

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Revisional Jurisdiction)

DATED : 06.04.2019

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.Rev.P. No.02 of 2017

Petitioner-Revisionist : State of Sikkim

versus

**Respondent-Accused/
Opposite Party** : Jasbir Singh,
S/o Mangram,
R/o Lbhobia, Jhum Jhum,
Rajasthan,
A/p 17 Mountain Division,
C/o 99 APO.
[Presently in Judicial Custody
at Central Prison, Rongyek, East Sikkim]

Application under Sections 397 and 401 read with
Section 482 of the Code of Criminal Procedure, 1973

Appearance

Mr. Karma Thinlay Namgyal, Additional Public Prosecutor with Mr. S. K. Chettri, Assistant Public Prosecutor and Mr. Thinlay Dorjee Bhutia, Advocate for the State/Revisionist-Petitioner.

Mr. Ajay Rathi, Mr. Rahul Rathi and Ms. Phurba Diki Sherpa, Advocates for the Respondent-Accused/Opposite Party.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The Revisionist being aggrieved, assails the Order dated 09-03-2017, passed in Sessions Trial Case No.03 of 2015, of the Learned Sessions Judge, Special Division-II, Sikkim, at Gangtok, in which the Learned Trial Court, after framing Charge against the

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Respondent/Accused (*hereinafter the "accused"*) under Sections 302 and 380 of the Indian Penal Code, 1860 (for short "IPC"), Section 25(1B)(a) of the Arms Act, 1959 (for short "Arms Act"), examining 20 witnesses for the Prosecution and hearing final arguments of both the parties, on the date fixed for Judgment concluded that, the Sessions Court had no jurisdiction to try the accused for the said offences. With this observation, the matter was remitted to the Court of the Learned Chief Judicial Magistrate, East Sikkim, with a direction to issue a written notice to the Commanding Officer of the Unit of the accused or a competent Military Authority in order to deliver him to such authority for trial by Court-Martial. Hence, the Revision Petition.

2. In order to appreciate the matter in its correct perspective it is essential to take stock of the events which have led to the instant Revision Petition. On 14-12-2014, at around 19:40 hours, Lance Naik Rajesh Kumar of 17 Mountain Division lodged an FIR before the Station House Officer, Sadar Police Station, Gangtok informing *inter alia* that on the relevant day at around 6 p.m. when he returned to his barracks he struck up a conversation with two Riflemen for a short while. After they parted company, he was freshening up when at around 6.30 p.m. to 6.45 p.m. he heard sound of gunshots inside the barracks. He immediately rushed to the barracks whereupon he witnessed L/Nk Jasbir Singh, the accused, opening fire on one Rifleman, Balbir Singh, with an INSAS Rifle. He pulled the accused out of the barracks along with the rifle and simultaneously raised an alarm for help, on which Signaller

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Ujjal Sinha and C.H.Anil arrived at the spot. The accused, in the meanwhile, escaped from the clutches of the Complainant. The Complainant then immediately rang up the Medical Room and returned to check on the injured Rifleman by which time he suspected that he was already dead.

3. The Police Station registered a case against the accused under Section 302 of the IPC and endorsed it to the Investigating Officer for investigation. It transpired that on the relevant day, i.e., 14-12-2014, the accused was detailed for Pilot duty of the GOC, 17 Mountain Division and also at the residence of the GOC with effect from 18:00 to 20:00 hours along with two other personnel. After attending to the Pilot duties, the Pilot party deposited their weapons at the Armoury around 15:30 hours. The accused stayed at the MP Depot for his next duty shift at the GOC's residence. While at the Depot, he met one Havaldar, together they went in the Pilot vehicle to purchase liquor from the Canteen and thereafter to the Signal barracks. Inside the barracks, the accused and the deceased engaged in light banter which however turned into a heated argument on which the deceased slapped the accused and pulled him by the belt of his uniform. On the intervention of another Head Constable, matters regained normality after which the accused left for the MP Depot evidently seething from the incident. Around 17:30 hours when a JCO came to the MP Depot for some work, he unwittingly dropped the key of the Armoury on the floor, retrieved it and put it inside a drawer in the table, which the accused caught sight of. After the JCO left the room, the accused took the key,

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went to the Armoury and took two INSAS rifles, two magazines with twenty live ammunitions in each magazine. He concealed one of the rifles under an army truck and took the second one with him duly loaded and ready for firing, to the barracks where the deceased was and fired at him from point blank range, causing his instantaneous death. By the time the Complainant arrived at the scene, the accused had already fired about twenty rounds out of which twelve bullets pierced the deceased Rifleman. The accused escaped from the clutches of the Complainant and went towards the Signal Gate. Meanwhile, on the failure of the accused to respond to his calls one Niwas Kumar who was to have relieved the accused made phone calls to the JCO. After some time however the accused called him and mentioned that he had killed someone. The said Niwas Kumar then informed the JCO. After completion of investigation Charge-Sheet was filed before the Court of the Learned Chief Judicial Magistrate against the accused under Sections 302/380 IPC, with the information that supplementary Charge-Sheet would be submitted on receipt of Forensic Report from the Central Forensic Science Laboratory.

4. On 28.02.2015, the accused was produced before the Learned Chief Judicial Magistrate (East and North Sikkim), who vide his Order of the same date took cognizance of the offence and finding that the Sections involved were exclusively triable by the Court of Sessions, committed the matter to the said Court.

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5. The Learned Court of Sessions framed Charge against the accused on 15-07-2015 under Sections 302/380 of the IPC and Section 25(1B)(a) of the Arms Act. On the plea of "not guilty" by the accused, twenty witnesses for the Prosecution were examined and concluded, the accused examined under Section 313 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") and on 25-02-2017 the final arguments of the parties were heard. On the date fixed for pronouncement of Judgment, i.e., 09-03-2018 the Learned Sessions Judge took the aforestated view, culminating thereby in the instant revision petition.

6. Learned Additional Public Prosecutor for the Revisionist submitted that on conclusion of trial and on the date fixed for Judgment instead of pronouncing judgment, the impugned Order was pronounced. That, the Learned Trial Court failed to consider that Section 125 of the Army Act, 1950 (for short "Army Act") presupposes that both a Criminal Court and a Court-Martial have concurrent jurisdiction to try a civil offence, and by the impugned Order left it to the discretion of the Commanding Officer to take a decision regarding the Forum. That, in the instant matter, the Army Authorities had handed over the accused to the Civil Police, thereby exercising their discretion and indicating their decision to have the accused tried by a Criminal Court. That the "Minute Sheet AG's Branch" Case No. 2513/58/A1(PC) filed in I.A. No. 2 of 2017 reveals that the Army authorities had "recommended" that the trial be conducted by the Sessions Court. The absence of the Army Authorities during the entire proceedings is consistent with their

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decision that the matter be tried by the Learned Trial Court. The non-filing of an application by the Commanding Officer for handing over the accused for Court-Martial is also proof of the fact that the Army had no objection to trial by a Criminal Court.

7. Walking this Court through Section 69 of the Army Act it was urged that the provision clearly lays down that, any person who has committed any "civil offence," which means, an offence triable by a Criminal Court as per Section 3(ii) of the Army Act, can be tried by a Criminal Court. Relying on the decision of **Som Datt Datta vs. Union of India and Others**¹, it was contended that the said Judgment clearly lays down that when an Order is issued by the concerned Authority of the Army under Section 125 of the Army Act, then no further argument need arise on this point. The "Minute Sheet" *supra* dated 14-01-2015 and 16-01-2015, was invoked to convince this Court that the recommendation had been duly signed by one Jiten Joshi who was the Lieutenant Colonel and Commanding Officer of the accused. A draft of the aforesaid recommendation was placed before the Deputy GOC, who in turn placed it before the GOC, who, duly approved the recommendation. In order to buttress his submissions, Learned Additional Public Prosecutor elicited strength from the ratio in **Som Datt Datta (supra)**. Reliance was also placed on **Joginder Singh vs. State of Himachal Pradesh**², **Major E.G. Barsay vs. The State of Bombay**³ and **Balbir Singh and Another vs. State**

¹ AIR 1969 SC 414

² (1971) 3 SCC 86

³ (AIR 1961 SC 1762

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*of Punjab*⁴. That in view of the facts and circumstances, the Learned Trial Court be directed to pronounce Judgment on the merits of the case.

8. *Per contra*, Learned Counsel advancing his contentions for the accused drew the attention of this Court to the provisions of Sections 69 and 70 of the Army Act canvassing the point that Section 69 commences with a caveat, i.e., "Subject to the provisions of Section 70," categorically laying down that the provisions of Section 70 are to be considered, while interpreting Section 69. That, both the accused and deceased were Army personnel triable in terms of Section 69 by Court-Martial. That, a careful reading of Section 70 would also reveal that, a person would not be triable by Court-Martial, if the offender is subject to the military, naval or air force law, but the victim is not, unless the offence is committed within the exceptions carved out in Section 70. That, "Active Service" which finds place in Section 70(a) of the Army Act has been elucidated in a Notification of the Ministry of Defence 1977 which provides that "active service" within the meaning of the Army Act, would mean, service in the State of (a) Jammu and Kashmir, (b) Manipur, (c) Nagaland, (d) Tripura and (e) Sikkim. In view of the aforestated provisions of law, the accused is to be tried by Court-Martial and not otherwise. Besides, the Charge-Sheet was placed before the Learned Chief Judicial Magistrate on 28-02-2015 who committed the matter on the same day to the Court of the Learned Sessions Judge at Gangtok after taking cognizance of the offences

⁴ (1995) 1 SCC 90

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under Sections 302/380 of the IPC without complying with the provisions of Section 125 of the Army Act and Rule 3 of the Army Rules, 1954. That, the Learned Court of Sessions after altering the Charge on 05-11-2015 and inserting Section 25(1B)(a) of the Arms Act sans sanction, issued no notice in terms of Section 475 of the Cr.P.C. to the accused. It was further contended that the contents of the "Minute Sheet" relied on by the Revisionist was never tested by way of cross-examination and hence filing of the document at the revisional stage cannot be permitted which in any event is of no assistance to the Revisionist.

9. While relying on the ratiocination of the Hon'ble Supreme Court in ***Delhi Special Police Establishment vs. Lt. Col. S. K. Loraiya***⁵ it was posited that the mandatory provisions of Section 475 Cr.P.C. of issuing notice to the Commanding Officer of the accused to enable him to exercise the option of trial by Court-Martial or a Civil Court, was sidestepped by the Magisterial Court as also the provisions of Rule 4 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952. That, in ***Superintendent and Remembrancer of Legal Affairs, West Bengal vs. Usha Ranjan Roy Chowdhury***⁶ it was held that the ordinary Civil Court would have no jurisdiction to take cognizance of the case and to try the accused in a manner where the procedure prescribed by the Rules has not been complied with. That, when there was conflict as to whether the accused should be tried by a Criminal Court or by Court-Martial, the

⁵ (1972) 2 SCC 692

⁶ 1986 (3) Crimes 11 (SC)

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matter should have been referred to the Central Government. Hence, the decision arrived at by the Learned Trial Court placing reliance on ***Sepoy (Lance Naik) Devender Nath Rai vs. Union of India***⁷ requires no interference.

10. I have heard the rival contentions placed by Learned Counsel *in extenso* and given it careful consideration. I have also carefully perused all documents appended and the impugned Order. The decisions relied on by both Learned Counsel have also been perused by me.

11. Section 2 of the Army Act delineates at length the categories of persons who are subject to the Act. Section 3 deals with definitions and the relevant provisions for the instant purpose are extracted below;

"3. In this Act, unless the context otherwise requires.—(i) **"Active service"**, as applied to a person subject to this Act, means the time during which such person—

- (a) is attached to, or forms part of, a force which is engaged in operations against an enemy, or
- (b) is engaged in military operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy, or
- (c) is attached to or forms part of a force which is in military occupation of a foreign country;

(ii) **"civil offence"** means an offence which is triable by a criminal court;

.....

(vii) **"court-martial"** means a court-martial held under this Act;

(viii) **"criminal court"** means a court of ordinary criminal justice in any part of India,

.....

(xi) **"the Forces"** means the regular Army, Navy and Air Force or any part of any one or more of them.

.....

(xvii) **"offence"** means any act or omission punishable under this Act and includes a civil offence as hereinbefore defined; ..."

⁷2000 (4) RCR (Criminal) 136 :
Civil Misc. Writ Petition No.35206 of 1991
of the Allahabad High Court

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The aforesaid provisions thus explain the terms in relation to the Act.

12. Chapter VI of the Act deals with offences and details the forum which can try the offences mentioned in the various Sections. Sections 34 to 68 are triable by Court-Martial. We may now look at the provisions of Sections 69 and 70 of the Army Act. Section 69 reads as follows;

"69. Civil offences.—Subject to the provisions of section 70, any person subject to this Act who at any place in or beyond India, commits any civil offence, shall be deemed to be guilty of an offence against this Act and, if charged therewith under this section, shall be liable to be tried by a court-martial and, on conviction, be punishable as follows, that is to say,—

- (a) if the offence is one which would be punishable under any law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and
- (b) in any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned."

13. The definition of "civil offence" as provided in Section 3(ii) of the Army Act extracted *supra* means an offence which is triable by a Criminal Court. Section 70 provides for civil offences not triable by Court-Martial and reads as follows;

"70. Civil offences not triable by court-martial.— A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a court-martial, unless he commits any of the said offences—

- (a) while on active service, or
- (b) at any place outside India, or

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- (c) at a frontier post specified by the Central Government by notification in this behalf.”

14. In *Som Datt Datta (supra)* the facts *inter alia* pertained to the death of an army personnel having been stabbed by another army personnel. Both were subject to the Army Act as in the instant case. While considering the provisions of Chapter VI therein, the Hon’ble Supreme Court observed *inter alia* as follows;

“4. Chapter VI is comprised of Sections 34 to 70. The heading of the chapter is “Offences”. As we have already noticed, the word “offence” is defined to mean not only any act or omission punishable under the Army Act, but also a civil offence. Sections 34 to 68 define the offences against the Act triable by Court Martial and also indicate the punishments for the said offences.

.....
 Shortly stated, under this Chapter there are three categories of offences, namely, (1) offences committed by a person subject to the Act triable by a Court Martial in respect whereof specific punishments have been assigned; **(2) civil offences committed by the said person at any place in or beyond India, but deemed to be offences committed under the Act and, if charged under Section 69 of the Act, triable by a Court Martial;** and (3) offences of murder and culpable homicide not amounting to murder or rape committed by a person subject to the Act against a person not subject to the military law. **Subject to a few exceptions, they are not triable by Court Martial, but are triable only by ordinary criminal courts.** The legal position therefore is that when an offence is for the first time created by the Army Act, such as those created by Sections 34, 35, 36, 37 etc., it would be exclusively triable by a Court Martial; **but where a civil offence is also an offence under the Act or deemed to be an offence under the Act, both an ordinary Criminal Court as well as a Court Martial would have jurisdiction to try the person committing the offence.** Such a situation is visualized and provision is made for resolving the conflict under Sections 125 and 126 of the Army Act

.....”
 (Emphasis supplied)

15. On these lines, we may now look at the provisions of Sections 125 and 126 of the Army Act, which are extracted hereinbelow for easy reference;

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"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 the offender in compliance with the requisition, or shall forthwith defer 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."

16. The observation *supra* in the case of **Som Datt Datta** clearly explains the position of offences committed under Sections 69 and 70 of the Army Act. It is clearly laid down therein *inter alia* at (2) that if civil offences are committed by a person subject to the Army Act at any place in or beyond India but deemed to be offences committed under the Act, when such a person is charged under Section 69 of the Act, it is triable by Court-Martial. So far as Section 70 is concerned the observation at (3) in the same ratio clarifies that when a person subject to the Army Act commits an offence of murder and culpable homicide not amounting to murder or rape, against a person not subject to the military law, subject to a few exceptions they are not triable by Court-Martial but are triable only

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by ordinary Criminal Courts. Section 70 therefore deals specifically with offences committed by a person subject to the Army Act against a person not subject to Army Act. The exceptions to Section 70 of the Army Act however provides that if the offence is committed while the accused is in "active service" or at any place outside India, or at a frontier post specified by the Central Government, in such circumstances he shall be tried by Court-Martial.

17. The Hon'ble Supreme Court while discussing Sections 69 and 70 of the Act in the ratio *ibid* observed as follows;

"4.

Section 125 presupposes that in respect of an offence both a Criminal Court as well as a Court Martial have each concurrent jurisdiction. Such a situation 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 Army Act. Under the scheme of the two sections, 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 decides 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, it 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. These two sections of the Army Act provide a satisfactory machinery to resolve the conflict of jurisdiction, having regard to the exigencies of the situation in any particular case."

(Emphasis supplied)

18. On the touchstone of the settled law, the question then is whether the Learned Sessions Judge erred in issuing the Order directing that the accused be tried by Court-Martial.

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19. It is now apposite to refer to the provisions of Section 475 of the Cr.P.C. which provides for delivery to Commanding Officer or persons liable to be tried by a Court-martial and reads as follows;

"475. Delivery to commanding officers of persons liable to be tried by Court-martial.—(1) The Central Government may make rules consistent with this Code and the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957), and the Air Force Act, 1950 (45 of 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, navel 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 purpose of being tried by a Court-martial.

*Explanation.—*In this section—

- (a) "unit" includes a regiment, corps, ship, detachment, group, battalion or company.
 - (b) "Court-martial" includes any tribunal with the powers similar to those of a Court-martial constituted under the relevant law applicable to the Armed Forces of the Union.
- (2) Every Magistrate shall, on receiving a written application for that purposes by the commanding officer of any unit or 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.
- (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."

(Emphasis supplied)

20. On the heels of the above provisions it is indeed imperative to discuss the relevant Rules which were notified by the Central Government. The Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1952 (for short "Rules of 1952") were notified by the Central Government in exercise of powers

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conferred under this Section and published in the Gazette of India dated 26-04-1952. This Rule was superseded in 1978 by the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978 (for short "Rules of 1978"). For convenience the relevant provisions of the Rules of 1978 are extracted hereinbelow;

"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 under section 252, sub-sections (1) and (2) of section 255 subsection (1) of section 256 or section 257 of the Code of Criminal Procedure, 1973 (2 of 1974), or hear him in his defence under section 254 of the said Code; or
- (b) frame in writing a charge against the accused under section 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 under section 209 of the said Code; or
- (d) make over the case for inquiry or trial under section 192 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 the 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 (1) of section 475** of the said Code to the officer specified in the said sub-section.

6. Where within the period of fifteen days mentioned in rule 4, or at any time thereafter but **before the**

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Magistrate takes any action or makes any order referred to in that rule, the commanding officer of the accused or the competent military, naval or air force authority, as the case may be, gives notice to the Magistrate that in the opinion of such officer or authority, 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 together with the statement referred to in sub-section (1) of section 475 of the said Code to the officer specified in the said sub-section."

(Emphasis supplied)

21. Rule 3 *supra* therefore provides for steps to be initiated by a Magistrate when a person subject to military, naval or air force or any other law relating to the Armed Forces is brought before him and charged with an offence for which he is also liable to be tried by a Court-Martial. The Rule enjoins upon the Magistrate not to proceed to try such person or even to commit the case to the Court of Sessions unless he is moved thereto by a competent military, naval or air force authority or if the Magistrate is of the opinion that he should proceed or commit the case without being moved by such authority, he is to record reasons for his action. Even if the Magistrate decides to proceed under Rule 3(b), Rule 4 lays down that before taking such steps the Magistrate shall give a written notice to the concerned authority of the accused and stay his hands until the expiry of fifteen days from the date of service of notice. In other words, till the expiry of fifteen days the Magistrate is not to convict or acquit the accused, frame charge against the accused, commit the accused for trial to the Court of Sessions or make over the case for inquiry or trial. Rule 5 lays down that where the competent authority pertaining to the accused takes steps before the Magistrate under Clause (a) of Rule 3 and subsequently gives notice to the Magistrate that such officer or authority is of the

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opinion that the accused should be tried by Court-Martial, the Magistrate if he has not taken action or made any order referred to in Clause (a), (b), (c) or (d) of Rule 4, before receiving the notice, shall stay the proceedings. If the accused is under the control of the Magistrate, the Magistrate shall then deliver him together with the statement of offence of which he is accused.

22. Indubitably both the accused and deceased were subject to the Army Act. From a careful perusal of the records, it is evident that the steps prescribed by law were not adhered to by the concerned Magistrate. The persuasion of the Revisionist that the Army authorities had exercised their discretion to try the accused in the criminal court bears no weight as no documentary evidence exists thereof. Mere handing over of the accused to the civil authority is no proof of exercise of option. This is settled in the ratio of **Som Datt Datta** (*supra*) wherein it was held that merely because the Police Officer conducted the inquest of the dead body or because he seized certain exhibits and sent them to the State Laboratory for chemical examination, it could not be reasonably argued that there was a decision of the competent military authority under Section 125 of the Army Act for handing over the inquiry to the Criminal Court. In the instant matter, after the FIR was lodged on 14-12-2014, investigation commenced on completion of which Charge-Sheet was submitted before the Court of the Learned Sessions Judge. The Learned Chief Judicial Magistrate proceeded to commit the matter to the Court of the Learned Sessions Judge on the same day *inter alia* ordering as follows;

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“.....

Seen the challan filed against the above named accused under Section 302/380 of the IPC, 1860.
Cognizance taken of the concerned offence against the accused person.
Since the section involved is exclusively triable by the Court of Session, the case is accordingly, committed to the Court of the Ld. Principal Sessions Judge, East Sikkim at Gangtok.
.....”

Evidently, the Magistrate sidestepped the procedure prescribed by law viz. Sections 125 and 126 of the Army Act, Section 475 Cr.P.C., and Rules 3, 4 and 5 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978.

23. In *Extra-Judicial Execution Victim Families Association and Another vs. Union of India and Another*⁸ Order dated 08-07-2016 of the Hon'ble Supreme Court before a Bench comprising of Hon'ble Justices Madan B. Lokur and Uday U. Lalit, while referring to the decision in *Som Datt Datta (supra)* concluded *inter alia* as follows;

“**188.** Section 125 and Section 126 of the Army Act are of considerable importance in this context and as far as this case is concerned. These Sections ought to be read in conjunction with Section 4 and Section 5 of the Code of Criminal Procedure. These Sections provide that when both a criminal court and a Court Martial have jurisdiction in respect of an offence, the first option would be with the Army to decide whether the accused person should be proceeded against in a criminal court or before a Court Martial. However, if the criminal court is of opinion that the proceedings should be instituted before itself, it may require the Army to send the alleged offender to the nearest Magistrate to be proceeded against or to postpone the proceedings pending a reference to the Central Government. In other words, in the event of a conflict of jurisdiction, whether an alleged offender should be tried by a criminal court constituted under the Code of Criminal Procedure or by a Court Martial constituted under the Army Act, that conflict

⁸ (2016) 14 SCC 578(2)

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shall be referred to the Central Government for passing an appropriate order.

189. In this context, it is necessary to refer to the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978. These Rules provide, inter alia, that when a person subject to the Army Act is brought before a Magistrate and is charged with an offence also triable by a Court Martial, then such Magistrate shall not proceed to try that person or commit the case to the Court of Session unless he is moved thereto by a competent Army authority or the Magistrate records his opinion in writing that he should so proceed without being so moved. In the latter event, the Magistrate shall give a written notice of fifteen days to the Commanding Officer of that person and shall until then effectively stay his hands.

.....
246. The result of the interplay between Section 4 and 5 of the CrPC and Section 125 and 126 of the Army Act makes it quite clear that the decision to try a person who has committed an offence punishable under the Army Act and who is subject to the provisions of the Army Act does not always or necessarily lie only with the Army – the criminal court under CrPC could also try the alleged offender in certain circumstances in accordance with the procedure laid down by CrPC.”

24. The ratio thereby explains the procedure to be adopted by the Magistrate when a person subject to the Army Act is brought before a Magistrate and is charged with an offence also triable by a Court-Martial.

25. It has been the persistent endeavour of the Revisionist to convince this Court that at the stage of the pronouncement of the Judgment the matter cannot be found to be triable by Court-Martial. Photocopy of the “Minute Sheet” was produced before this Court rather belatedly where the GOC has allegedly accepted the recommendation put forth by one ‘(Jiten Joshi), Lt. Col., Offg Col A’ that *“murder case be tried by the civ Court (sic) under relevant Section of the IPC & CrPC”*. In the first instance, it may be stated that this document was never furnished before the Learned Trial Court. Secondly, it is only a photocopy of the document, apparently

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not a certified copy and not even admissible in terms of the Indian Evidence Act, 1872 thus beyond the scope of consideration. Even if this document was to be considered, there is no proof that any letter pursuant to the alleged recommendation was despatched to the Magistrate expressing the opinion of the concerned Army authority. It is indeed luculent that the prescribed procedure as elucidated in the Cr.P.C. and the Rules both of which are extracted hereinabove were not adhered to by the Learned Magistrate. The Learned Magistrate committed the case to the Court of Sessions before being moved thereto by any competent authority pertaining to the accused.

26. That having been said it is now settled law that where the statute mandates a procedure no discretion is left with the Court but to draw the statutory conclusion. This has been succinctly laid down in *B. Premanand and others vs. Mohan Koikal and others*⁹ as follows;

"11. As stated by Justice Frankfurter of the U.S. Supreme Court (see 'Of Law & Men: Papers and Addresses of Felix Frankfurter'):

"Even within their area of choice the courts are not at large. They are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society. **As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature.** The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. **A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration.** He must not read

⁹ (2011) 4 SCC 266

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in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction.”

12. As observed by Lord Granworth in *Grundy v. Pinniger* (1852) 1 LJ Ch 405:

“... to adhere as closely as possible to the literal meaning of the words used, is a cardinal rule from which if we depart we launch into a sea of difficulties which it is not easy to fathom.”

13. In other words, once we depart from the literal rule, then any number of interpretations can be put to a statutory provision, each Judge having a free play to put his own interpretation as he likes. This would be destructive of judicial discipline, and also the basic principle in a democracy that it is not for the Judge to legislate as that is the task of the elected representatives of the people. Even if the literal interpretation results in hardship or inconvenience, it has to be followed (see G.P. Singh's Principles of Statutory Interpretations, 9th Edn. pp 45-49). Hence departure from the literal rule should only be done in very rare cases, and ordinarily there should be judicial restraint in this connection.

14. As the Privy Council observed (per Viscount Simonds, L.C.):

“... Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used.” (see *Emperor v. Benoarilal Sarma* AIR 1945 PC 48, pg. 53).

15. As observed by this Court in *CIT v. Keshab Chandra Mandal*:

“... **Hardship or inconvenience cannot alter the meaning of the language employed by the Legislature if such meaning is clear on the face of the statute...**”

16. Where the words are unequivocal, there is no scope **for importing any rule of interpretation vide Pandian Chemicals Ltd. v. C.I.T. It is only where the provisions of a statute are ambiguous that the Court can depart from a literal or strict construction (vide Narsiruddin v. Sita Ram Agarwal). Where the words of a statute are plain and unambiguous effect must be given to them (vide Bhaji v. SDO).**

.....
19. In *Shiv Shakti Co-operative Housing Society v. Swaraj Developers* this Court observed (SCC p 669, para 19):

“19. It is a well-settled principle in law that the Court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent.” ...”

(Emphasis supplied)

27. In *Delhi Special Police Establishment vs. Lt. Col. S. K.*

Loraiya (supra), the Hon’ble Supreme Court held as follows;

5. The Central Government has framed under Section 549(1) Cr.P.C., rules which are known as the

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Criminal Courts and Courts Martial (Adjustment of Jurisdiction) Rules, 1952. The relevant rule for our purpose is Rule 3. It requires 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 a court-martial also, the Magistrate shall not proceed with the case unless he is requested to do so by the appropriate military authority. He may, however, proceed with the case if he is of opinion that he should so proceed with the case without being requested by the said authority. Even in such a case, the Magistrate has to give notice to the Commanding Officer and is not to make any order of conviction or acquittal or frame charges or commit the accused until the expiry of seven days from the service of notice. The Commanding Officer may inform the Magistrate that in his opinion the accused should be tried by the Court-martial. Subsequent rules prescribe the procedure which is to be followed where the Commanding Officer has given or omitted to give such information to the magistrate.

6. 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), Cr.P.C., and Rule 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 has urged before us that in the particular circumstances of this case the respondent is not 'liable to be tried' by a Court-martial.

7. 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."

28. To conclude, from the discussions which have ensued hereinabove, the procedure as envisaged by law not having been complied with, no error obtains in the impugned Order of the Learned Sessions Judge.

29. A tangential argument could arise with regard to Section 122 of the Army Act which deals with the period of limitation for trial. In **Delhi Special Police Establishment vs. Lt. Col. S. K. Loraiya** (*supra*) at paragraph 10, it was held as follows;

"10. Again, sub-section (3) of Section 122 of the Army Act provides that while computing the period of three years specified in sub-section (1), any time spent by the

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accused as a prisoner of war or in enemy territory, or in evading arrest after the commission of the offence, shall be excluded. On a conjoint reading of sub-sections (1) and (3) of Section 122, it is evident that the court-martial and not the ordinary criminal court has got jurisdiction to decide the issue of limitation. There is nothing on record before us to indicate that the respondent had not been evading arrest after commission of the offence. As the court-martial has initial jurisdiction to enter upon the enquiry in the case, it alone is competent to decide whether it retains jurisdiction to try the respondent in spite of sub-section(1) of Section 122. The issue of limitation is a part of the trial before it. **If the court-martial finds that the respondent cannot be tried on account of the expiry of three years from the date of the commission of the offence, he cannot go scot free. Section 127 of the Army Act provides that when a person is convicted or acquitted by a court-martial, he may, with the previous sanction of the Central Government, be tried again by an ordinary criminal court for the same offence or on the same facts. So it would be open to the Central Government to proceed against the respondent after the court-martial has recorded a finding that it cannot try him on account of the expiry of three years from the date of the commission of the offence."**

(Emphasis supplied)

This decision should clear the air on the question of limitation.

30. This Revision Petition fails and is accordingly dismissed.

31. Copy of this Judgment along with records be sent forthwith to the Court of the Learned Chief Judicial Magistrate, East Sikkim at Gangtok, for information and requisite steps.

32. Copy of this Judgment also be forwarded to the Court of the Learned Sessions Judge, Special Division-II, for information.

(Meenakshi Madan Rai)
Judge

06.04.2019

Approved for reporting : **Yes**
Internet : **Yes**

ds/ml