisions aforesaid, the Police Magistrate, Sealdah, could only give a written notice to the G.O.C., Bengal Area, requiring him, at his option, either (a) to deliver over the Army personnel to the Police Magistrate to be

proceeded against according to law or (b) to postpone the proceedings before the Court Martial pending a reference to the Central Government for determination as to the Court before which such proceedings should be instituted.

22. From the certified copy of the order of the Police Magistrate of Sealdah dated April 16, 1969, which has been annexed to the petition, it does not seem to us that the Magistrate acted in accordance with the provisions of Section 126 of the Army Act, 1950, or Rule 8 of the Criminal Courts and Court martial (Adjustment of Jurisdiction) Rules, 1952. His order issuing warrants of arrest directed to the Sub-Area Commander, Calcutta Sub-Area, Fort William, for immediate arrest of the Army personnel herein and their production before him appears to be wholly without jurisdiction. Even by a liberal construction of this order it is not possible to hold that he was trying to require the G.O.C., Bengal Area, to postpone the proceedings before the Court Martial pending a reference to the Central Government.

23. The Supreme Court in Major E.G. Barsay Vs. The State of Bombay, , has discussed the provisions of Section 125 and Section 126(1) of the Army Act. The Supreme Court has said that Sections 125 and 126 are clearly intended to apply to offences which are triable both by an ordinary Criminal Court having jurisdiction to try them and a Court Martial. In the case before the Supreme Court the designated officer in s, 125 had not chosen to exercise his discretion to decide before which Court the proceedings would be instituted. As he had not exercised the discretion, the Supreme Court observed, there was no occasion for the Criminal Court to invoke the provisions of Section 126, for the second part of Section 126(1) which enabled the Criminal Court to issue a notice to the officer designated in Section 125 to deliver over the offender to the nearest Magistrate or to postpone the proceedings pending a reference to the Central Government, indicated that the Sub-section presupposed that the designated officer had decided that the proceedings would be instituted" before a Court Martial and directed that the accused person would be detained in Military, custody. The Supreme Court says further that if no such decision was arrived at, the Army Act could not obviously be in the way of a Criminal Court exercising its ordinary jurisdiction in the manner provided by law.

24. In the case before us, we find from the records that the designated" officer in Section 125 had, in fact, exercised his discretion and had directed on April 10, 1969, that proceedings would be instituted before a Court Martial and during the pendency of the proceedings the Army personnel would be detained in Military custody. In these" premises, the Criminal Court was incompetent to exercise its ordinary jurisdiction except in accordance with the provisions of Section 126.

25. The Supreme Court in Som Datt Datta Vs. Union of India (UOI) and Others, has again discussed the scope of the relevant provisions in Sections 125 and 126 of the Army Act in these words:

Under the scheme of these two sections, in the first instance it is left) to the

discretion to the officer mentioned in Section 125 to decide before which Court the proceedings shall be instituted,, and, if the officer decides that they should be instituted before a Court Martial, the accused person is to be detained in Military custody; but if a Criminal Court is of opinion that the said offence shall be tried before itself, it may issue the requisite notice u/s 126 either to deliver over the offender to the nearest Magistrate or to postpone the proceedings pending a reference to the Central Government. On receipt of the said requisition, the officer may either deliver over the offender to the said Court or refer the question of proper Court for the determination of the Central Government whose order shall be final. These two sections of the Army Act provide a satisfactory machinery to dissolve the conflict of jurisdiction, having regard to the exigencies of the situation in a particular case.

26. On the facts of this case, there is no doubt that the Police Magistrate, Sealdah, had adopted an erroneous procedure. He has said, in his order: until now the Military authorities have not charged the D.S.C. personnel concerned with any offence under a wrong impression and should have made further enquiries before issuing warrants of arrest. The operative part of his order violates the provisions of Section 126(1) of the Army Act and of Rule 8 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952, and must be set aside.

27. In the result, the Rule issued herein with respect to issue of warrants is made absolute and the order of the Police Magistrate, Sealdah, dated April 16, 1969, issuing warrants of arrest directed to the Sub-Area Commander, Calcutta Sub-Area, Fort William, is quashed.

R.N. Dutt, J.

28. I agree.

Banerjee, J.

29. I agree.