

# MYSORE HIGH COURT

C. Ramanujan

Vs

State of Mysore

Criminal Revn. Petn. No. 477 of 1961

(A.R. Somnath Iyer, J.)

02.01.1962

## JUDGMENT

### **A.R. Somnath Iyer, J.**

1. The petitioner in this case who is a Havaldar in the Madras Engineering Group, Ulsoor and who is therefore an employee in the Indian army, was charged with having committed the murder of one Tatachari, a Subedar in that army unit, on November 1, 1961. The information about this murder was communicated by one Captain Yedav, another officer in that army on November 2, 1961 and this information reached the concerned Magistrate on November 3, 1961. After the investigation was completed by the police, a charge sheet was placed before the Magistrate on November 22, 1961. On December 8, 1961, the officer commanding the army in which the petitioner was serving, made an application to the Magistrate under Section 125 of the Army Act asking for the delivery of the petitioner to him so that he may be tried by a Court-martial. The Magistrate gave the officer commanding, the order which he wanted, and it is against this order that the petitioner complains in this revision petition.

2. It is not disputed by the petitioner that he is subject to the military law, under which, the offence of murder which was stated to have been committed by him could be tried by a Court-martial. It is also not disputed that the officer commanding the army who made the application to the Magistrate was commanding the army in which the petitioner was serving.

3. Now under Section 125 of the Army Act under which the officer commanding the army made the application, if an offence committed by a person serving in the army is triable not only by a Criminal Court but also by a Court-martial, it will be for the officer commanding the army to decide in which Court the proceedings in respect of the offence committed by that person should be instituted. That section also provides that if that officer decides that the proceedings should be instituted before a Court-martial, he could direct the accused to be detained in military custody.

That is what Section 125 provides.

4. Next we have Section 549 of the Code of Criminal Procedure which provides for the delivery to the military authorities of persons liable to be tried by a Court-martial. That section empowers the Central Government to make rules for that purpose. That section further provides that if a person who is liable to be tried by a Criminal Court and also by a Court-martial for an offence committed by him, is brought before a Magistrate, and is charged with the offence for which he is liable to be so tried, such Magistrate, shall, in accordance with the rules framed by the Central Government in that regard under Section 549, in proper cases deliver the accused to the military authorities referred to in that section.

5. Rule 3 of the rules framed under Section 549 of the Code of Criminal Procedure by the Central Government is the relevant rule which is applicable to this case, and that rule provides that, if a person who is liable to be tried for an offence not only under the Code of Criminal procedure but also by a Court-martial is brought before a Magistrate and is charged with an offence, the Magistrate shall not proceed to try the offence with which the accused is charged, unless he is of opinion for reasons to be recorded by him that he should so proceed and there is no application made by a competent military, naval or air force authority for his delivery to them.

6. The clear effect of the three statutory provisions to which I have referred, viz., section 125 of the Army Act, Section 549 of the Code of Criminal Procedure and Rule 3 of the rules framed under Section 549, is that if a person commits an offence for which he could be tried under the Code of Criminal Procedure and also by a Court-martial, it will be for the military authorities to decide whether he should be tried by a Court-martial and if these authorities decide that he should be tried before a Court-martial, the Magistrate, on an application to him, must deliver the accused if he is brought before him, for being tried by a Court-martial.

7. The only cases in which a Magistrate can proceed to try a person under Section 549 of the Code of Criminal Procedure would be cases in which no application is presented by the military authorities for the delivery of the offender to their custody and the Magistrate considers it desirable that he should himself proceed with the trial. Since in this case, when the accused was brought before the Magistrate and was charged with the offence of having murdered Tatachari, the military authorities did make an application to the Magistrate for his delivery to them so that the petitioner may be tried by a Court-martial, it was incumbent on the Magistrate to deliver the petitioner to the military authorities, since the offence committed by him was one which was admittedly triable by a Court-martial. The Magistrate was also of the opinion that in the circumstances, since the prosecution did not object to the delivery of the petitioner to the military authorities, this was a case in which the petitioner should be so delivered.

8. If this was all that could be said about this matter, there could be no difficulty in coming to the conclusion that the order made by the Magistrate against which the petitioner complains, is one

made entirely in accordance with the provisions of Section 549 of the Code of Criminal Procedure and Rule 3 of the rules made under it.

9. But Mr. Venkatnarasimhaiah has argued before me that it was not competent for the Magistrate to deliver the petitioner to the military authorities in this case. His argument was that such delivery, even though permissible under the provisions of Section 549 of the Code of Criminal Procedure, could be made only before a charge-sheet was placed against the petitioner which was in this case done on November 22, 1961. The argument constructed by Mr. Venkatanarasinhiiah on the provisions of Section 125 of the Army Act is that the discretion which could be exercised by the military authorities under that section could be exercised only until a charge sheet is placed before the Criminal Court and that once a charge sheet is placed before a Criminal Court it was no longer open to the military authorities to elect to try the offender before a Court-martial.

10. This argument rests entirely upon the expression "shall be instituted" occurring in S.125 of the Army Act. I do not consider this argument to be substantial.

11. It is no doubt true that section 125 of the Army Act, says, that it is for the military authorities to decide whether the proceedings shall be instituted before a Criminal Court or before a Court-martial, but the mere fact that it contains such a provision does not mean that once proceedings are instituted before a Criminal Court, it would no longer be possible for the military authorities to ask for an order for delivery of the offender under Section 549 of the Code of Criminal Procedure. Section 125 of the Army Act which confers power on the military authorities to decide before which tribunal the offender shall be tried, does not provide for the delivery of the offender to the military authorities. The relevant statutory provision under which such delivery could be asked is Section 549 of the Code of Criminal Procedure, and, when that section is looked into it becomes obvious that the delivery of the offender to the custody of the military authorities may be asked not only before the proceedings before the Criminal Court are instituted but even thereafter. The words "when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried" occurring in Section 549 of the Code of Criminal Procedure make it clear that that is the proper construction to be placed on the provisions of Section 549 of the Code of Criminal Procedure.

12. In my opinion the Magistrate was right in coming to the conclusion that this was a case in which the officer commanding the army had a right to ask for the delivery of the petitioner to him so that he may be tried by a Court-martial.

13. This revision petition therefore fails and is dismissed.  
Petition dismissed.