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The State Of Sikkim Vs. Jasbir Singh

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Court : Supreme Court of India

Decided On : Feb-01-2022

Judge : Hon'Ble the Chief Justice Hon'Ble Mr. Justice Surya Kant Hon'Ble Mr. Justice Vikram Nath

Appeal No. : Crl.A. No.-000085-000085 - 2022

Appellant : The State Of Sikkim

Respondent : Jasbir Singh

Advocate for Pet/Ap. : NARENDRA KUMAR __

Judgement :

Reportable IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION Criminal Appeal No.85 of 2022 The State of Sikkim Appellant Versus Jasbir Singh & Anr. Respondent 1

JUDGMENT

Dr Dhananjaya Y Chandrachud, J A Facts.....2
B Submissions.....8
C Analysis.....14

D

Conclusion.....42

A Facts 2 1 This appeal arises from a judgment of a Single Judge of the High Court of Sikkim. While exercising the revisional jurisdiction under Sections 397 and 401 read with Section 482 of the Code of Criminal Procedure 19731, the High Court has upheld the order of the Sessions Judge, Special Division-II, Sikkim, at Gangtok, directing the Chief Judicial Magistrate, East Sikkim to furnish a written notice to the Commanding Officer of the unit of the respondent-accused and deliver him for trial by a court-martial. 2 On 14 December 2014, at about 19:40 hours, Lance Naik Rajesh Kumar of 17 Mountain Division of the Indian Army lodged a First Information Report2 before the Station House Officer at the Sadar Police Station in Gangtok stating inter alia that on the relevant date at around 6.00 p.m., when he returned to his barracks, he struck up a conversation with two riflemen for a short while. After that, as he was freshening up, between 6.30 p.m. and 6.45 p.m. he heard sounds of gunshots inside the barracks. He immediately rushed to the barracks and witnessed the respondent- accused, Lance Naik Jasbir Singh, opening fire on a rifleman, Balbir Singh, with an INSAS Rifle. The informant pulled the respondent-accused out of the barracks along with the rifle and simultaneously raised an alarm for help, on which Signalmen Ujjal Sinha and C.H. Anil arrived at the spot. The accused, in the meanwhile, escaped from the clutches of the informant. The informant then immediately rang up the medical room and returned to check on the injured rifleman, by which time he 1 Cr PC 2 FIR No.409/2014 3 suspected that the he was already dead. FIR No.409 of 2014 was registered on 14 December 2014 at the Sadar Police Station, Gangtok. 3 On 15 December 2014, the custody of the accused was handed over by the competent military authority to the Investigating Officer3 and an arrest/ court surrender memo was issued by the Sub-Inspector of Police at the Sardar Police Station. While conducting the investigation, the IO issued a requisition to the Commanding Officer of the 17 Mountain Division Pro Unit, informing him that an FIR under Section 302 of the Indian Penal Code 18604 had been registered against the respondent-accused. The IO requested certain documents for the purpose of investigation, namely: (i) The order of appointment of the accused; (ii) Duty Deployment Chart of Sunday, 14 December 2014; (iii) Weapon Issue Register of

Sunday, 14 December 2014; and (iv) Records of any previous offence. 4 In response to the above communication, Colonel RR Nair, the Commanding Officer5 of the 17 Mountain Division Pro Unit furnished the following documents by his letter dated 27 December 2014: (i) Copy of the posting order in respect of No.778224F L/Nk(MP) Jasbir Singh; (ii) CTC of Pilot duty detailment extract as on 14 December 2014; (iii) CTC of Weapon Issue Register, where he informed the IO that the respondent-accused had withdrawn the weapon for piloting duty on 14 3 IO 4 IPC 5 CO 4 December 2014. After completion of the duty however, while committing the offence, the respondent had unauthorizedly accessed the weapon; and (iv) Record of previous offences. A copy of this communication was forwarded by the CO to the Headquarters of the 17 Mountain Division Pro Unit. 5 On 12 January 2015, the IO filed an application before the Chief Judicial Magistrate (East & North), for recording the statement of the informant (Rifleman Rajesh Kumar). On 13 February 2015, the IO submitted a charge-sheet after the completion of investigation against the respondent-accused for offences punishable under Sections 302 and 308 of the IPC. An order of committal was passed by the Chief Judicial Magistrate to the Principal Sessions Judge. On 28 February 2015, a case was registered as Sessions Trial Case No.03/2015. On 15 July 2015, the Sessions Judge framed charges against the respondent under Sections 302 and 308 of the IPC and under Section 25(1-B)(a) of the Arms Act 19596. On 18 November 2015, the Sessions Judge allowed an application filed under Section 216 of the Cr PC for alteration of the charge under Section 25(1-B)(a) to Section 27(3) of the Arms Act. 6 During the course of the trial, on 18 June 2016, the Sessions Judge directed the issuance of fresh summons to Colonel RR Nair returnable on 7 July 2016. On 07 July 2016, the Sessions Judge was informed that a letter had been received from the Army authorities stating that Colonel RR Nair was undergoing a training course 6 Arms Act 5 and was on leave up to 24 July 2016. During the course of the trial, the CO, Colonel RR Nair was examined as PW19 on 28 July 2016. After the recording of evidence was complete, the Sessions Judge heard the counsel for the parties for final arguments. During the course of the hearing, counsel for the accused inter alia contended that as the respondent-accused and the deceased were both governed by the Army Act 19507 when the incident took place, in view of Section 69 of the Army Act, the accused could be tried only by a General Court-

Martial and not by the Sessions Court. Having due regard to the provisions of Section 69 of the Army Act, the Sessions Judge by his order dated 9 March 2017 upheld the objection of the respondent-accused by concluding that given the nature of offence, the accused ought to have been tried by court-martial alone and that the Sessions Court had no jurisdiction. With this conclusion, the Chief Judicial Magistrate was directed to give a written notice to the CO of the respondents unit or the competent military authority for his trial by a court-martial. 7 The order of the Sessions Court was challenged in revision. The Sikkim High Court in its judgment dated 6 April 2019 adverted to the provisions of Section 69 and 70 of the Army Act. The High Court held that the procedure prescribed under Sections 125 and 126 of the Army Act, Section 475 of the Cr PC, and Rules 3, 4 and 5 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules 19788 had not been observed. While issuing notice to the Army authorities, the High Court held that both the respondent and the deceased were subject to the Army Act. The 7 Army Act 8 1978 Rules 6 procedure mandated by the 1978 Rules had to be followed and the submission that the Army authority had exercised their discretion to try the accused in the criminal court was held to bear no weight on the ground that no documentary evidence existed to prove the exercise of the discretion. Moreover, the mere handing over of the accused to the civil authority was held not to be proof of the exercise of the option. While a minute sheet was produced before the High Court where the General Officer Commanding9 had accepted the recommendation that the accused be tried by the Sessions Court, the High Court rejected this on the ground that: (i) the document was not furnished before the Sessions Judge and (ii) the document which was produced was a photocopy and not a certified copy. The revision petition was dismissed. 8 Pursuant to the impugned judgment of the High Court, the GOC of 17 Mountain Division Pro Unit, Maj. General. RC Tiwari, by an order dated 22 April 2019, exercised his powers under Section 125 of the Army Act and decided that the proceedings against the respondent-accused be instituted before the criminal court and that he be detained in civil custody. An application was filed before the Chief Judicial Magistrate to convey the decision of the GOC. By an order dated 22 April 2019, the Chief Judicial Magistrate rejected the application of the GOC in view of the order of the Sessions Judge dated 9 March 2017, which required that the accused be

delivered to the competent military authority. Since this order had been upheld by the High Court, the Chief Judicial Magistrate directed the Superintendent of Prisons, Central Jail, Rongyek to hand over the respondent to the competent military 9 GOC 7 authority. The respondent was handed over to the Army and has been in military custody since 23 April 2019. Meanwhile, the respondent retired from service on 31 March 2020. On the same day, the Army authorities passed an order for extension of the time of detention. B Submissions 9 The State of Sikkim is in appeal against the judgment of the High Court. The State has been represented by Mr Vivek Kohli, learned Advocate General. The challenge made by the State of Sikkim has been supported by the Union of India appearing as a respondent through Mr Aman Lekhi, learned Additional Solicitor General. The arguments on behalf of the respondent were made by Mr Pradeep Kumar Dey, learned Senior Counsel. 10 Mr Vivek Kohli, Advocate General appearing on behalf of the appellant-State made the following submissions: (i) The High Court and Sessions Court have both failed to appreciate that the criminal courts and court-martial have concurrent jurisdiction to try a case, depending on the discretion exercised under Section 125 of the Army Act. The discretion to decide whether or not the accused is to be tried by court- martial, is solely with the Commanding Officer; (ii) Under Section 125, one of the following three situations may arise: (a)The Commanding Officer may exercise his discretion and affirmatively choose to try the accused through court martial; (b)The Commanding Officer may exercise his discretion and may not choose a trial through court martial; and 8 (c) There may be no overt exercise of discretion by the Commanding Officer, in which event his conduct should determine whether there was an exercise of discretion; (iii) When the Commanding Officer exercises discretion in terms of the first two situations noted above, the procedure under Section 126 of the Army Act and Rules 3, 4 and 5 of the 1978 Rules becomes applicable; (iv) However, when the Commanding Officer does not exercise his discretion as detailed in the last situation, the absence of any objection by the Army authorities to the trial by the criminal court can be regarded as a tacit approval of the Commanding Officer for the accused to be tried by the criminal court; (v) As held by this Court in Joginder Singh v. State of Himachal Pradesh10, if the designated officer does not exercise his discretion to institute proceedings before a court-martial, then the Army Act

would not come in the way of the criminal court exercising its ordinary jurisdiction in the manner provided by law; (vi) On the basis of the above premises, in the present case, the discretion has been exercised by the Commanding Officer by recommending that the trial can be conducted by the civil court (ie, the criminal court) which, in the present case is, the Sessions Judge, Special Division-II, Sikkim, Gangtok. The following circumstances indicate the exercise of this discretion:

10. (1971) 3 SCC869 (a)The handing over of the accused by the Commanding Officer to the IO on 15 December 2014, immediately after the incident took place on 14 December 2014; (b)The letter dated 27 December 2014 by the Commanding Officer in response to the requisition made by the IO (by his letter dated 26 December 2014) for furnishing of documents for conducting the investigation; (c) The recording of the statement under Section 164 of the Cr PC on 12 January 2015 of the informant - Lance Naik Rajesh Kumar; (d)The examination on 28 July 2015 of the Commanding Officer (Colonel RR Nair) during the course of the trial, together with the examination of other Army officials; (e)The participation, right from the institution of the FIR till the investigation and throughout the trial, by the Commanding Officer and the Army in the proceedings before the criminal court. Thus, the trial has to be conducted by the criminal court and not the court-martial; (f) On 16 January 2015, the Army authorities recommended that the case of the accused be tried by the civil court (criminal court). On 8 March 2015, this recommendation culminated into the Commanding Officer exercising discretion by deciding that the case of the accused should be tried by the criminal court. On 22 April 2019, the Commanding Officer exercised his discretion under Section 125 of the Army Act read with Rule 9 of the 1978 Rules by addressing a communication to the Chief Judicial Magistrate, 10 East Sikkim (Gangtok), intimating the decision that the trial of the accused should be conducted by the criminal court; and (vii) The order of the Sessions Judge dated 9 March 2017, turned back the clock at the stage of final arguments. The High Court has failed to consider that under Section 122 of Army Act, the period of limitation to commence a trial by court-martial is three years from the date of the offence. In the present case, the offence took place on 14 December 2014 and immediately thereafter proceedings were initiated before the criminal court. 11 Mr Aman Lekhi,

Additional Solicitor General, has supported the submissions of the State of Sikkim and urged the following propositions: (i) The controversy in the present case is covered by the decision of this Court in Joginder Singh v. State of Himachal Pradesh11, where it was held that the Army authority was aware of the offence committed and decided to handover the custody of the accused to the police and not to hold a court martial; (ii) There are three categories of offences, namely: - (a) Offences which are created by the Army Act, such as those provided under Sections 34, 35, 36 and 37, which are exclusively triable by a court- martial; (b) Offences which are committed under Section 70 of the Army Act which are to be tried by a criminal court subject to exceptions; and 11 (1971) 3 SCC8611 (c) Offences involving the exercise of jurisdiction by the court-martial and by an ordinary criminal court (Section 69), where a court martial can be convened if a decision in terms of Section 125 of the Army Act is taken; (iii) In the present case, the Army authorities had taken control of the accused and handed him over to the IO for trial by criminal court. This clearly establishes that the Army did not want to try the accused by court-martial. 12 Mr Pradeep Kumar Dey, Senior Counsel appearing on behalf of the respondent-accused has supported the decision of the High Court and made the following submissions: (i) In view of the provisions of Sections 69 and 70 of the Army Act, a trial is possible only before the court-martial and not by an ordinary criminal court; (ii) Sections 125 and 126 operate in different spheres. Section 125 relates to the discretion of the Army authorities to the effect that when a criminal court and a court- martial both have jurisdiction in respect of an offence, it shall be the discretion of the Commanding Officer to decide before which court the proceedings shall be instituted; (iii) Section 126 deals with the power of the criminal court to require delivery of an offender. 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, to either deliver the offender to the nearest magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the Central Government. In every such case the said officer shall either 12 deliver the offender in compliance with the requisition, or shall forthwith refer the question as to the court before which the proceedings are to be instituted for the determination by the Central Government, whose order

upon such reference shall be final; (iv) Section 475 of the Cr PC and Rules 3, 4 and 5 of the 1978 Rules indicate that in this case, a trial is only permissible before the court-martial; (v) It is a settled principle of law that where a statute provides that a particular thing should be done in the manner prescribed by law and if it is not done in the same manner, failure to comply with this mandatory requirement would lead to severe consequences and any action taken would be a nullity. It will be a mockery of the provisions of Section 461(l) of the Cr PC and other provisions of the law and the trial stands vitiated; (vi) The trial before the ordinary criminal court will cause serious prejudice to the accused and will result in a failure of justice. The entire trial before the ordinary criminal court is null and void as it lacks jurisdiction; (vii) The decision in Joginder Singh (supra) is contrary to the judgments of the Constitution Bench in Som Datt Datta v. Union of India and others12 and Ram Sarup v. Union of India and another13; (viii) The crucial question is the stage at which the discretion has to be exercised under Section 125. The decision has to be taken after the filing of the charge- sheet and before taking cognizance. However, in the present case, the decision was taken by the Army authority to opt for a trial before the ordinary criminal court before filing the charge-sheet, which is clear from the cross- 12 AIR 1969 SC41413 AIR 1965 SC24713 examination of the Commanding Officer. Since the decision was taken before the submission of the charge-sheet, it is immaterial; (ix) The Magistrate was required under Rules 3 and 4 of the 1978 Rules to issue a notice to the Commanding Officer and to require him to take a decision under Section 125 of the Army Act. The Magistrate, however, committed the case to the Sessions Court on the same day as the filing of the charge sheet, as a consequence of which there was non-compliance of the provisions of Rules 3, 4 and 5 of the 1978 Rules. In view of the well settled position of law, the discretion under Section 125 has to be exercised by the Commanding Officer only after filing of the charge-sheet; (x) The 1978 Rules have been framed in pursuance of the powers conferred under Section 475 Cr PC and the mandate of issuing a notice is provided under Section 126 of the Army Act; and (xi) The respondent can still be tried by a court-martial under Section 123 of the Army Act, having regard to the fact that his retirement was due on 31 March 2020. 13 The rival submissions shall now be considered. C Analysis 14 Chapter VI of the Army Act deals with offences. The expression civil

offences is defined in Section 3(ii) to mean an offence which is triable by a criminal court. 14 Section 6914 deals with civil offences. Section 7015 deals with civil offences which are not triable by a court-martial. 15 Section 12516 deals with a situation where both a criminal court and a court- martial have jurisdiction in respect of an offence. In such a case, it is the discretion of the Commanding Officer of the unit where the accused person is serving to decide before which court the proceedings shall be instituted, and if that officer decides that the proceedings should be instituted before a court-martial, he may direct that the accused be retained in military custody. Section 125, in other words, confers the discretion on the designated officer to decide whether the accused should be tried by a court martial or by the regular criminal court. 16 Section 126, as the marginal note indicates, deals with the powers of the criminal court to require delivery of offender. Section 126 provides that when a 14 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. 15 70. Civil offence 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 (c) at a frontier post specified by the Central Government by notification in this behalf. 16 125. 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. 15 criminal court having jurisdiction is of the opinion that the proceedings should be instituted before itself in respect of any alleged offence, it may by written notice require the officer referred to in Section 125 to either deliver over the offender to the nearest magistrate to be dealt with in accordance with law or in the alternative to postpone the proceedings, pending a reference to the Central Government. Under Section 126, the designated officer has two courses of action open: (i) deliver the offender in compliance with the requisition of the criminal court; or (ii) refer the question to the Central Government for determining the court before which the proceedings are to be instituted. The determination by the Central Government is to be final. 17 Sections 125 and 126 operate in different domains. Section 125 envisages that there is a discretion in the designated officer to determine as to whether the accused should be tried by a court-martial or by the competent criminal court. Section 126 on the other hand recognises that the criminal court may require the officer designated in Section 125 by a written notice, to deliver the offender to the nearest magistrate to be proceeded with in accordance with law. Upon the issuance of such a written notice, the designated officer has the discretion either to accept the decision of the criminal court by delivering the offender or the officer may decide to refer the matter to the Central Government for its decision. Section 126 explicitly recognises that in the event of a difference of view between the officer designated under Section 125 and the criminal court under Section 126, the matter has to be referred to the Central Government for resolution, finality being attached to the 16 decision of the Central Government. Section 126, in other words, has provided the modalities for resolving a situation where a criminal court decides to proceed against the accused, while on the other hand the designated officer under Section 125 decides to have the accused tried by a court-martial. It is to resolve a situation of this nature that a reference is envisaged to the Central Government. 18 Section 47517 of the Cr PC has empowered the Central Government to make rules consistent with the Cr PC and the Army Act, Navy Act

1957 and the Air Force Act 1950 and any other law relating to the Armed Forces of the Union, as regards the cases in which persons subject to military, naval or air force law or such other law, shall be tried by a court to which the Cr PC applies or by a court-martial. The first part of Section 475(1) recognizes the rule making power of the Central Government. The latter part of Section 475(1) contemplates an eventuality in which a person is brought before a Magistrate and is charged with offences for which that person is liable to be tried either by a court to which the Cr PC applies or by a court- 17 475. 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. 17 martial. In such a situation, the Magistrate is to have regard to the rules and shall in proper cases deliver the person together with a statement of the offences of which he is accused to the Commanding Officer of the unit of the

nearest military, naval or air force station, for the purpose of being tried by a court-martial. 19 In exercise of the powers which have been conferred by Section 475 of the Cr PC, the Central Government framed the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules 1952 which were notified and published in the Gazette of India on 26 April 1952. These Rules were superseded by the Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules 1978. Rules 3, 4, and 5 of the 1978 Rules are extracted below: 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 sub-section (1) of section 256 or section 257 of the Code of Criminal Procedure, 1973 18 (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. 20 Under Rule 3, where a person who is subject to military, naval or air force law, (or any other law relating to the Armed Forces of the Union) is brought before a Magistrate and is charged with an offence liable to tried by a court-martial, the Magistrate cannot proceed to try such a person or commit the case to the Court of Session, except in one of the two eventualities specified in clauses (a) and (b). Clause (a) envisages a situation where the Magistrate is moved by a competent military, naval, or air force authority. Clause (b) envisages a situation where the Magistrate is of the opinion that the person should be tried by him or that the case should be committed to the Court of Session. 19 21 Rule 4(c) provides that before proceeding under clause (b) of Rule 3, the Magistrate has to give a written notice to the Commanding Officer or the competent authority of the accused and until the expiry of fifteen days, the Magistrate cannot make an order committing the accused for trial to the Court of Session under Section 209 of the Cr PC. Rule 5 deals with a situation where the Magistrate has been moved by the competent military, naval or air force authority under clause (a) of Rule 3 and subsequently, the Commanding Officer or competent authority gives notice to the Magistrate that in the opinion of the officer, the accused should be tried by a court-martial. 22 The purpose underlying Rule 3 and Rule 4 is that unless the Magistrate has been moved by a competent military, naval or air force authority, the Magistrate must furnish a written notice to the Commanding Officer or the competent authority, if he is of the opinion that either the trial should proceed before the Magistrate or an order of committal of the case to the Court of Sessions should be passed against the accused held liable to be tried by a court-martial. The object and purpose of giving the notice is to facilitate an exercise of discretion by the designated officer to determine whether the accused should be tried by a court-martial or in the alternative, should be proceeded with before the ordinary criminal court. The above provisions have been interpreted in several decisions of this Court. 23 In Ram Sarup v. Union of India and another18, the petitioner, who was a sepoy subject to the Army Act, was charged under Section 69 of the Army Act read 18 (1964) 4 SCR93120 with Section 302 of the IPC. The petitioner was tried by the

General Court-Martial for having shot dead two sepoys, and was found guilty and sentenced to death. The Central Government confirmed the findings and the sentence awarded by the General Court-Martial. The petitioner inter alia challenged the provisions of Section 125 of the Army Act on the ground that they were in violation of Article 14 of the Constitution. While dealing with the constitutional challenge, Justice Raghubar Dayal, speaking for the Constitution Bench observed as follows: 17. Section 69 provides for the punishment which can be imposed on a person tried for committing any civil offence at any place in or beyond India, if charged under Section 69 and convicted by a Court Martial. Section 70 provides for certain persons who cannot be tried by Court Martial, except in certain circumstances. Such persons are those who commit an offence of murder, culpable homicide not amounting to murder or of rape, against a person not subject to Military, Naval or Air-Force law. They can be tried by Court Martial of any of those three offences if the offence is committed while on active service or at any place outside India or at a frontier post specified by the Central Government by notification in that behalf. This much therefore is clear that persons committing other offences over which both the Court Martial and ordinary criminal courts have jurisdiction can and must be tried by Courts-Martial if the offences are committed while the accused be on active service or at any place out-side India or at a frontier post. This indication of the circumstances in which it would be better exercise of discretion to have a trial by Court Martial, is an index as to what considerations should guide the decision of the officer concerned about the trial being by a Court Martial or by an ordinary Court. Such considerations can be based on grounds of [maintenance]. of discipline in the army, the persons against whom the offences are committed and the nature of the offences. It may be considered better for the purpose of discipline that offences which are not of a serious type be ordinarily tried by a Court Martial, which is empowered under Section 69 to award a punishment provided by the ordinary law and also such less punishment as be mentioned in the Act. Chapter VII mentions the various punishments which can be awarded by Court 21 Martial and Section 72 provides that subject to the provisions of the Act a Court Martial may, on convicting a person of any of the offences specified in Sections 31 to 68 inclusive, award either the particular punishment with which the offence is stated in the said sections to

be punishable or in lieu thereof any one of the punishments lower in the scale set out in Section 71, regard being had to the nature and degree of the offence. 24 In the above extract, the Court dealt with the considerations which would ultimately weigh in determining as to whether a trial by a court-martial should be convened. In that backdrop, the Court noted : 21. In short, it is clear that there could be a variety of circumstances which may influence the decision as to whether the offender be tried by a Court Martial or by an ordinary criminal court, and therefore it becomes inevitable that the discretion to make the choice as to which Court should try the accused be left to responsible military officers under whom the accused be serving. Those officers are to be guided by considerations of the exigencies of the service, maintenance of discipline in the army, speedier trial, the nature of the offence and the person against whom the offence is committed. (emphasis supplied) 25 Hence in the view of the Constitution Bench, there are a wide variety of circumstances which may be relevant in deciding whether an accused should be tried by a court-martial or by an ordinary criminal court. Due to this, the choice of making this decision is entrusted to the military officer under whom the accused was serving. The Court also noted that under Section 549 of the Code of Criminal Procedure 1898 (equivalent to Section 475 of the Cr PC), the final choice about the forum of the trial of a person accused of a civil offence rests with the Central 22 Government, whenever there is a difference of opinion between a criminal court and the military authority. 26 In Som Datt Datta v. Union of India19, the Constitution Bench considered a challenge under Article 32 to the proceedings before a General Court-Martial, pursuant to which the petitioner had been found guilty of charges under Section 304 and Section 149 of the IPC and sentenced to rigorous imprisonment of six years and cashiering. The first question which was considered by the Constitution Bench was whether the Court-Martial had jurisdiction to try and convict the petitioner for the offences. Justice V Ramaswami, speaking for the Constitution Bench, elaborated that under Chapter VI of the Army Act, Sections 34 to 68 define the offences against the Act which are triable by a court-martial. After alluding to Sections 69 and 70, the Court observed: 4. []. 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 19 (1969) 2 SCR17723 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. 27 The Court noted that where a civil offence is also an offence under the Army Act or is deemed to be an offence under the Act, both the ordinary criminal court as well as the court-martial have jurisdiction to try the accused committing the offence. In that case, the petitioner argued that the Commanding Officer had not furnished a notice under Rule 5 to the Magistrate that the petitioner should be tried by a court- martial and hence the criminal court alone had jurisdiction. This submission was held to be misconceived for the following reasons: 7. It was argued on behalf of the petitioner that there was no notice given by the Commanding Officer to the Magistrate under Rule 5 that the petitioner should be tried by a Court Martial and hence the criminal court alone had jurisdiction under Rule 3 to conduct proceedings against the petitioner for the offences charged. In our opinion, the argument on behalf of the petitioner is misconceived. The Rules framed by the Central Government under Section 549 of the Criminal Procedure Code apply to a case where the proceedings against the petitioner have already been instituted in an ordinary Criminal Court having jurisdiction to try the matter and not at a stage where such proceedings have not been instituted. It is clear from the affidavits filed in the

present case that the petitioner was not brought before the Magistrate and charged with the offences for which he was liable to be tried by the Court Martial within the meaning of Rule 3 and so the situation contemplated by Rule 5 has not arisen and the requirements of that Rule are therefore not attracted. It was pointed out by Mr Dutta that after the first information report was lodged at Pallavaran police station a copy thereof should have been sent to the Magistrate. But that does not mean that the petitioner was brought before the Magistrate and charged with the offences within the meaning of Rule

3. It is manifest that Rule 3 only applies to a case where the police had completed investigation and the accused is brought before the Magistrate after submission of a charge-sheet. The 24 provisions of this Rule cannot be invoked in a case where the police had merely started investigation against a person subject to military, naval or air force law. With regard to the holding of the inquest of the dead-body of Spr. Bishwanath Singh it was pointed out by the Attorney-General that Regulation 527 of the Defence Services Regulations has itself provided that in cases of unnatural death that is death due to suicide, violence or under suspicious circumstances information should be given under Section 174 of the Criminal Procedure Code to the civil authorities, and the conduct of Maj. Agarwal in sending information to the civil police was merely in accordance with the provisions of this particular regulation. For these reasons we hold that counsel for the petitioner is unable to make good his argument on this aspect of the case. (emphasis supplied) 28 From the above extract, it is evident that the Constitution Bench held that the Rules applied in a situation where proceedings had already been instituted in an ordinary criminal court. In that case, the petitioner was not brought before the Magistrate and charged with an offence for which he was liable to be tried by the court-martial. Rule 3 only applied, as the Court noted, where the police had completed the investigation and the accused was brought before the Magistrate after the submission of the charge-sheet. The decision in Som Datt Datta (supra), in other words, dealt with a situation where the offender had been tried by a court-martial. The argument that the Rules applied but had not been followed by the competent officer was rejected. 29 In Joginder Singh v. State of Himachal Pradesh20, a two-judge Bench of this Court dealt with a case where the appellant, who was governed by the Army Act, challenged the legality of his trial and

conviction for committing the offence under Section 376 of the IPC by the Assistant Sessions Judge, Nahan. Unlike the situation 20 (1971) 3 SCC8625 before the Constitution Bench in Som Datt Datta (supra) (where the accused had been tried by a court-martial), in Joginder Singh (supra) the accused had been tried and convicted by the Sessions Court. In that case, the appellant who was subject to the Army Act was alleged to have committed rape in relation to a person who was not subject to military, naval or air force law and hence under Section 70, the accused could normally be tried by an ordinary criminal court. However, since the appellant was in active service at the time of the alleged offence, the court-martial also had the jurisdiction to try him and the case involved a situation where both the court-martial and the ordinary criminal court had concurrent jurisdiction. After considering the earlier judgments of this Court in Major EG Barsay v. State of Bombay21, Ram Sarup (supra) and Som Datt Datta (supra), the Court observed: 22. It is further clear that in respect of an offence which could be tried both by a criminal court as well as a Court-martial Sections 125, 126 and the Rules, have made suitable provisions to avoid a conflict of jurisdiction between the ordinary criminal courts and the Court-martial. But it is to be noted that in the first instance, discretion is left to the officer mentioned in Section 125 to decide before which court the proceedings should be instituted. Hence 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 will have to exercise his discretion and decide under Section 125 in which court the proceedings shall be instituted. It is only when he so exercises his discretion and decides that the proceedings should be instituted before a Court-martial, that the provisions of Section 126

(1) come into operation. If the designated officer does not exercise his discretion and decides that the proceedings should be instituted before a Court-martial, the Army Act would not obviously be in the way of a criminal court exercising its ordinary jurisdiction in the manner provided by law. (emphasis supplied) 21 (1962) 2 SCR19526 30 In the above observation, the Court clarified that Sections 125 and 126 have made provisions to avoid a conflict of jurisdiction between ordinary criminal courts and a court-martial in respect of an offence which could be tried by both the criminal court and by a court-martial. The Court observed that Section

125 leaves the discretion, in the first instance, with the competent officer and it is only when he so exercises the discretion and decides that the proceedings should be instituted before a court-martial that Section 126 would come into operation. If the designated officer does not exercise this discretion to institute proceedings before a court- martial, the Army Act would not interdict the exercise of jurisdiction by the ordinary criminal court. After adverting to the provisions of the Rules, the Court noted: 29. Rule 4 is related to clause (a) of Rule 3 and will be attracted only when the Magistrate proceeds to conduct the trial without having been moved by the competent military authority. It is no doubt true that in this case the Assistant Sessions Judge has not given a written notice to the Commanding Officer as envisaged under Rule

4. But, in our view, that was unnecessary. When the competent military authorities, knowing full well the nature of the offence alleged against the appellant, had released him from military custody and handed him over to the civil authorities, the Magistrate was justified in proceeding on the basis that the military authorities had decided that the appellant need not be tried by the Court-martial and that he could be tried by the ordinary criminal court. 31 In Joginder Singh (supra) therefore the Court noted that the absence of a written notice to the competent officer under Rule 4 was unnecessary where the competent military authorities, knowing about the nature of the offence alleged against the appellant, released him from military custody and handed him over to the 27 civil authorities. In such a situation, it was held that the Magistrate was justified in proceeding on the basis that the military authorities had decided that the appellant need not be tried by a court-martial and that he should be tried by the ordinary criminal court. 32 The next decision to which a reference has to be made is that of a three-judge Bench decision in Delhi Special Police Establishment, New Delhi v. Lt. Col. SK Loraiya22. The respondent in that case was a Lieutenant Colonel in the service of the Army and was charged by the Special Judge, Gauhati for offences punishable under Section 120B of the IPC read with Section 5(1)(c) and (d) and Section 5(2) of the Prevention of Corruption Act 1988. A revision against the framing of charges was allowed by the High Court. The order of the High Court quashing the charges was assailed before this Court. In that context, the Court held: 9. As regards the trial of offences committed by army men, the Army Act draws a threefold scheme. Certain offences

enumerated in the Army Act are exclusively triable by a Court- Martial; certain other offences are exclusively triable by the ordinary Criminal Courts; and certain other offences are triable both by the ordinary criminal court and the Court-Martial. In respect of the last category both the courts have concurrent jurisdiction. Section 549(1) Cr PC is designed to avoid the conflict of jurisdiction in respect of the last category of offences. The clause for which he is liable to be tried either by the court to which this Code applies or by a Court-Martial in our view, qualifies the preceding clause when any person is charged with an offence in Section 549(1). Accordingly the phrase is liable to be tried either by a court to which this Code applies or a Court-Martial imports that the offence for which the accused is to be tried should be an offence of which cognizance can be taken by an ordinary criminal court as well as a Court-Martial. In our opinion, the phrase is intended to refer to the initial jurisdiction of the two 22 (1972) 2 SCC69228 courts to take cognizance of the case and not to their jurisdiction to decide it on merits. It is admitted that both the ordinary criminal court and the Court-Martial have concurrent jurisdiction with respect to the offences for which the respondent has been charged by the Special Judge. So, Section 549 and the rules made thereunder are attracted to the case at hand. (emphasis supplied) 33 The Court noted that it was an admitted fact that the procedure specified in Rule 3 was not followed by the Special Judge, Gauhati before framing the charges. The Court held that Section 549(1) of the Code of Criminal Procedure 1898 (equivalent to Section 475 of the Cr PC) had to be construed in the light of Section 125 of the Army Act and both the provisions had in mind the object of avoiding a collision between the ordinary criminal court and the court-martial. In this backdrop, the order of the High Court quashing the framing of charges was sustained. 34 An order of a two-judge Bench of this Court in SK Jha v. State of Kerala23 arose from a case where three naval officers were arrested for offences punishable under Sections 143, 147, 148, 452, 307, 326 and 427 read with Section 149 of the IPC. An application was filed by the Commanding Officer of the Naval Unit for handing over the accused for trial under the Navy Act 1957. The application was rejected by the Magistrate on the ground that the stage for consideration would only be on the completion of the police investigation. The order of the Magistrate was challenged before the High Court in revision and the challenge was rejected. The

two-judge Bench held that the decision in Som Datt Datta (supra) governed the case and the option as to whether the accused should be tried before the criminal 23 (2011) 15 SCC49229 court or by a court-martial could be exercised only after the police had completed the investigation and submitted the charge-sheet. In that case, the police had merely commenced the investigation and hence the rejection of the request of the Commanding Officer by the Magistrate was upheld. 35 In Extra-Judicial Execution Victim Families Association and Another v. Union of India24, a submission was urged on behalf of the Union of India that an offence committed by a member of the Armed Forces must be tried under the provisions of the Army Act through a court-martial and not under the Cr PC. Justice Madan B Lokur, speaking for the two-judge Bench, inter alia adverted to the decisions of the Constitution Benches in Ram Sarup (supra) and Som Datt Datta (supra). The Court also referred to the following extract from the decision in Balbir Singh and Another v. State of Punjab25: 240. In para 17 of the Report in Balbir Singh case [Balbir Singh v. State of Punjab, (1995) 1 SCC90:

1995. SCC (Cri) 202]. , this was held as follows : (SCC pp. 99-100) 17. A conjoint reading of the above provisions shows that when a criminal court and court martial each have jurisdiction in respect of the trial of the offence, it shall be in the discretion of the officer commanding the group, wing or station in which the accused is serving or such other officer as may be prescribed, in the first instance, 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 persons shall be detained in air force custody. Thus, the option to try a person subject to the Air Force Act who commits an offence while on active service is in the first instance with the Air Force Authorities. The criminal court, when such an accused is brought before it shall not proceed to try such a person or to inquire with 24 (2016) 14 SCC53625 (1995) 1 SCC9030 a view to his commitment for trial and shall give a notice to the Commanding Officer of the accused, to decide whether they would like to try the accused by a court martial or allow the criminal court to proceed with the trial. In case, the Air Force Authorities decide either not to try such a person by a court martial or fail to exercise the option when intimated by the criminal court within the period prescribed by Rule 4 of the 1952 Rules (supra), the accused can be tried by the ordinary criminal court

in accordance with the Code of Criminal Procedure. On the other hand if the Authorities under the Act opt to try the accused by the court martial, the criminal court shall direct delivery of the custody of the accused to the Authorities under the Act and to forward to the Authorities a statement of the offence of which he is accused. It is explicit that the option to try the accused subject to the Act by a court martial is with the Air Force Authorities and the accused person has no option or right to claim trial by a particular forum. However, in the event the criminal court is of the opinion, for reasons to be recorded, that instead of giving option to the Authorities under the Act, the said court should proceed with the trial of the accused, without being moved by the competent authority under the Act and the Authorities under the Act decide to the contrary, the conflict of jurisdiction shall be resolved by the Central Government under Section 125(2) of the Act and the decision as to the forum of trial by the Central Government in that eventuality shall be final. (emphasis supplied) 36 The Court also adverted to the following extract from the decision in the Additional Director General, Army Headquarters v. Central Bureau of Investigation26: 244. This Court in Army Headquarters case [Army Headquarters v. CBI, (2012) 6 SCC228: (2012) 3 SCC (Cri) 88]. then recorded its conclusions in para 95 of the Report and they read as follows : (SCC p.

264) 95. To sum up:

26. (2012) 6 SCC22831 95.1. The conjoint reading of the relevant statutory provisions and Rules make it clear that the term institution contained in Section 7 of the 1990 Act means taking cognizance of the offence and not mere presentation of the charge-sheet by the investigating agency. 95.2. The competent army authority has to exercise his discretion to opt as to whether the trial could be by a court martial or criminal court after filing of the charge-sheet and not after the cognizance of the offence is taken by the court. 95.3. Facts of this case require sanction of the Central Government to proceed with the criminal prosecution/trial. 95.4. In case option is made to try the accused by a court martial, sanction of the Central Government is not required. 37 In this backdrop, the Court held that if an offence is committed even by Army personnel, there was no concept of absolutely immunity from trial by the criminal court constituted under the Cr PC. Rejecting the submission of the Union of India, the Court observed: 246. The result of the

interplay between Section 4 and Section 5 Cr PC and Sections 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 Cr PC could also try the alleged offender in certain circumstances in accordance with the procedure laid down by Cr PC. 38 In the present case, the essence of the submission which has been urged on behalf of the respondent is: (i) The stage of the exercise of discretion by the Army authority to either opt for a court-martial or for trial before the criminal court is after the charge-sheet is filed and before cognizance has taken; 32 (ii) The Magistrate precluded the exercise of the discretion by the Army authorities by passing an order of committal to the Court of Sessions immediately after the charge-sheet was filed; (iii) There was a failure on part of the Magistrate to follow the mandatory provisions of the 1978 Rules by issuing a notice under Rule 4 to the competent officer; and (iv) All that has transpired prior to the submission of the charge-sheet in terms of the handing over of the accused by the Army authorities to the police stands obliterated and in the absence of a notice under Rule 4, the trial would stand vitiated. 39 Now in evaluating this submission, a survey of the precedent indicates that Ram Sarup (supra) was a case of a court-martial where there was a challenge to the validity of Section 125 of the Army Act. The challenge was rejected on the ground that a variety of circumstances bearing upon the exigencies of the service would determine the exercise of discretion by the competent authority to opt for a court-martial. 40 The decision of the Constitution Bench in Som Datt Datta (supra) involved a challenge to the court-martial proceedings on the ground that no notice had been issued by the competent officer to the Magistrate notifying the latter that the accused was to be tried by a court-martial. The argument was rejected on the ground that Rule 3 only applied to a situation where a person who is charged with an offence is 33 brought before a Magistrate, which was not the case before the Constitution Bench. In that case, the accused had been tried by the court-martial and there was no involvement of the Magistrate. Thus, the challenge that there had been a violation of the procedure mandated under the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules 1952 was rejected. 41 Broadly speaking there are three categories of offences. First, the provisions of Chapter VI

of the Army Act indicate that where an offence is created by the Act itself it would be exclusively triable by a court-martial. Second, where a civil offence is also an offence under the Army Act or is deemed to be an offence under the Act, both the ordinary criminal court as well as court-martial would have jurisdiction to try the person committing the offence. The third category (referred to in Section

70) consists of the offences of murder, culpable homicide not amounting to murder or rape committed by a person subject to the Army Act against a person who is not subject to military, naval or air force law. Subject to the three exceptions which are set out in Section 70, such offences are not triable by a court-martial but by an ordinary criminal court. 42 The offence in the present case does not fall in the category of those offences which are triable exclusively by a court-martial (Section 34 to

68) or those offences which cannot be tried by a court-martial (under Section 70). The offence with which the respondent-accused is charged falls in the category where there is a concurrent jurisdiction between the court-martial and the ordinary criminal court. Hence, it needs to be underscored that there is no inherent lack of jurisdiction in the ordinary 34 criminal court to conduct a trial in accordance with the procedure envisaged in the Cr PC. 43 Section 69 provides when a person who is subject to the Act shall be deemed to be guilty of an offence against the Act. Section 69 of the Army Act has been made subject to the provisions of Section 70. When a provision of a statute is made subject to another provision by the legislature, this evinces an intent that where the latter provision is attracted, the former would give way. Where the conditions requisite for the application of Section 70 exist, Section 69 would give way to Section 70. Section 70 provides for the conditions in which a person who is subject to the Army Act shall not be deemed to be guilty of an offence under the Act and shall not be tried by a court-martial. In other words, Section 70 of the Army Act provides for where the court-martial would not exercise jurisdiction (unless the case falls under the exceptions to Section 70). When the provisions of Section 70 apply, a person who is subject to the Army Act is not deemed to be guilty of an offence under the Act if the ingredients of that provision are fulfilled. The ingredients of Section 70 are: (i) The offence must be committed by a person subject to the Army Act; (ii) The offence

must be committed against a person who is not subject to military, naval or air force law; and (iii) The offence must be of murder, culpable homicide not amounting to murder or rape. 35 Where these conditions apply, the person is not deemed to be guilty of an offence under the Act and is not to be tried by a court-martial unless the three exceptions which are carved out in clauses (a), (b) and (c) of Section 70 are attracted. 44 In the present case, the conditions requisite for the application under Section 70 do not stand attracted for the reason that the offence in the present case was committed against a person who was subject to military law and in any event, the offence was committed by the respondent while on active service in Sikkim. Since Section 70 has no application, the respondent who is alleged to have committed a civil offence in India would be subject to the provisions of the Army Act as provided by Section 69. The crucial words of Section 69 however are that an accused 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. The liability to be tried by a court-martial arises if the person is charged with an offence under this section, that is Section 69. The language of Section 69 is a clear indicator that it does not ipso jure oust the jurisdiction of the ordinary criminal court. Where there exists concurrent jurisdiction in the court-martial and in the ordinary criminal court, primarily the discretion of conducting the court-martial in preference to a trial by the ordinary criminal court is entrusted to the designated officer under Section 125. The designated officer has been conferred with the discretion to decide before which court the proceedings shall be instituted. Moreover, Section 125 has a conjunctive requirement which is amplified by the expression and, if that officer decides that they should be instituted before a court-martial. Thus, the conjunctive requirement 36 under Section 125 is that the competent officer has the discretion to decide before which court the proceedings shall be instituted and if the officer exercises that discretion to institute proceedings before a court-martial, then the officer will direct that the accused be detained in military custody. Section 125, in other words, not only recognizes that an element of discretion has been vested in the designated officer, but it also postulates that the designated officer should have decided that the proceedings be instituted by the court-martial in which event the court-martial would take place. 45 Significantly, in the present case there was no decision by the designated officer to

institute proceedings before a court-martial in terms of Section 125. The argument on the absence of compliance with Rule 3 and Rule 4 of the 1978 Rules is misconceived. The 1978 Rules, which have been made pursuant to Section 126 of the Army Act and Section 475 of the Cr PC, were intended to obviate a conflict of jurisdiction where both the Army authorities under a court-martial as well as the ordinary criminal court assert jurisdiction to try a person for the same offence. Section 126(2) provides the modality for the resolution of a conflict by the Central Government. The rules which have been framed under Section 475 of the Cr PC provide for the issuance of a notice by the Magistrate to the competent officer in order to enable the competent officer to take a considered decision on whether the interest of the service would warrant a trial by a court-martial. But the present case does not involve a conflict in the exercise of jurisdiction in the first place. The entire sequence of events both before and after the completion of investigation provides a 37 clear indicator that the Commanding Officer took a conscious decision that the investigation and trial should be conducted in accordance with the provisions of the Cr PC. In the earlier part of this judgment, we have narrated these circumstances namely: (i) the handing over of the accused by the Army to the custody of the police; (ii) the co-operation of the Commanding Officer, Colonel RR Nair, in meeting the requisitions of the Investigating Officer; (iii) the recording of the statement of the informant under Section 164 of the Cr PC; (iv) the recording of the evidence of the Commanding Officer during the course of the criminal trial, thereby indicating a clear intent that the trial would proceed in terms of the jurisdiction of the ordinary criminal court. 46 The respondent-accused has relied on the decision of this Court in Loraiya (supra), to urge that the provisions of Section 475 of the Cr PC are mandatory, that is, the Magistrate must issue notice to the Commanding Officer to enable him to exercise the option of a trial by court-martial or by a criminal court. The submission is that since the procedure under this provision and Rule 4 of the 1978 Rules was not followed, the trial stands vitiated. We do not find this submission to be persuasive. The decision in Loraiya (supra) is distinguishable. Loraiya (supra) involved the framing of charges under the Prevention of Corruption Act 1988 and the IPC against a person subject to the Army Act. The judgment of this Court does not contain any indication of a deferral to the jurisdiction of the ordinary criminal court by the Army authorities, as in the

present case. 38 47 The High Court has found fault with the prosecution in not producing certified copies of the decision of the Army authorities to defer to the jurisdiction of the criminal court. But even keeping that decision aside, it is abundantly clear that far from there being any decision by the competent officer regarding the institution of proceedings before the court-martial, there was in the present case an unequivocal and clear acceptance of the jurisdiction of the ordinary criminal court coupled with explicit cooperation with the Court of Sessions. 48 The respondent has also submitted that the proceedings before the Sessions Judge would be in violation of the Section 461(l) of the Cr PC. The submission is thoroughly misconceived as Section 461(l) indicates that if a Magistrate has not been empowered by law to try an offender, then the proceedings would be void. For the reasons, we have indicated above, it is clear that the Sessions Judge had the jurisdiction to try the offender and thus, the provisions of Section 461(l) of the Cr PC have no application. 49 During the course of the proceedings, Mr Pradeep Kumar Dey urged before this Court that in case the trial is conducted by the ordinary criminal court and not a court-martial under the Army Act, the respondent would not be able to avail the benefit of being awarded a lower punishment under the Army Act. 50 Section 69 of the Army Act is reproduced below: 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 39 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. (emphasis supplied) Sub-section (a) of Section 69 states if a person is convicted of a civil offence which is punishable with death or transportation under the law in force, then 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. In contrast with sub-Section (a), sub-Section (b) provides that in all other offences, the person convicted shall be liable to suffer the punishment assigned under the laws in force or imprisonment for a term which may extend to seven years, or such less punishment as provided in the Act. The words of the statute clearly indicate that the legislature provided different punishments for serious offences which under law are punishable with death or life imprisonment, and for all other offences. In case of the former, sub- Section (a) of Section 69 provides that the court-martial may convict him and punish him with death or life imprisonment. In addition to this, the court-martial may also give a lesser punishment under the Army Act (such as cashiering, dismissal from 40 service, etc., provided under Section 7127). The use of the word and in sub-Section (a) clarifies the intent of the legislature, which is to ensure that the Army authorities have sufficient discretion to grant a punishment for serious offences, over and beyond what is permissible under Penal Code. This however, does not imply that a person who is otherwise liable for death or life imprisonment can be granted a lesser punishment under the Army Act. In contrast, sub-Section (b) of Section 69 uses the term or to indicate that for offences that under the Penal Code or any other law are of less severity, the Army authorities may order a lesser punishment. If the argument of the respondent is accepted, it would imply that a person who is convicted and punished by a Court-martial under the Army Act will be in an advantageous position than a person who, though subject to the Army Act, has been convicted by an ordinary criminal court. If that was the intent of the legislature - that is to protect persons subject to the Army Act by awarding them lesser punishment even for serious offences - then the Act would not have provided for concurrent jurisdiction of 27 71. Punishments awardable by court-martial. Punishments may be inflicted in respect of offences committed by persons subject to this Act and convicted by courts-martial, according to the scale following, that is to say,-- (a) death; (b) transportation for life or for any period not less than seven years; (c) imprisonment either rigorous or simple, for any period not exceeding fourteen years; (d) cashiering, in the case of officers; (e) dismissal from the service; (f) reduction to the ranks or to a lower rank or grade or place in the list of their rank, in the case of warrant officers; and reduction to (he ranks or to a lower rank or grade, in the case of non-

commissioned officers: Provided that a warrant officer reduced to the ranks shall not be required to serve in the ranks as a sepoy; (g) forfeiture of seniority of rank, in the case of officers, junior commissioned officers, warrant officers and non-commissioned officers; and forfeiture of all or any part of their service for the purpose of promotion, in the case of any of them whose promotion depends upon length of sendee; (h) forfeiture of service for the purpose of increased pay, pension or any other prescribed purpose; (i) severe reprimand or reprimand, in the case of officers, junior commissioned officers, warrant officers and non-commissioned officers; (j) forfeiture of pay and allowances for a period not exceeding three months for an offence committed on active service; (k) forfeiture in the case of a person sentenced to cashiering or dismissal from the service of all arrears of pay and allowances and other public money due to him at the time of such cashiering or dismissal: (l) stoppage of pay and allowances until any proved loss or damage occasioned by (he offence of which he is convicted is made good. 41 court-martial and ordinary criminal courts at all. Although the Army Act is special law in this case as compared to the IPC, if the statute in its text does not make any qualifications or exceptions to the general law, it would be impermissible for the court to read such qualifications in the Act. Thus, we are unable to accept this submission of the respondent. D Conclusion 51 For the above reasons, we find that the High Court was in error in affirming, in the exercise of its revisional jurisdiction, the decision of the Sessions Judge that the court-martial alone would have jurisdiction. Both on law and in fact, the position is to the contrary. The Sessions Judge was competent and there was no error in the assumption or the exercise of the jurisdiction. The consequence of the decision of the High Court is to foist an obligation on the Army Authorities to hold a court-martial despite a clear and unequivocal submission to the jurisdiction of the Court of Sessions. We accordingly allow the appeal and set aside impugned judgment of the Single Judge of the High Court of Sikkim dated 6 April 2019 in Criminal Revision Petition No 2 of 2017. The respondent-accused shall be transferred from military custody to civil custody to face trial. 52 The trial would proceed from the stage that was reached when the Sessions Judge decided that there was an absence of jurisdiction. The trial shall be proceeded with and be concluded in accordance with law. The appeal is allowed in the above terms. 42 53 Pending applications, if any,

shall stand dismissed. J.

[Dr Dhananjaya Y Chandrachud]. J.

[Surya Kant]. New Delhi; February 01, 2022 43

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