

# MADHYA PRADESH HIGH COURT

Major Gopinathan

Vs.

State of M.P

Criminal Revn. No. 203 of 1961, Decided on 20-11-1961, against order of 1st Addl.  
S.J., Jabalpur  
(T.P. Naik, J.)

17.03.1961. 20.11.1961

## ORDER

**T. P. Naik, J.**

1. The order in this revision shall also dispose of criminal revision No. 199 of 1961.
2. These are applications for revising the order of the Magistrate First Class, Jabalpur, dated 30-8-1960, whereby he held that the proceedings initiated before him, on a complaint by Shri Mahabir Prasad, for offence under Sections 342, 352 and 500 read with section 34 of the Indian Penal Code against the applicant Major Gopinathan, an officer of the Armed Forces and as such subject to the Army Act, shall proceed, notwithstanding the fact that the Commanding Officer of the accused (Major Gopinathan) had given notice to the Magistrate that in his opinion he (the accused) should be tried by a court-martial.
3. Facts, which are necessary for understanding the controversy, are as follows :

Shri Mahabir Prasad filed a complaint against Major Gopinathan, the applicant, and ten others for offences under Sections 341, 342, 352, 500 and 504 read with Sections 34 and 147 of the Indian Penal Code in the Court of the Magistrate first Class, Jabalpur. After examination of the complainant, the learned Magistrate registered the complaint for offence under Sections 342, 352 and 500 read with section 34 of the Indian Penal Code and issued summonses to the accused for their appearance on 18-7-1960. On 30-7-1960, the applicant Major Gopinathan filed an application before the Magistrate claiming that he was

triable by a court-martial alone and not by an ordinary criminal court. The aforesaid objection was overruled by the Magistrate by his order dated 18-8-1960. He, however, issued a written notice to the Commanding Officer of the accused Major Gopinathan as required by R. 4 of the Rules framed by the Union Government under section 549 of the Code of Criminal Procedure (hereinafter called 'the Rules'). In answer to the notice, the Commanding Officer intimated the Magistrate as required by R. 5 of the Rules that in his opinion the accused Major Gopinathan should be tried by a court-martial. The learned Magistrate on receipt of the said reply held that unless charges were framed against the accused by appropriate authority under the Army Act, his (the accused's) liability to be tried by a court-martial did not arise and consequently the provisions of section 549 of the Code of Criminal Procedure were not attracted to bar his jurisdiction to try the accused. The First Additional Sessions Judge, Jabalpur, was moved to refer the case to this Court under section 438 of the Code of Criminal Procedure; but he, having declined to do so, the applicant (accused Major Gopinathan) has himself moved this Court for revising the order of the Magistrate dated 30-8-1960. The Commanding Officer, who had moved the Magistrate under Rule 5 of the Rules, has also come up in revision against the same order. Both these revisions are being dealt with by this order.

4. The contention of the learned counsel for the applicants is that offences under Sections 342, 352 and 500 of the Indian Penal Code are, no doubt, 'civil offences' liable to be tried by ordinary criminal courts; but by virtue of section 69 of the Army Act, they are also deemed to be offences under that Act and liable to be tried by a court-martial. There was thus a conflict of jurisdiction between the two courts which were both competent to try the accused Major Gopinathan for the alleged offences which had to be resolved by taking recourse to section 549 of the Code of Criminal Procedure. under Rule 5 of the Rules the Commanding Officer of the accused Major Gopinathan had given to the trying Magistrate a notice that in his opinion the accused should be tried by a court-martial and consequently the Magistrate had no option but to stay the proceedings pending before him and to deliver the accused to the Commanding Officer with the statement prescribed in sub-section (1) of section 549 of the Code of Criminal Procedure for trial by a court-martial.

5. The answer of the learned counsel for the complainant is that the provisions of section 549 of the Code of Criminal Procedure are not attracted as there was no such

conflict of jurisdiction as needed to be resolved by recourse to that section. According to him, even though by the deeming provision in section 69 of the Army Act civil offences have been fictionally made to be Army Act offences, the liability of an offender committing them to be tried by a court-martial does not arise unless and until he is 'charged therewith' under the sections, i.e., unless and until formal charges contained in a charge-sheet have been drawn up.

6. To appreciate the contentions a few more facts may now be noted.

Under the scheme of the Army Act, 1950 (Act No. 46 of 1950), hereinafter called 'the Army Act', offences have been categorised into four categories;

- (1) Offences which are not offences under the civil law but which for the first time have been created by the Army Act :
- (2) Offences which are offences under the civil law but which have also been included in the definitions of offences under the Army Act;
- (3) Offences which are offences under the civil law but have been by a legal fiction made to be offences under the Army Act; and
- (4) Offences which are offences under the civil law but have not been included amongst Army Act offences either by definition or fictionally.

The first category of offences is exclusively triable by a court-martial. Similarly, the last category of offences is exclusively triable by ordinary criminal courts. The second and third categories of offences are triable both by a court-martial as well as by ordinary criminal courts. In respect of these offences a conflict of jurisdiction arises because both the court-martial as well as the ordinary criminal courts have concurrent jurisdiction for their trial. For resolving such a conflict Sections 125 and 126 of the Army Act have been enacted, as also the provisions of section 549 of the Code of Criminal Procedure.

7. In *E. G. Barsay v. The State of Bombay*,<sup>1</sup> the Supreme Court has pointed out :

"Such a situation (i.e., where both a criminal court as well as a court-martial have each concurrent jurisdiction in respect of an offence) can arise in a case of an act or omission punishable both under the Army Act as well as under any law in force in India. It may also arise in the case of an offence deemed to be an offence under the Act."

It has further been pointed out that where an offence being a civil offence is deemed to be an offence against the Army Act by the force of section 69 of the Act, it is triable both by an ordinary criminal Court having jurisdiction to try the offence as well as by a court-martial and that to such a situation Sections 125 and 126 of the Army Act are clearly intended to apply.

The learned Judges then pointed out :

"Under the scheme of the said two provisions (Ss. 125 and 126), in the first instance it is left to the discretion of the officer mentioned in section 125 to decide before which court the proceedings shall be instituted and, if the officer decided that they should be instituted before a court-martial, the accused person is to be detained in military custody; but if a criminal court is of opinion that the said offence shall be tried before itself, he may issue the requisite notice under section 126 either to deliver over the offender to the nearest magistrate or to postpone the proceedings pending a reference to the Central Government. On receipt of the said requisition, the officer may either deliver over the offender to the said court or refer the question of proper court for the determination of the Central Government whose order shall be final."

8. It would be seen that these provisions (Ss. 125 and 126 of the Army Act) cover cases where the Army Act authorities, in the first instance, decide before which court the proceedings shall be instituted. What if the proceedings have already been instituted in an ordinary criminal court having jurisdiction to try the matter ? Such cases are governed by section 549 of the Code of Criminal Procedure. Under that section,

"The Central Government may make rules consistent with this Code and the Army Act ..... 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....."

The Central Government has made rules in exercise of the powers conferred on it under the section. These are published at p. 690 in section 3 of Part II of the Gazette of India, dated 26th April 1952, under Ministry of Home Affairs, S. R. O. 709, dated, New Delhi, the 17th April 1952. The scheme of the rules is that where a person subject to military law is brought before a Magistrate and charged with an offence for

which he is liable to be tried by a court-martial, he shall not proceed to try him unless he had been moved to do so by the competent military authority (Rule 3). If he had not been moved, he may yet proceed to try him -

(a) after recording reasons that he was of opinion that he should do so;  
and

(b) after giving seven days' written notice to the Commanding Officer of the accused. (Rules 3 and 4).

Until the expiry of seven days from date of the service of such notice, the Magistrate shall not convict or acquit him, or hear him in his defence or frame in writing a charge, or commit him for trial to the High Court or the Court of Sessions (Rule 4). If within seven days or at any time thereafter, but before the Magistrate has done any of the acts or issued any of the orders mentioned in R. 4 of the Rules, the competent military authority gives notice to the Magistrate that in his opinion the accused should be tried by a court-martial, the Magistrate shall stay the proceedings and, if the accused is in his power or under his control, shall deliver him with the statement prescribed in sub-section (1) of section 549 of the Code of Criminal Procedure to the competent military authority (Rule 5). Under Rule 6 of the Rules, even where the Magistrate is proceeding to try the accused, on being moved to do so by the competent military authority, he has to stay the proceedings and deliver the accused to the competent military authority provided he is given notice by the competent military authority before he has done any of the acts or issued any of the orders mentioned in R. 4, that in his opinion the accused should be tried by a court-martial. If on being delivered to the competent military authority the accused is not tried by a court-martial or other effectual proceedings are not taken against him, the Magistrate shall report the circumstances to the State Government, which may, in consultation with the Central Government take appropriate steps to ensure his being dealt with in accordance with law (Rule 7). Provision is also made in the Rules (See Rule 8), empowering the Magistrate to require the Commanding Officer by a written notice to deliver an accused subject to military law to him for being proceeded against according to law or to stay proceedings and make a reference to the Central Government for determining the court before which the proceedings should be instituted if in his opinion the proceedings in respect of the offence committed by him ought to have been instituted before him. Rule 9 of the Rules provides for delivery of an offender to the Magistrate by the Commanding Officer for being proceeded against under the civil law.

9. There can thus be no dispute that if the Rules applied, the Magistrate, under Rule 5 of the Rules, had no option but to stay the proceedings before him and to deliver the accused to the competent military authority for being proceeded against under the provisions of the Army Act. It also cannot be disputed that as proceedings had already been initiated before the Magistrate in the ordinary criminal court on a private complaint without giving to the competent military authority an opportunity to determine before which court the proceedings should be instituted the provisions of section 549 of the Code of Criminal Procedure were attracted.

10. The main basis of the non-applicant's (complainant's) contention is that there was no such conflict of jurisdiction as needed to be resolved by recourse to section 549 of the Code of Criminal Procedure, i.e., in the instant case in respect of the offences under Sections 342, 352 and 500 of the Indian Penal Code the ordinary criminal court and a court-martial had not concurrent jurisdiction. Reliance was placed on the interpretation of section 69 of the Army Act by the Bombay High Court in *Major E. G. Barsay v. The State*,<sup>2</sup> and it was contended that under that section the liability of a person to be tried by a court-martial only arose after charges had been investigated or framed against him for offences of which he is deemed to be guilty. In my opinion the contention cannot be accepted.

11. In the first place, the decision in Major E. G. Barsay's case, AIR 1958 Bombay 354 (supra) of the Bombay High Court was subject of an appeal to the Supreme Court in Criminal Appeal No. 2 of 1958, decided on 24-8-1961 (Now reported in AIR 1961 Supreme Court 1762) and the Supreme Court judgment does not show that the observations of the Bombay High Court on the interpretation of section 69 of the Army Act were accepted. On the other hand, their Lordships of the Supreme Court laid down that conflict of jurisdiction arose in case of an offence deemed to be an offence under the Army Act. Again, while dealing with the offence of conspiracy which was not an offence under the Army Act, their Lordships said :

"Though the offence of conspiracy does not fall under section 52 of the Act (the Army Act), it, being a civil offence, shall be deemed to be an offence against the Act by the force of section 69 of the Act. With the result that the offences are triable both by an ordinary criminal court having jurisdiction to try the said offences and a court-martial."

Their Lordships then went on to consider the provisions dealing with the resolving of the conflict. If no conflict of jurisdiction arose till the charges were investigated or framed, that by itself would have been a complete answer to the applicant-accused's contention and their Lordships need not have considered the provisions of Sections 125 and 126 of the Army Act and section 549 of the Code of Criminal Procedure. The fact that they proceeded to consider them on the basis of the conclusion that there was a conflict of jurisdiction showed that the contention based on the observations of the Bombay High Court in Major E. G. Barsay's case, AIR 1958 Bombay 354 (supra) as to the Interpretation of section 69 of the Army Act was not accepted by them.

12. Secondly, the expression 'charged' has been used both in the Army Act as well as in the Code of Criminal Procedure in two senses, viz., as meaning 'accused' or 'charge-sheeted' i.e., formally accused by the drawing up of a written accusation. Whether it has been used in one sense or the other has to be gathered by considering the context in which it has been used. In my opinion, in section 69 of the Army Act it has been used in the sense of 'accused' and not in the sense of 'charge-sheeted'. 'If charged therewith under this section' occurring in section 69 of the Army Act, therefore, means 'if accused of an offence which is an Army Act offence because of the legal fiction created by Section 69'.

13. Thirdly, both section 125 of the Army Act and section 549 of the Code of Criminal Procedure speak of concurrent jurisdiction in respect of an offence and do not suggest that in respect of fictional offences the jurisdiction to try them by a court-martial is postponed till a charge is investigated or framed, especially when jurisdiction to try an accused of an offence arises when the offence is committed and not when a formal written accusation is drawn up.

14. Fourthly, in Chapter IX of the Army Act, which deals with proceedings before trial, when a person who is subject to the Army Act is 'charged with an offence', he may be taken into military custody (S. 101) : and the Commanding Officer shall take care that he is not detained in such custody for more than forty-eight hours after the committal is reported to him without the charge being investigated, unless the investigation within that period was impracticable (Section 102). Procedure for the investigation of charges and trial by a court-martial is provided by the rules framed under section 191 of the Army Act. Under Rules 22 and 24 of the rules again the expression 'charged with an offence' has been used in the sense of 'accused of an

offence'. It is only after this has been done that R. 26 for the first time speaks of a copy of the charge to be delivered to the accused along with an extract of the evidence to be adduced. Thereafter, Rules 28 to 32 deal with the framing of charges and it is in this context that the charge has been defined in R. 28 to mean : 'an accusation contained in a charge-sheet that a person subject to the Act has been guilty of an offence'. under Rule 25, where an accused is ordered to be tried by a court-martial without the recording of any evidence in his presence, an abstract of the evidence to be adduced at the trial has to be delivered to him free of charge as provided by sub-rule (7) of R. 33. Thereafter, under Rule 34, the accused is to be informed of every charge for which he is to be tried, and inter alia a copy of the charge-sheet has to be given to him, which, if necessary, has also to be read and explained to him under sub-rule (2) of R. 34. It would thus appear that the framing of a charge is a step taken after investigation but before trial by a court-martial and is not a step necessary for the initiating of a proceeding for the trial of a person by a court-martial under the Army Act.

15. Fifthly, I do not see why if two courts have concurrent jurisdiction to try a person subject to the Army Act of an offence punishable thereunder, they both should conduct proceedings simultaneously upto the stage of framing of a charge under the Army Act when nothing is gained thereby except duplication of proceedings to the unnecessary harassment of the accused.

16. Lastly, it has to be remembered that it is in the interest of the Army discipline that a charge against an Army personnel is investigated and tried with expedition and that the somewhat dilatory procedure of the ordinary criminal court is avoided. It has also to be borne in mind that a court-martial can so regulate its procedure as to best subserve the interest of the Army, while the procedure before the ordinary Criminal Court can be abused by a person subject to the Army Act as to destroy the Army discipline. For instance, take the case of an army personnel who is on orders of immediate transfer which he is interested in avoiding. All that he has to do is to get a criminal complaint filed against him in an ordinary Criminal Court of a civil offence. In spite of the fact that the civil offence is deemed to be an Army Act offence under Section 69 of the Army Act, if the contention of the learned counsel for the non-applicant be correct, it cannot be sent for trial to a court-martial from the Court of the Magistrate where the complaint was filed, unless and until the charge has been investigated or framed against him under the Army Act. This would result in his

successfully avoiding his transfer which could never have been the intent of the Army Act and Section 549 of the Code of Criminal Procedure which are specifically designed to avoid the conflict of jurisdiction in such a situation. In my opinion an interpretation of the Army Act and Section 549 of the Code of Criminal Procedure and the rules framed thereunder which creates such conflicts has to be avoided.

17. I am, therefore, of opinion that the civil offences of which a complaint has been registered by the learned Magistrate in the ordinary Criminal Court are liable to be tried by a court-martial as they are also deemed under Section 69 of the Army Act to be offences under the Army Act. Consequently both the ordinary Criminal Court and a court-martial have concurrent jurisdiction in respect of them. As the complaint in respect of them had been registered by the learned Magistrate without being moved to do so by the competent military authority, the rules framed by the Central Government under Section 549 of the Code of Criminal Procedure applied and a written notice as required by Rule 4 of these rules was rightly sent by the learned Magistrate to the Commanding Officer of the accused, with the result that on receipt of the written notice from the Commanding Officer that in his opinion the accused should be tried by a court-martial the learned Magistrate had no option but to stay the proceedings and, to hand over the accused to the competent military authority with the statement prescribed under Section 549 (1) of the Code of Criminal Procedure for his trial by a court-martial in accordance with law.

18. It was, however, contended that under Section 549 of the Code of Criminal Procedure the learned Magistrate had discretion not to hand over the accused as it enjoined on him the duty to hand his over only in proper cases and in this case it was not proper to do so as all the accused could only be tried before the ordinary Criminal Court and it was not proper to hold two trials simultaneously, one before a court-martial in respect of a person subject to the Army Act and the other before the ordinary Criminal Court in respect of the other persons not so subject to the Army Act. In my opinion the contention is misconceived. In the first place, under Rule 5 of the rules framed under Section 549 of the Code of Criminal Procedure the stay of proceedings by the Magistrate holding the trial in the ordinary Criminal Court is obligatory. Under the substantive provisions of Section 549 of the Code, he has been given the power not to hand over the accused to the competent military authority in proper cases, but the operation of that clause must be confined to cases where the Magistrate disputes the jurisdiction of a court-martial to try the accused and where a

reference to the Central Government to resolve the conflict would therefore be necessary. No such necessity arises in this case and hence this was not a case where the Magistrate could reasonably refuse to hand over the accused-applicant Major Gopinathan to the competent military authority.

19. In the result, the applications for revision are allowed. The prosecution pending in the Court of the learned trying Magistrate as against the applicant-accused Major Gopinathan is hereby stayed under Rule 5 of the Rules framed under Section 549 of the Code of Criminal Procedure and the learned Magistrate is further directed as provided in the said rule to hand over the aforesaid accused-applicant to the competent military authority with the statement prescribed in Section 549 (1) of the Code of Criminal Procedure for his trial in accordance with law.

Applications allowed.

Cases Referred.

1. Cri. Appeal No. 2 of 1958, D/d. 24.4.1961, (now Reported in AIR 1961 SC 1762)
2. AIR 1958 Bom 354