Superintendent and Remembrancer of Legal Affairs, West Bengal

Vs

Usha Ranjan Roy Choudhury and Another

Criminal Appeal Nos. 170 and 171 of 1977

(V. B. Eradi, M. P. Thakkar JJ)

21.05.1986

JUDGMENT

THAKKAR, J. -

1. The validity of the trial of three Army officers is in question.

2. The High Court has taken the view that the learned Judge presiding over the Special Court had acted without jurisdiction in taking cognizance of the case and proceeding with the trial of three Army officers resulting in the conviction of one of them, and the acquittal of the remaining two and has quashed the proceedings. The question which calls for determination in these two allied appeals by special leave preferred by the State of West Bengal is whether the High Court was right in doing so.

3. The following facts are not in dispute :

(1) Three accused persons who were tried by the judge presiding over the Fourth Additional Court, Calcutta (hereinafter referred to as the learned trial Judge for the sake of brevity) were Army officers. They were charged with offences in respect of which the ordinary criminal Court and the court-martial both had concurrent jurisdiction.

(2) The learned trial Judge had failed to follow the procedure prescribed by the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952 (referred to as Rules hereinafter) framed under Section 549 (1) of the Code of Criminal Procedure of 1898 (CrPC).

4. The following contentions were urged before the High Court on behalf of the State with a view to substantiate the contention that the learned trial Judge had jurisdiction to take cognizance of the case and that the trial was not null and void notwithstanding the fact that the procedure prescribed by the Rules had not been followed.

(1) The rules framed under Section 549 (1) of CrPC were not attracted inasmuch as the rules applied to magistrates and not to a judge presiding over a Special Court.

(2) Having regard to the provision contained in Section 122 of the Army Act, 1950, which prescribes a period of limitation of three years, which period had already elapsed during the pendency of the proceedings in the High Court, the court-martial

would have no jurisdiction to try the accused and that the trial held by the learned trial Judge could not be said to have been vitiated in view of this circumstance.

(3) In view of a letter addressed by the Brigadier of the Division concerned to the police officer for investigating the offences, it can be said by necessary implication that the Army authorities had opted for the trial of the case by the ordinary civil (sic criminal) court.

5. The High Court repelled all the three contentions, allowed the appeal of the officer who was convicted, and dismissed the appeal of the State calling into question the acquittal of the remaining two.

6. Besides reiterating the same three contentions before this Court, learned counsel for the appellant has raised a new point which was not urged before the High Court. We propose to dale with the submissions which were urged in the High Court before coming to grips with the new point sought to be raised by the learned counsel for the appellant-State.

7. For a proper appreciation of the first point, a quick look at the statutory provisions and the position emerging therefore is called for. In regard to the offence which fall within the purview of Section 70 of the Army Act of 1950, an offender can be tried only by Court-martial whereas in regard to offences falling within the purview of Section 52 of the said Act, the offences can be tried both by the ordinary criminal court as also by the court-martial both of which have concurrent jurisdiction. The offences with which the concerned accused were charged before the learned trial Judge were offences which fell within the scope of Section 52 of the Army of 1950 and accordingly the ordinary criminal court as also the court-martial a had concurrent jurisdiction. In order to avoid any conflict of jurisdiction between the criminal court and the court-martial in regard to offenders who are charged with having committed offences which fall under the purview of Section 52 of the Army Act, 1950, Section 52 of the Army Act, 1950, Section 549 (1) of CrPC provides that Central Government may make Rules consistent with CrPC and the Army Act. In pursuance of this provision contained in Section 549 (1) CrPC the Central Government has framed rules known as Criminal Rules, 1952. Rules 3 of the said Rules required that when a person subject to Military, Naval or Air Force law is brought before a magistrate on accusation of an offence for which he is liable to be tried by court-martial also the magistrate shall not proceed with the case unless he is requested to do so by the appropriate military authority. On a combined reading of Rules 3 and 4, it is evident that in case the

1. 549. Delivery to military authorities of persons liable to be tried by court-martial. - (1) The Central Government may make rules consistent with this Code and the Army Act, the Naval Discipline Act and the Indian Navy (Discipline) Act, 1934 and the Air Force Act and any similar law for the time being in force as to the cases in which persons subject it military, naval or air force law shall be tried by a court to which this Code applies, or by court-martial, and when any person is brought before a magistrate and charged with an offence for 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 to which he is accused, to the commending officer of the regiment, corps, ship or detachment 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 propose of being tries by court-martial

> 2. 3. Where a person subject to military, naval or air force law is brought before a magistrate and charged with and offence for which he is liable to be tried by a court-martial, such magistrate shall not proceed to try such person or to issue orders for his case to be referred to a Bench, or to inquired with a view to his commitment for trial by the court of sessions or the High Court for any offence tribal by such court, unless
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> (a) he is of opinion, for resons to be recorded, that he should so proceed without being moved thereto by competent military, naval or air force authority, or
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> (b) he is moved thereto by such authority.
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> 4. Before proceedings under clause (a) of Rules 3 the magistrate shall give written notice to the commending offence of the accused and until the expiry of a period of seven days from the date of the service of such notice he shall not -
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> (a) convict or acquit the accuse under Sections 243, 245, 247, or 248 of the Code of Criminal Procedure, 1898 (5 of 1898), or hear him in his defence under Section 244 of the said Code, or
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> (b) frame in writing a charge against the accused under Section 254 of the said Code, or
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> (c) make an order committing the accused for trial by the High Court or the Court of Sessions under Section 213 of the said Code.

magistrate is of the opinion that he should proceed with the case without there being any such request from the appropriate military authority, the concerned magistrate is enjoined to give notice to the commanding officer in this behalf. Till the expiry of seven days from the service of such notice on the commanding officer, the magistrate is prohibited from taking any order of conviction or acquittal or framing any charges or committing the accused. It is in the background of these provision that the High Court has taken the view that compliance with the procedure prescribed by the Rules is a mandatory requirement and that any proceedings undertaken by the learned trial Judge without compliance with the aforesaid mandatory procedure would vitiate the trial before the ordinary criminal court and the entire proceedings would be rendered null and void. Faced with this situation, counsel for that State contended before the High Court that the procedure embodied in Section 549 (1) of the CrPC and Rules framed there under was applicable only in the court presided over by a magistrate and not to a judge proceeding over a Special Court. This contention was negatived by the High Court. And is has now been reiterated before us, it being an admitted position that the prescribed procedure has not been followed by the learned trial Judge in the case giving rise to the present appeals. This argument was possibly inspired by a point debated Major E. G. Barsay v. State of Bombay. The view was taken therein that inasmuch as the aforesaid Rules refer to a magistrate the Rules were not attracted with regard to a trial before a Special Judge. It was presumably on account of this decision that the Criminal Law (Amendment) Act of 1952 was amended by incorporating Sections 8 (3-A) and 11, reading as under :

> 8 (3-A) In particular, and without prejudice to the generality of the provisions contained in sub-section (3), the provisions of Section 350 and 549 of the Code of Criminal Procedure, 1898 shall, so far as may be, apply to the proceedings before a Special Judge, and for the purposes of the said provisions a Special Judge shall be

deemed to be a magistrate.

11. Military, naval and air force laws not to the affected :-

(1) Nothing in this Act shall affect the jurisdiction exercisable by, of or the procedure applicable to, any court or other authority under any military, naval or air force law.

This amendment was effected by virtue of Central Act 22 of 1966. Having regard to the provision contained in Section 8 (3-A) of the Criminal Law (Amendment) Act of 1952 as it now stands it is clear that a Special Judge is deemed to be a magistrate for the purposes of the Rules framed under Section 549 (1) of the Code of Criminal Procedure with the end in view to eschew the conflict between court-martial on the one hand and the ordinary criminal courts on the other. The High Court was therefore, perfectly justified in repelling this contention urged on behalf of the appellant-State, albeit on a reasoning which is somewhat obscure. Confronted by this situation counsel for the appellant-State has raised a new point to which a reference was made in the earlier part of the judgment. The new point which has been so raised in that Sections 8 (3-A) and 11 quoted hereinabove which were incorporated by Central Act 2 of 1958 as further amended by Central Act 22 of 1966 were not applicable to the State of West Bengal from where the matter giving rise to the present appeals stems. Since no such arguments was advanced before the High Court, initially, we were reluctant to permit counsel to raise this new point. But having regard to the fact that it goes to the root of the matter we have permitted counsel to urge this contention. We will however deal with it after exhausting all the points which were urged before the High Court.

8. The next point which was unsuccessfully urged before the High Court was in the context of Section 122 of the Army Act of 1950 which prescribes a period of limitation of three years. The High Court did not accede to the submission in this behalf regard to the law enunciated by this Court in Delhi Special Police Establishment v. Lt. Col. S. K. Loraiya. We are of the opinion that the High Court was right. This court in the aforesaid case has taken the view to the effect that the question being essentially one of the initial jurisdiction of the ordinary criminal court on the one had and the court-martial on the other, unless the procedure prescribed by the rules is complied with the ordinary criminal court would not have initial jurisdiction in regard to the matter, as is evidence from the following passage :

[SCC pp. 694-5, SCC (Cri) p. 1103, paras 6 to 9]

It is an admitted fact in this case that the procedure specified in Rule 3 was not followed by the Special Judge. Gauhati before framing of charges against the respondent. Section 549 (1) CrPC and Rules 3 under which charges were framed are mandatory. Accordingly the charges framed by the Special Judge against the respondent cannot survive. But counsel for the appellant had urged before us that in the particular circumstances of this case the respondent is not "liable to be tried" by a court-martial.

Section 122 (1) of the Army Act, 1950, provides that no trial by court-martial of any person subject to the Army Act for any offence shall be commenced after the expiry of the period of three years from the date of the offence. The offences are alleged to have been committed by the respondent in November-December, 1962. So more than three years have expired from the alleged commission of

the offence. It is claimed that having regard to Section 122 (1), the respondent is not liable to be tried by court-martial.

This argument is built on the phrase "is liable to be tried either by the court to which this Code applies or by a court-martial" in Section 549 (1). According to counsel for the appellant this phrase connotes that the ordinary criminal court as well as the court-martial should not only have concurred initial jurisdiction to take cognizance of the case but should also retain jurisdiction to try him up to the last stage of conviction or acquittal. We are unable to accept this construction of the phrase.

As regards the trial of offences committed by army men, the Army Act draws a threefold scheme. Certain offences enumerated in the Army Act are exclusively triable by a court-martial; certain other offences are exclusively triable by the ordinary criminal court; and certain other offences are triable both by the ordinary criminal court and the court-martial. In respect of the last category both the courts have concurrent jurisdiction. Section 549 (1) CrPC is designed to avoid the conflict of jurisdiction in respect of the last category of offences. The clause "for which he is liable to be tried either by the court to which this Code applies or by a court-martial" in our view, qualifies the preceding clause "when any person is charged with an offence" in Section 549 (1). Accordingly the phrase "is liable to be tried either by a court to which this Code applies or a court-martial" imports that the offence for which the accused is to the tried should be and offence of which cognizance can be taken by an ordinary criminal court as well as a court-martial. In our opinion, the phrase is intended to refer to the initial jurisdiction of the two courts to take cognizance of the case and not to their jurisdiction to decide it on merits. It is admitted that both the ordinary criminal court and the court-martial have concurrent jurisdiction with respect to the offences for which the respondent has been charged by the Special Judge. So, Section 549 and the rules made are attracted to the case at hand.

9. Having regard to the enunciation of law to this effect it is evidence that the ordinary criminal count would have no jurisdiction to take cognizance of the case and to try the accused in a matter where the procedure prescribed by the Rules has not been complied with. The initial lack of jurisdiction to take cognizance and try the case would of logical necessity vitiate the trial and the order of conviction and sentence would be liable to be quashed as a result thereof. We are therefore unable to accede to the submission urged on behalf of the appellant-State that even if the Rules are applicable, having regard to the fact that more than three years have expired from the date of the commission of the alleged offence, the trial is not vitiated.

10. The last contention said before the High Court was that having regard to the fact that the investigation which preceded the lodging of the complaint before the learned trial Judge was commenced in pursuance of a letter written by the Brigadier of the Division, which contained a request for investigation by the police into alleged offences, it can be said that the Army authorities had opted for the trial of the accused person by the ordinary criminal court. The argument was that by necessary implication this would follow as a logical corollary. The High Court brushed aside this contention as untenable, taking into account the contents of the letter in question. The said letter was in the following terms :

> Dear Sir,
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> (1) Please refer to Memo No. 8940 dated August 28, 1963 from Shri R. K. Bhattacharya, Superintendent of Police, DEB, Darjeeling.

> (2) At Appendix "A" please find a copy of the investigation that had been carried by us. We request you to take over the case and submit your detailed report to us at your earliest convenience.

The High Court relied on the face that the Army had called for detailed report by the police which would show that the Army authorities had not taken any such decision either expressly or by necessary implication. Counsel for the appellant has not been able to press this point with any vigour for the obvious reason that it relates to the stage of investigation preceding the complaint. The question regarding exercise of jurisdiction by the court-martial would arise only after the investigation was completed and the police report was available. What is more, it is only after the prescribed procedure under Rules 3 and 4 of the Rules is resorted to by the ordinary criminal court that the question of exercising an option can arise. In the present matter, admittedly the procedure prescribed by the Rules was not followed. Under the circumstances it is futile to contend that the Army authorities had voluntarily abandoned their option to try the accused person in the court-martial. There is no substance in the plea and it has been rightly repelled by the High Court.

11. At long last, we come to the last point, the which was not urged before the High Court but which we have permitted the learned counsel for the State to raise before us. It is argued that the Criminal Law (Amendment) Act of 1952 was not applicable to the State of West Bengal inasmuch as the State of West Bengal had enacted an Act of its own known as West Bengal Criminal Law Amendment (Special Courts) Act, 1949 which was in operation throughout the whole of West Bengal. No doubt it is true that criminal law is a subject which falls within the scope of Entry 1 of List III (Concurrent List) embodied in Seventh Schedule to the Constitution of India. The Union Government as well as the State Government both can therefore legislate in regard to criminal law. The contention that the Criminal Law (Amendment) Act, 1952 enacted by the Parliament of India is not applicable to the State of West Bengal is altogether misconceived. It is necessary to advert to the legislative history for a proper appreciation of the point at issue. In 1938 the Government of India had enacted the Criminal Law (Amendment) Act 1938. In 1949 the State of West Bengal introduced the State legislation being the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 (West Bengal Act). This Act was further amendment after the enforcement of the Constitution of India by incorporating Section 13 in 1953. The said Section 13 has great significance from the standpoint of the present argument :

> 13. Certain Sections of Act 46 of 1952, not to apply to West Bengal - Sections 6, 7, 8, 9 and 10 of the Criminal Law (Amendment) Act, 1952 shall not apply and shall be deemed never to have applied to West Bengal.

It will thus be see that Section 13 of the West Bengal Act in terms accords recognition to the applicability of the Criminal Law (Amendment) Act of 1952 except and save some of the sections namely Sections 6, 7, 8, and 10 thereof which as provided in Section 13 shall not apply and shall be never deemed to have applied to West Bengal. It is implicit in Section 13 of the West Bengal Act that the Central Act namely Criminal Law (Amendment) Act of 1952 is applicable to the State of West Bengal except and save aforesaid five sections. There can be no doubt or debate about this position having regard to the fact that criminal law is a subject which falls under the Concurrent List and the Criminal Law (Amendment) Act of 1952 enacted by the Parliament is Applicable subject to inconsistency, if any, between the said Act and the West Bengal Act. So far as the coverage of the present point is concerned, there is no such inconsistency. The West Bengal Act does not contain nay provision pertaining to personnel governed by the Army Act. It is altogether silent in regard to the matter pertaining to the procedure to be followed in regard to Army personnel from the

perspective of Section 549 CrPC and the rules framed under the authority thereof. There is thus no conflict between the Criminal Law (Amendment) Act of 1952 and the West Bengal Act insofar as this matter is concerned. Such being the position the provision conflict in Criminal Law (Amendment) Act of 1952 with a special eye on the procedure to be followed in Section 8 (3-A) and Section 11 of the Criminal Law (Amendment) Act of 1952 will operate in this sphere without any let or hindrance. And inasmuch as Section 8 (3-A) in terms provides that the provision of Section 549 CrPC shall so far as may be applied to the proceeding before the Special Judge and that for the purpose of that provision a Special Judge shall be deemed to be a magistrate, the said provision remain fully alive and unaffected by the West Bengal Act. In view of this provision the procedure prescribed by Section 549 CrPC read with the rules framed thereunder which have been quoted in the earlier part of the judgment will be applicable to a proceeding before a Special Judge in West Bengal as well. Insofar as the Army personnel are concerned therefore the law governing them and the procedure required to be follows in their case would be the same in West Bengal as elsewhere in India as it should be. It may incidentally be mentioned that in the West Bengal Act also the judge presiding over the Special Court is called a Special Judge (vide Schedule to the West Bengal Act). He would therefore be deemed to be a magistrate for the purpose of the Rules in view of Section 8 (3-A) of the Criminal Law (Amendment) Act of 1952. The mandatory procedure prescribed by the Rules is according obligatory even in respect of proceedings before a Special Court under the West Bengal Act. There is thus no substance in this point. We are of the opinion that this feeble and faint-hearted attempt is born out of desperation and deserves no more consideration. We have therefore no hesitation in negativing this plea. No other point has been urged. The appeal must therefore fail. But before we write "finis" it any be made clear that the acquittal rendered by the High Court is no the ground of lack of jurisdiction on the part of the learned Special Judge who tried the case in the Special Court and not on merits. The expression "acquitted" has been employed by the High Court though it was sufficient to say no more that this, that the order of conviction and sentence was without jurisdiction and was therefore being quashed. In the eye of law, it is not an acquittal since it is not on merits. It is therefore for the competent authority to decide whether or not to subject the accused to a fresh trial after following the prescribed by the Rules. With these observations, we dismiss the appeal.

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