

(1987) 02 DEL CK 0038

In the Delhi High Court

Case No : Criminal Writ Appeal No. 285 of 1985

Sulakhan Singh

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 13-02-1987

Acts Referred:

Citation : (1987) 12 DRJ 297 : (1987) 1 RCR(Criminal) 563

Hon'ble Judges : Yogeshwar Dayal, J;Mahinder Narain, J

Bench : Division Bench

Advocate : M.S. Gujral, M.M. Gujral and S.K. Mishra, for the Appellant;

Judgement

Yogeshwar Dayal, J.

(1) This is a petition by Sepoy Sulakhan Singh of 20 Punjab Regiment, Fazilka for quashing orders filed as Annexures "D" "E" and "F" to the writ petition. Annexure "D" is the Charge-sheet as well as orders of the Officiating General Officer Commanding directing the trial of the petitioner by General Court Martial for an offence u/s 302 Indian Penal Code.

(2) The petitioner was charged along with three others for committing murder of Hav. Lekh Ram on the night of 2/4/1983 & 3/4/1983 by causing his death. Annexure "E" is the finding of the Court Martial finding the petitioner, Sulakhan Singh as guilty of the charge. The finding was announced subject to confirmation, and was awarded the sentence of imprisonment for life and also to be dismissed from the service. Annexure "F" is the order of confirmation dated 19/5/1984 confirming the finding and sentence dated 4/2/1984. The appeal against the confirmation of conviction and sentence was dismissed by the Authority on 6/3/1986.

(3) The aforesaid findings and sentence have been challenged on the following three grounds :-

(1) That the Magistrate who took the cognizance of the case initially acted

illegally in handing over the petitioner to the Army Authority for trial by order dated 23/7/1983. It is submitted that this order of the Magistrate handing over the accused to the Army Authorities was illegal in as much as the Magistrate did not exercise his mind and is bound by the Rules framed u/s 475 of the Code of Criminal Procedure, 1973. In the alternative all the Rules framed by the Central Government are ultra-vires Section 475 of the Code of Criminal procedure 1973.

(2)The trial by the Court Martial was against the principle of natural justice in as much as Army Authorities were assisted by legally trained person whereas the petitioner was not provided assistance of a legally trained person well versed in the law of crimes and the Military law.

(3)That the finding and the sentence by the General Court Martial vitiated in view of the possible illegality in the address of Judge Advocate General while making submissions before the Court Martial.

(4) Coming to the first point, it will noticed that Sections 125 and 126 of the Army Act, 1950 provide as under :-

"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.

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 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."

(5) Section 475 of the Code of Criminal Procedure, 1973 provides as under:-

"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.

(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 endeavors 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." "

(6) In view of the provisions of Section 475 of the Code of Criminal Procedure (hereinafter referred to as "Code" the Central Government has framed Rules regarding Adjustment of jurisdiction of Civil and Military courts over Military personnel accused of civil offences. These Rules are called the Criminal Courts and Court martial (Adjustment of Jurisdiction) Rules, 1978. Rules 3, 4 and 5 provide as under :

"3. Where a person subject to military, naval or air force law, or any other law relating to the Armed Forces of the Union for the time being in force is 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-section (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 defense 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 Session u/s 209 of the said Code ; or

(D) make over the case or inquiry or trial u/s 152 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 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 (a), (b), (c) or (d) of Rule 4 before receiving the notice shall stay the 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 (4) of Section 475 of the said Code to the officer specified in the said Sub-section."

(7) It will be noticed that Section 125 of the Army Act, 1950 gives choice of forum of trial. If a person serving in the defense service, the choice is of the Army Authority. Section 126 of the Army Act contemplates that ordinary established Criminal Courts on the request by the Army Authorities will either deliver the offender to the Army Authorities or postpone proceedings pending a reference to the Central Government. Army Authorities have a right to move the Central Government if the Magistrate decides not to deliver the offender to the Army Authorities or calls upon the Army Authorities to deliver the accused to the criminal court. It was in this -situation of possibility of conflict of jurisdiction that Section 475 of the Code was enacted and the Rules have been framed in pursuance of Section 475 but the Rules have to be consistent not only with the Code of Criminal Procedure but also with the three Acts dealing with the three wings of Armed forces. It is in this light that one has to judge also the virus of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978.

(8) On the one hand the Army Act gives a choice of forum of trial to the Army Authority and in case of conflict it contemplates reference by the Army Authority to the Central Government. On the other hand code gives jurisdiction as contemplated by Code of Criminal Procedure for various offences to be tried by various courts. To avoid that conflict it is postulated by Section 475 of the Code of Criminal Procedure itself that Central Government May frame Rules consistent both with Army, Air and Naval force Act and the Code of Criminal Procedure. Read in this light, it will be noticed that the aforesaid Rule, 3 of the aforequoted Rules contemplates that the Magistrate shall not proceed to try the offence unless he is moved by competent defense Authority to try the offence or the Magistrate himself is of the opinion that it should proceed or proceed to commit without being moved by the defense Authorities. But before he proceeds to try. Rule 4 contemplates that the court shall give notice to the Commanding Officer concerned, and he shall wait for the expiry of 15 days from the service of such notice before taking the four steps mentioned in Clauses (a), (b) (c), and (d) of Rule 4. Then comes Rule 5 which contemplates that where a Magistrate has been moved by the Army Authorities to proceed with the trial but subsequently the Army Authorities gives notice to the Magistrate not to proceed then the Magistrate is required not to proceed unless the case is covered by four contingencies mentioned in Clauses (a), (b), (c) and (d) of Rule 4. If the case is not covered by four contingencies mentioned in Rule 4, then the Magistrate is

obliged to refer the offender to the Army Authorities together with such statement as referred to in Sub-section (1) of Section 475 of the Code of Criminal Procedure.

(9) It may be noticed that the Central Government was likely being troubled every day with conflicting views of the two Authorities, and Therefore, it thought fit to frame these Rules providing guidelines and the Magistrate is supposed to act according to the guidelines given in Rules 3, 4 and 5. There is nothing which can be said to be contrary to Section 475 of the Code in these Rules. Mr. Gujral, learned counsel for the petitioner, however, emphasises that the expression, "shall in proper cases deliver him" in Section 475 of the Code gives a discretion in the Magistrate to deliver or not to deliver whereas the Rule do not leave any such discretion. It will be noticed that Rule 3 initially leaves discretion in the Magistrate. It is only when the defense Authorities move otherwise, then guidelines are provided in Rules 4 and 5 as to how the Magistrate should proceed. The expression, "shall in proper cases deliver him" only means that he has to act in accordance with the Rules framed u/s 475 of the Code. In the circumstances we do not consider the Rules to be in any way vocative of Section 475(1) of the Code. If the guidelines in the Rules are satisfied the Magistrate can still try the case himself even though requested by the defense Authorities. But if the guidelines are not satisfied, the Magistrate is left with no option but to deliver the offender to the defense Authorities.

(10) It will be noticed that in the present case the contingencies as contemplated by Clauses (a) to (d) of Rule 4 had not arisen ; it is only in these four contingencies that the Magistrate could have declined the request of the Army Authorities. In the absence of these contingencies, the Magistrate in the present case referred the accused to the Army Authorities. There is thus no infirmity in the Rules or in order of the Magistrate dated 23/7/1983. So far as second contention is concerned that petitioner was not provided assistance of a legally trained person, it is pointed out that one practicing lawyer of Ferozepur was engaged by the petitioner and this may be in view of the provisions contained in Rules 96 and 97 of the Army Rules, 1954. In view of the fact that the petitioner has had, in fact, a counsel of his choice, there was no question of unequal rights being enjoyed by the offender and the Army Authorities. There is no discrimination on the facts of the case.

(12) Coming to the last submission of learned counsel for the petitioner, learned counsel has taken objection to the following lines in the address of the Judge Advocate to the General Court Martial :

"I may advise you that Court Martial does not deal with a "Civil liability". The learned defense counsel have cited a number of cases from High Courts, Supreme Court in support of their arguments. The circumstances and facts of each case differ from the other. Hence the cited cases and commentaries are not binding on you as law".

(13) It will be noticed that this is the last part of the address given by Judge Advocate. No other part of his address is taken objection to and the substance of his address is legally summing up. The Court Martial Authority should decide the case on its own facts. It does not tell the General Court Martial that they are not bound by the Supreme Court judgments of the High Court or to ignore the law. The Judge Advocate General is entitled to tell the Court Martial what law is. He was in no way misstating the law. There is thus no infirmity in the address of the Judge Advocate General to the Court Martial.

(14) No other point was argued. Petition, Therefore, fails and is dismissed.