

(1988) 12 KAR CK 0001
In the Karnataka High Court
Case No : W.P. No. 8388/1988

Major Obanna Kamma Pedda

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 12-12-1988

Acts Referred:

Army Act, 1950 — Section 70

Citation : (1988) 3 KarLJ 225

Hon'ble Judges : M. Rama Jois, J

Judgement

Rama Jois, J.-The petitioner, an ex-Major of the Indian Army has presented this petition praying for quashing the conviction and sentence imposed on him by a Court Martial.

2. The facts of the case, in brief, are as follow: (i) The petitioner joined the Army in April 1963. In October 1971, he became a Major. In December 1986 he was attached to ASC Centre (South), Bangalore. He was also provided with a residential quarters. On 7-12-1986 another Major in the Army filed a complaint before the Ulsoor Police Station alleging that on 6-12-1986 at about 7.30 P.M. the petitioner committed rape on his minor daughter, aged about twelve years, at Room No.2 of the petitioner's quarters. The Police investigated into the complaint and they filed a charge-sheet before the V Metropolitan Magistrate, Bangalore. The petitioner was charged with the offences punishable under Section 342 (wrongful confinement) and 376 (rape), of the I.P.C. The petitioner appeared before the learned Magistrate and was enlarged on bail on 11-12-1986. Thereafter, the learned Magistrate on going through the charge-sheet, directed issue of notice to the petitioner-accused on 30-1-1987.

(ii) Thereafter, the Commandant, ASC Centre (South) made an application before the learned Magistrate under Section. 125 of the Army Act making a prayer to the effect that the petitioner be handed over to the custody of the Army, as the Commandant wanted to try the petitioner for the offences charged against him under the provisions of the Army Act by constituting a Court Martial. This

application was allowed by the learned Magistrate on 31-3-1987. Thereafter, a Court Martial was constituted and the petitioner was tried before the Court Martial so constituted. On 3-6-1987 the Court Martial found the petitioner guilty of the offences with which he was charged before the Court Martial, and imposed the sentence vide Annexure-J. It reads:

"The court is closed for the consideration of the sentence.

SENTENCE

The court sentence the accused Shri Obanna Kamma Pedda, formerly IC-18602W Maj Obanna Kamma Pedda, ASC Centre (South) Bangalore, now attached to the same unit and liable to be tried by Court Martial under Section 123 of the Army Act to:

- (a) To be dismissed from the service.
- (b) To suffer rigorous imprisonment for two years.

ANNOUNCEMENT OF SENTENCE

The court being re-opened, the accused is brought before it. The sentence is announced in open court; the sentence is announced as being subject to confirmation.

Signed at Bangalore, on this the Third day of June 1987.

(MH Chawda)

Lt. Col. Judge

Advocate Sd/-

(OPK Pillai)

Brig.

Presiding Officer."

Aggrieved by the said order, the petitioner preferred a revision before the General Officer Commanding. On 13-7-1988 the revisional authority made the following order (Annexure-K). It reads:

"REVISION ORDER

1. Order by 1C-613 OY Major General Nirmal Sondhi, AVSM, General Officer Commanding, Andhra, Tamil Nadu. Karnataka and Kerala Area.
2. The General Court Martial which assembled on 18 May 87 and subsequent days for the trial of Shri Obanna Kamma Pedda formerly IC-18602W Major Obanna Kamma Pedda, ASC Centre (South) Bangalore, now attached to the same unit, will now reassemble in open court, at ASC centre (South), Bangalore on Fifth day of August 1987 at 1000h for the purpose of reconsidering the

sentence awarded by the Court to the accused.

3. While in no way wishing to interfere with the discretion vested in the Court with regard to quantum of punishment to be awarded, I, as confirming officer, wish to point out that the sentence of dismissal and rigorous imprisonment for two years awarded to the accused is not legal as the same is not known in the eyes of law. In case of an officer, a sentence of cashiering is required to precede the sentence of imprisonment. Once the Court had decided to award imprisonment to the accused officer, it was mandatory for the Court to sentence the accused to be cashiered keeping in view the provisions of AA Section 74. Care should have been taken to comply with the aforesaid statutory provision.

4. After the revision order is read in open court and before reconsidering the sentence; the Court will give the accused an opportunity to make any further statement/address with reference to the points raised in this revision order.

5. In view of the foregoing, the court should revoke its earlier sentence and award legal sentence.

6. Attention is drawn to AA Section 160, Army Rules 65 and 68 and notes thereto and the specimen form of proceedings on revision at pages 421 and 422 of the MML-Vol.II, 1983.

7. After the revision, the proceedings shall be forwarded to this HQ through Dy. JAG, HQ Southern Command, Pune.

Signed at Madras on this thirteenth day of July 1987.

Sd/-

(Nirmal Sondhi)

Major General

General Officer Commanding

Andhra, Tamil Nadu,

Karnataka and Kerala Area."

Thereafter, once again on 6-8-1987 the Court Martial passed the following sentence against the petitioner. It reads:

"SENTENCE ON REVISION

The Court is closed to reconsider their sentence.

The Court having attentively considered the observations of the confirming authority and the whole of the proceedings, do now revoke their sentence and now sentence Shri Obanna Kamma Pedda formerly IC-18602W Major Obanna Kamma Pedda, ASC Centre (S) Bangalore, now attached to the same unit:

(a) to be Cashiered (b) to suffer rigorous imprisonment for two years

ANNOUNCEMENT OF SENTENCE

The Court being re-opened, the accused is brought before it. The sentence is announced in open court; the sentence is announced as being subject to confirmation.

Signed at Bangalore on this sixth day of August 87.

(MH Chawda)

Lt Col

(Judge Advocate) Sd/-

(OPK Pillai)

Brig

(Presiding Officer)

The said sentence was confirmed by the order of the Chief of the Army Staff (Annexure-H). It reads:

"C/00169/DV-2

MINUTE

GCM: SHRI OBANNA KAMMA PEDDA FORMERLY IC-18602W MAJ KP OBANNA ASC (CENTRE) BANGALORE

CONFIRMATION

1. I confirm the finding and sentence of the court.
2. I direct that the sentence of rigorous imprisonment shall be carried out by confinement in civil prison.
3. The accused is recommended Division "C" (or III) while undergoing sentence in the Civil Prison. If there are only two division of prisoners the accused is recommended Division "B" (or II),

Signed at New Delhi on this Twenty eight day of December 1987.

Sd/-

(K. Sundarji)

General Chief of the Army Staff.

Aggrieved by the said order, the petitioner has presented this petition.

3. In the petition, the petitioner has urged the following grounds in support of his prayer for quashing the penalty imposed on him by the Court Martial and confirmed by the Chief of Army Staff;

(i) In view of Section 70 of the Army Act, the petitioner was not liable to be tried

for the offence with which he was charged, by a Court Martial, but he was liable to be tried only by an ordinary criminal court having jurisdiction to try for offences punishable under Sections 342 and 376 of the I.P.C. and in particular for offence under Section 376 of the I.P.C.

(ii) The order convening the General Court Martial was illegal and invalid for the reason that it had not been signed by Major General Nirmal Sondhi.

(iii) None of the provisions of Rule 37, Clauses (i) to (iv) of the Army Rules had been complied with by Brigadier R.C. Mehta who had convened the Court Martial for and on behalf of the Major General Nirmal Sondhi; nor the latter himself had complied with the provisions of the said Rules.

(iv) There was violation of Regulation which makes it obligatory upon the Convening Officer to refer the case to the Judge Advocate General before referring the case to the General Court Martial.

(v) The refusal on the part of the Court Martial to summon the wife of the petitioner whom the petitioner wanted to examine as a defence witness had resulted in serious miscarriage of justice.

4. I, now proceed to consider the first contention urged for the petitioner based upon Section 70 of the Army Act. The said Section reads:

"Section 70. Civil Offences not triable by court-martial: 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."3

According to the above Section, a person subjected to the Army Act is not liable to be tried by a Court Martial in respect of the following three offences:

(i) Murder, (ii) Culpable homicide not amounting to murder, (iii) Rape.

provided the offences are against persons who are not subject to the provisions of the Army Act. There are, however, three exceptions. If any of the three offences is committed by a person subject to the Army Act even against a person not subject to the provisions of the Army Act, the offender could be tried by a Court Martial if at that time the concerned person is on active service or at any place outside India or at a frontier post specified by the Central Government by notification in this behalf. On the facts of the case, there is no dispute that the offence of rape alleged to have been committed by the petitioner was against the daughter of another Major in the Army and therefore the offence was committed on the person who was not subject to the provisions of the Army Act. At the time when the petitioner is alleged to have committed he was not in active service

and it was committed at Bangalore. Therefore, in view of Section 70 of the Army Act, the petitioner could have been tried only by a Court of Sessions which had the jurisdiction to try for offence of rape. Even so, an application was made under Section 125 of the Act before the Magistrate for handing over the petitioner to military custody for enabling his trial before the Court Martial. Section 125 of the Act reads:

"Section 125. Choice between criminal Court and Court-Martial: 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."

From the language of Section 125 of the Army Act, it is clear that a discretion is given to the Commanding Officer of the Army either to allow an officer of the army to be tried by an ordinary criminal court or to try him before a Court Martial, provided the offence with which the concerned Member of the armed force is charged is triable both by the Court Martial and by the criminal court. Section 475 of the Cr.P.C. empowers the Central Government to make rules regarding cases to be tried by the Court to which the code applies and by a Court Martial. That Section reads: "Section 475(1) The Central Government may make rules consistent with this Code and the Army Act, 1950, the Navy Act, 1957, and the Air Force Act, 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.

(a) "unit" includes a regiment, corps, ship, detachment, group, battalion or company, (b) "Court-martial" includes any tribunal with the powers similar to those of a Court-martial constituted under the relevant law applicable to the Armed Forces of the Union.

(2) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any unit or body of soldiers, sailors or airmen stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

(3) A High Court may, if it thinks fit, direct that a prisoner detained in any jail situate within the State be brought before a Court-martial for trial or to be examined touching any matter pending before the Court-martial."

The contention of the petitioner is that both having regard to the language of Section 125 of the Army Act and Section 475 of the Cr.P.C. the Commanding Officer could not have sought the withdrawal of the case from the Court of Metropolitan Magistrate and to subject the petitioner for trial before a Court Martial, as the offence with which he was charged was rape falling under Section 376 of the I.P.C. and therefore the Court Martial had no jurisdiction to try the petitioner for that offence in view of the clear bar contained in Section 70 of the Act.

5. The answer of the respondents to this contention, however, is that the offence with which the petitioner was charged was not Section 376 of the I.P.C. as such but the charge levelled against the petitioner was an attempt to commit rape falling under Section 511 read with Section 376 of the I.P.C. In support of the above contention, Sri Dharmakumar, the learned Counsel for the respondents relied on the order of the Metropolitan Magistrate made on the application of the Commanding Officer, copy of which is produced as Annexure-R-2. It reads:

"In the Court of the Metropolitan Magistrate, V Court, Bangalore City.

Complainant:

Accused:

C.C.No.154/87 Ulsoor Police

v

Major K.P. Obanna,

S/o Obalesh,

aged 52 years,

A.S.C. Centre.

Cr.No.580/86

The charge sheet against the accused in this case is filed by the Ulsoor Police, for an offence punishable under Sections 342, 354 and 376 r/w 511 IPC.

1. The accused is on bail and on 31-1-87 an application is filed for taking over the case by the Court Marshal against the accused is filed by one Krishna Kumar, Major, Adjutant for Commandant to the effect that it was decided by the higher authorities that the case has to be tried by the Military Court and his request was made by that application that for the transfer of the above case and its records with documents to the Military Court and the said application is enclosed with the sanction Order under the provisions of the Army Act under Section 125 r/w Army

Rules 197-A wherein the sanction is accorded by Brig, Commandant, ASC Centre (South) Mr.S.P. Bhatia for taking over the case against the accused filed by the Ulsoor Police for the above said offences from this Hon''ble Court to the Military Court.

2. Perused the sanction and the application made and also the Memo of the learned A.P.P. dated 31-1-87 for the transfer of the present proceeding together with entire records under Section 475 Cr.P.C. to the Military Court. I have also gone through the order of the Director of Prosecutions addressed to the Senior Assistant Public Prosecutor, Metro politan Magistrate, v Court, Bangalore, under its order No.DPN-ADM.7/87 dated 31-1-87. Perused the provisions of Section 475 of the Cr.P.C. and heard the learned A.P.P. for the State. Hence the case records in C.C. No.154/87 be transferred to the Military court along with the entire records and documents for the trial of the alleged offence against the accused by the competent military court. The entire case records in this case be transferred to Major U.P. Singh of A.S.C. Centre (South) who is present on behalf of the Unit Officer S.P. Bhatia, Brig. Commandant, ASC Centre (South).

Dated this the 31st day of January, 1987.

Sd/-

Metropolitan Magistrate,

V Court, Bangalore City.

The learned Counsel pointed out that as can be seen from the first paragraph of the order, the offences with which the petitioner was charged were Sections 342, 354, 376 read with 511 of the I.P.C. The learned Counsel submitted that there was a clear difference between an offence of rape falling squarely under Section 376 and the offence of attempt to commit rape falling under Section 376 read with Section 511 of the I.P.C. He maintained that if the offence was only an attempt to commit rape, the bar created by Section 70 of the Act would not operate.

6. Sri P.S. Devadas, the learned Counsel for the petitioner, furnished two answers to the above contention urged by Sri Dharma Kumar. They are:

(i) That according to the First Information Report given by the complainant, the offence alleged to have been committed by the petitioner was rape falling under Section 376 of the I.P.C. and not an attempt to commit rape. After investigation into the offence, in the charge sheet filed by the Police before the Magistrate also, the offences with which the petitioner was charged were Sections 342 and 376 I.P.C. In the Court Martial the charge under Section 376 was altered into one of an attempt to commit rape falling under Section 376 r/w Section 511 I.P.C. only in an attempt to have the petitioner tried before a Court Martial and avoiding trial before the Sessions Court and for doing so the respondents had no authority as they could not go behind the proceedings which had already taken before the learned Magistrate.

(ii) Even on the basis that the charge levelled against the petitioner was an attempt to commit rape, the bar created by Section 70 of the Act operates.

7. In support of the submission that the offence with which the petitioner was charged was only Section 376 and not an offence of an attempt to commit rape falling under Section 376 read with Section 511, the petitioner has produced a photo copy of the charge-sheet, which had been served on him after the same was filed before the jurisdictional Magistrate. In the charge-sheet the entire complaint given by the complainant against the petitioner on 7-12-1986 is set out. In the said complaint, it is specifically stated that the petitioner raped the daughter of the complainant and in the charge-sheet it is clearly stated that the offences with which the petitioner were under Sections 342 and 376 of the I.P.C.

8. As the entire case of the petitioner depended upon the offences with which he was charged before the Magistrate and as the petitioner had produced only a photo copy of the charge-sheet, on the last occasion after the matter was heard in part, a direction was issued to the respondents to produce the original charge-sheet filed by the Ulsoor Police against the petitioner. The original records have been produced today in which the charge-sheet is available. The records show that what the petitioner has produced is a true copy of the charge-sheet. In the original charge-sheet also the offences with which the petitioner was charged is shown as Sections 342 and 376 I.P.C.

9. How and why the learned Magistrate stated in his order made on the application filed by the Commanding Officer under Section 125 of the Army Act read with Section 475 of the Cr.P.C. that the charge levelled against the petitioner was under Section 376 read with Section 511 of the I.P.C., is difficult to understand. But the fact remains that in the complaint lodged against the petitioner as well as in the charge-sheet filed by the Police after investigation before the Magistrate, the offence with which the petitioner was charged was under Section 376 I.P.C. This being the position, the application filed by the Commanding Officer before the Magistrate for handing over the petitioner to the custody of the Army for being tried in a Court Martial itself was not maintainable and could not have been granted by the Magistrate.

10. In support of the submission that the charge levelled against the petitioner in the charge sheet before the Magistrate, which was taken cognizance of, by the Magistrate and on the basis of which the notice was issued to the petitioner could not be ignored. Learned Counsel for the petitioner relied on the Judgment of the Supreme Court in the case of Union of India v S.K. Sharma (A.I.R. 1987 S.C. 1878). The relevant portions of the Judgment read:

"13. On the aforesaid analysis we are of opinion that the Army authority is not entitled to ignore the proceeding taken by the Additional Chief Judicial Magistrate and to invoke the provisions of Rule 22 and related rules of the Army Rules. The Additional Chief Judicial Magistrate having held that there is a case for trying the two accused officers and having directed their appearance, the Army authority

must proceed to hold a court-martial for their trial or take other effectual proceedings against them as contemplated by the law. The contention advanced by learned counsel for the appellants to the contrary must be rejected.

14. We have also been referred to the provisions of the Army Rules relating to Courts of Inquiry, and learned Counsel for the appellants urges that notwithstanding the proceeding taken by the Additional Chief Judicial Magistrate it is open to the Army authority to hold a Court of Inquiry and determine whether there is any case for trying the accused by a court-martial. We have been taken through R.177 and the connected Rules which deal with the institution and conduct of Courts of Inquiry, but we see nothing in those provisions which can support the contention now raised before us. If on the analysis detailed earlier, it is not open to the Army authority to have recourse to R. 22 and investigate the charge directed against the accused officer in this case, for the same reason it is not open to it to hold a Court of Inquiry and supersede the proceeding already taken by the Additional Chief Judicial Magistrate."

From the above judgment, it is clear that it is not open for the army authorities to supersede the proceedings already taken before the Metropolitan Magistrate and hold a Court of Inquiry to formulate the charges against the petitioner, when the police had investigated into the complaint lodged before them against the petitioner that he had committed an offence of rape and had filed the charge-sheet before the Magistrate stating that the petitioner had committed an offence of rape under Section 376 I.P.C. and the Magistrate on going through the investigation report directed issue of notice to the petitioner, any further proceedings under the provisions of the Army Act had to proceed on this sard basis. The proceedings before a Court of Inquiry required to be held under the Army Rules, are meant to formulate the charges against the accused person governed by the Army Act, before subjecting him for trial before the Court Martial, are equivalent to the proceedings before the Magistrate taking cognizance of the offence against an accused person and issuing of notice. The ratio of the decision of the Supreme Court in S.K. Sharma's case is that the Army authorities are not entitled to ignore the proceedings that had taken place before the Magistrate This clearly means if the offences with which the petitioner was charged in the proceedings before the Magistrate were triable both by the criminal courts under the Code as also under the Army Act, the Army Officer had the discretion to decide as to whether the accused concerned should be tried by the Court or Court Martial, in view of Section 125 of the Army Act read with Section 475 of the Cr.P.C. But in the present case in the proceeding before the Magistrate the petitioner was charged with offence of rape falling under Section 376 I.P.C. The Court Martial had no jurisdiction to try the petitioner for that offence in view of the bar created by Section 70 of the Act and therefore the entire proceedings of the Court Martial ending with the conviction of and imposition of sentence on, the petitioner are liable to be set aside as totally without jurisdiction.

11. The alternative submission of Sri Devadas, the learned Counsel for the petitioner was that even on the basis that the framing of modified charge under Section 376 read with Section 511 I.P.C. was not illegal, still the bar under Section 70 of the Act would operate. The learned Counsel submitted that when Section 70 bars the jurisdiction of a Court Martial for trying an offeree of rape, it includes the offence of an attempt to commit rape also. In support of this he relied on the judgment of the Allahabad High Court in the case of State v Jai Kiran Singh (AIR 1955 Allahabad N.U.C. 1721). In this decision, the Allahabad High Court has held that even an offence of an attempt to commit rape can be tried only by an ordinary criminal court, and that Section 70 bars the jurisdiction of a Court Martial to try, for such an offence. I consider it unnecessary to go into this question for the reason. I have come to the conclusion that the offence with which the petitioner was charged before the Magistrate was under Section 376 of the I.P.C. and the respondents could not have ignored the proceedings which had taken place before the Magistrate and alter the charge.

12. In view of the acceptance of the first contention of the petitioner, it is unnecessary for me to consider the various other contentions raised by the petitioner regarding the legal infirmities in the convening as well as conducting the proceedings of the Court Martial.

13. The learned Counsel for the respondents submitted that the quashing of the conviction and sentence passed by the Court Martial against the petitioner and its confirmation by the Chief of Army Staff, does not constitute a bar for" continuing the proceedings before the Magistrate and therefore he requested that liberty may be reserved for continuing the proceedings before the Magistrate. If according to law those proceedings could be continued, it is unnecessary for me to give any such liberty.

14. In the result, I make the following order:

(i) The Writ Petition is allowed;

(ii) The conviction and sentence against the petitioner passed by the Court Martial dated 6-8-1987 (Annexure-M) and its confirmation by the Chief of the Army Staff dated 28-12-1987 (Annexure-N) are set aside and the petitioner shall be set at liberty.

Writ petition allowed