

CALCUTTA HIGH COURT

Awadh Behari Singh

Vs.

State (Calcutta)

Criminal Revn. No 110 of 1965

(Amaresh Roy and S.N. Bagchi, JJ.)

03.08.1966

JUDGMENT

Amaresh Roy, J.

1. This Rule was issued upon a revisional application made on behalf of the petitioner, Awadh Behari Singh, who has been convicted by a Magistrate, 1st Class at Siliguri for an alleged offence under section 9 (a) of the Opium Act and sentenced to undergo rigorous imprisonment for two years and also to pay a fine of Rs. 1,000 in default, to undergo rigorous imprisonment for six months. That order of conviction and sentence was affirmed on appeal by the learned Sessions Judge of Jalpaiguri-Darjeeling.

2. The petitioner Awadh Behari Singh, a member of the Indian Army being a Company Commander of the rank of a Naik in the 9th Grenadiers (Mewar). He was arrested in a military compartment while he was travelling by the railways and was produced before the Magistrate at Siliguri on 29th of March, 1962. Allegations against him were that on search of his beddings in the military compartment, a packet containing about eleven seers of contraband opium was found for which he had no licence. On being produced before the Magistrate, the accused was granted bail of rupees 25,000 with two sureties of Rs. 12,500 each. By order dated the 12th of April, 1962, the learned Magistrate reduced the amount of bail to Rs. 15,000 with two sureties of Rs. 7500 each. The bail bond on the record shows that he availed of the bail and was enlarged on 12-4-1962. On the 3rd of May, 1962, however, the learned Magistrate on seeing a report of Major Maurice, C. O. 9th Grenadiers (Mewar) directed the sureties to produce the accused on the next date and on the 7th of May, 1962, when he was produced, the Magistrate took him into custody and made an order for handing up the accused to the nearest military battalion. The accused was, in fact, made over to the military authorities on their request only on the 4th of September, 1962. In the mean-time, on 4th of July, 1962, investigation completed and a charge sheet had been submitted before the Magistrate alleging offence under section 9 (a) of the Opium Act and on the

3rd August, 1962, the case was transferred for disposal, obviously, under section 192 of the Code of Criminal Procedure to a learned Magistrate Shri Bose. The Magistrate after examining two witnesses for the prosecution framed charge against the accused under section 9 (a) of the Opium Act, 1878, as amended by Act III of 1957. The case was tried by taking evidence and he was convicted by the trial Magistrate on 23rd of August, 1963 and sentences were passed as have been mentioned already.

3. Against that order of conviction and sentence, an appeal was taken to the court of session. At the hearing of that appeal, a point was taken by the lawyer representing the accused based on section 549 of the Code of Criminal Procedure. The learned Sessions Judge by his order dated the 23rd July, 1964, kept the appeal pending in his court and directed the Magistrate to take additional evidence for proving certain documents which, we will mention later. In compliance with that order, the Magistrate took additional evidence and forwarded those to the court of session. Thereafter, the appeal was heard by learned Sessions Judge other than the learned Sessions Judge who had made the order for taking additional evidence.

4. The point based on section 549 of the Code of Criminal Procedure in connection with which the additional evidence was directed to be taken in the court of appeal was that the Magistrate had no jurisdiction to try the case as he had failed to comply with the provisions of section 549 of the Code of Criminal Procedure. To meet that point, the prosecution proved as additional evidence two letters, one exhibit 5 and another exhibit 12, the former being a letter written by the Deputy Commissioner of Excise, (Excise Intelligence Bureau, West Bengal.), to the Officer Commanding, 9th Grenadiers Unit. By that letter dated 31st March, 1962, exhibit 5, the Deputy Commissioner of Excise made enquiries about the rank etc. of the accused person in the army and then said in the last two paragraphs of the letter :-

"I would under the circumstances request you to verify if the said person is actually a military personnel attached to your unit and if so, I would request you to let me know within a fortnight if you desire to proceed against him under the Military Rules or if you have any objection to his trial under the ordinary Civil Laws of the land.

The accused person has been forwarded in the court of the Sub-Divisional Officer, Siliguri, Dist, Darjeeling (West Bengal) to whom A copy of your reply may be endorsed for taking necessary action thereon." It appears that in reply to this letter, which has been proved as exhibit 5 in this case, the Commanding Officer wrote in reply letter No. 2902 AC dated 18th April, 1962, but that letter of the Commanding Officer has not been proved in the case, although another letter in continuation of that letter has been proved as exhibit 12. That letter (exhibit 12) dated 26th of April, 1962, is addressed by the Commanding Officer to the Deputy Commissioner of Excise and its contents are in these words :-

"In continuation of this office letter No. 2902 AC dated 18 Apr. 62 in reply to your letter

No. 149 ED (Con) dated 31 Mar 62.

No. 2640609 Naik AWADHA BEHARI SINGH of this unit may please be tried under Civil Law."

At the bottom of that letter appears :-

"Copy to :-

The SDO, SILIGURI

Dist. DARJEELING (West Bengal) for taking necessary action in the matter.

CONFIDENTIAL".

In that state of evidence and materials on the record, we have to examine section 549 of the Code of Criminal Procedure for ascertaining whether the requirements of that section have been complied with. Section 549 of the Code of Criminal Procedure is in these terms :-

"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 (44 and 45 Vict. c. 58), the Naval Discipline Act (29 and 30 Vict. c. 109) 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 to 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 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 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 purpose of being tried by Court-martial. Apprehension of such persons - (2) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any 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."

5. The rules mentioned in that section to which the Magistrate is enjoined to have regard were previously the rules that appear in Notification No. F-102-/35 dated 12th of March, 1935, but in 1952 by S.R.O. 709, dated the 17th April, 1952, new rules called. 'The Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1952, have been framed and the preamble of that notification is in these terms :-

"In exercise of the powers conferred by sub-section (1) of section 549 of the Code of Criminal Procedure, 1898 (5 of 1898) and in supersession of all previous notifications on the subject, the Central Government hereby makes the following rules for the trial of

persons subject to military, naval or Air Force law, by a court to which the said Code applies, or by a court-martial."

This particularity has to be noticed because the learned Sessions Judge in his judgment has devoted careful consideration to the point taken before him but has examined the matter in the back-ground of the Rules of 1935 which have been superseded and replaced by the present Rules of 1952. Rule 3 of the present Rules is in these terms :-

"3. Where a person subject to military, naval or Air Force law is brought before a Magistrate and charged with an offence for which he is liable to be tried by a Court-martial such Magistrate shall not proceed to try such person or to inquire with a view to his commitment for trial by the Court of Session or the High Court for any offence triable by such Court, unless

(a) he is of opinion, for reasons to be recorded, that he should so proceed without being moved thereto by competent military, naval or Air Force authority, or

(b) he is moved thereto by such authority." Thereafter the Rules make provisions in successive Rules providing for the duty of the Magistrate to give written notice to the Commanding Officer and to refrain from proceeding with the trial generally and also from particular actions in course of the trial for a period of seven days from the date of the service of such notice. Those provisions may be noticed in Rule 4. In Rule 6 the kind of action by which the Magistrate has to be moved by the Military authorities as mentioned in clause (b) of Rule 3 is indicated. From the outline of those Rules, it appears to us that compliance with those provisions is necessary not only as the correctitude of the procedure that a Magistrate shall adopt in cases in which any army personnel is brought before the Magistrate under arrest but also provides the basis of jurisdiction of the Magistrate to try such personnel. In other words, although both the court of the Magistrate as civil authority and the court-martial as military authority may have concurrent jurisdiction to try such accused persons, the first requirement by Rule 3, clause (a) is for the Magistrate to record reasons for his opinion that he should proceed without being moved by competent military authority for exercise of the jurisdiction to proceed to try such an accused person. The other clause in Rule 3, that is, clause (b), requires that the army authority may move the Magistrate. Looking to the provisions of Rule 6, it is clear that by so moving the Magistrate, the army authority may either request the Magistrate to proceed to try such person or give notice to the Magistrate that in the opinion of such authority, the accused should be tried by a court-martial. In either of the two contingencies that may happen between Clauses (a) and (b) of Rule 3, the Rules make clear and stringent provisions regarding the procedure that would be followed by the Magistrate and the army authority. The importance as also the mandatory character of those Rules appear from the parallel provisions contained in sections 125 and 126 of the Army Act, 1950(Act 46 of 1950). In view of that character, we cannot uphold the view of the learned Sessions Judge that although those Rules have not been complied with in any

manner, far less in proper manner, yet the two letters, exhibit 5 and exhibit 12 should be construed as substantial compliance with the Rules. We hold that exhibit 12 was by no means an application by which the army authority had moved the Magistrate. Mr. Mukherjee on behalf of the State has sought to argue before us that it shows that the army authority had given consent for this accused being tried before the Magistrate. We need only point out that exhibit 12 is not a communication by the Commanding Officer to the Magistrate and whatever information is contained in it, that has reached the Magistrate through the indirect source of the Deputy Commissioner of Excise. That can never be viewed as an act of the Commanding Officer to move the Magistrate. It is noticeable also that exhibit 12 has been marked out as 'confidential', although a copy of that letter addressed to the Deputy Commissioner of Excise was sent to the Sub-Divisional Officer, Siliguri, at the request of the Deputy Commissioner appearing in Exhibit

5. No petition before a Magistrate, be it by any party, including military authorities, can be a confidential document. We, therefore, cannot accept Mr. Mukherjee's argument that there has been substantial compliance with the requirements enjoined by the present Rules which, unfortunately, were not before the learned Sessions Judge, who heard the appeal.

6. The mandatory provisions both in section 549 of the Code of Criminal Procedure as also the Rules framed thereunder not having been complied with, it must be held that the procedural defect is not merely an irregularity but is an illegality, which has affected the jurisdiction of the Magistrate in the trial court. For that reason, the orders of conviction and sentence passed against this accused must have to be set aside and we do so.

7. The question then arises whether the accused should be retried by adhering to the procedure laid down in section 549 and the Rules which we have mentioned in this judgment, either by the Magistrate or in the court-martial, if the military authorities exercise that option according to those Rules. From the records it appears that the incident happened in March 1962. From the date of his arrest, the accused has remained in custody of the court as an under-trial prisoner for over four months. After his conviction in the trial court he has suffered imprisonment for about a week before he was released on bail under the orders of the learned Sessions Judge and it is quite likely that he has already suffered some days of imprisonment before he had moved this Court in revision. Apart from that, the evidence in the case also shows certain features in which the defence that is taken by this accused at the trial by making statements when examined under section 342 of the Code of Criminal Procedure provide an insight to a possible result that may follow, if a retrial would be ordered. Taking all these into consideration, we do not order a retrial but instead acquit the accused.

8. The order of conviction and sentence passed against him is set aside.

9. The order of the Magistrate forfeiting the contraband opium is, however, maintained.

10. The Rule is made absolute.

11. The petitioner is discharged from the bail bond.

12. On the prayer of the learned Advocate for the petitioner, we also direct that the Pay Book of the accused which has remained in the record may be returned either to him or to the Commanding officer of his unit in the army if they want to take it, within seven days from today. If the Pay Book is not taken back from this court, the Pay Book will be returned to the accused petitioner by the learned Magistrate without any further delay.

Bagchi, J.

13. I agree.

Petition allowed.