

Emperor Vs. Jerry D'Sena

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Court : Mumbai

Decided On : Jun-22-1944

Reported in : (1944)46BOMLR597

Judge : N.J. Wadia and ;Sen, JJ.

Appeal No. : Criminal Application for Revision No. 70 of 1944

Appellant : Emperor

Respondent : Jerry D'Sena

Judgement :

Sen, J.

1. This is an application by the Government of Bombay for revision of an order passed by the Presidency Magistrate, 7th Court, Bombay, discharging the opponent, Private Jerry D'Sena, No. 3034, accused of theft and praying that the order be set aside on the ground that the accused, who is subject to military law has been erroneously discharged and that the provisions of rules made under Section 549 of the Criminal Procedure Code, 1898, by the Government of India have not been complied with.

2. The accused was alleged to have committed the theft on February 18, 1942, and he was arrested in January, 1943. He was put up for trial and there were

several adjournments ' for want of time' from February 3, 1943, up to August 18, 1943. Thereafter there were more adjournments and on September 20 the case was fixed for hearing peremptorily on September 27, 1943 ' to enable the prosecution to write to the military '. Thereafter three more adjournments were given and on October 11, 1943, the Magistrate made the following order :

In spite of the case being adjourned in order to enable the prosecution to write to the military for their permission, as there is no permission of the military authorities produced and the accused before the Court is in military service, this Court has no jurisdiction. Accused discharged. Bail bond cancelled.

Section 549 of the Criminal Procedure Code lays down that the Governor-General-in-Council may make rules, consistent with the Code and the Army Act and the Air Force Act or any similar law for the time being in force, as to the cases in which persons subject to military or air force law shall be tried by a Court to which the Code applies or by Court-martial, and that when any person is brought before a Magistrate and charged with an offence for which he is liable, under the Army Act, Section 41, or under the Air Force Act, Section 41, to be tried by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the Commanding Officer of the regiment, corps or detachment to which he belongs, or to the Commanding Officer of the nearest military or air force station, as the case may be, for the purpose of being tried by Court-martial. Under Section 41 of the Indian Army Act every person subject to the said Act who commits any civil offence is to be deemed guilty of an offence under a military law, and, if charged therewith under the section is liable to be tried, subject to the provisions of the Act, for the same by Court-martial. 'Civil offence' has been defined in Section 7(18) of the Army Act as an offence which, if committed in British India, will be triable by a criminal Court. On March 12, 1935, the Government of India in the Home Department published a notification No. 4051/2 making rules as to the cases in which persons were subject to military, naval or air force law are to be tried by a Court to which the Criminal Procedure Code applies or by a Court-martial, and Rules 1 and 2 of the said rules are material. Rule 1 reads thus :-

Where a person subject to military, naval or air force law is brought before a Magistrate and charged with an offence for which he is liable to be tried by a court-martial, such Magistrate shall not proceed to try such person, or to issue orders for his case to be referred to a Bench, or to inquire with a view to his commitment for trial by the Court of Session or the High Court for any offence triable by such Court, unless :-

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

(b) he is moved thereto by such authority.

Rule 2, so far as material, is as follows :-

Before proceeding, under Clause (a) of Rule 1 the Magistrate shall give notice to the Commanding Officer of the accused and until the expiry of a period of five days from the date of the service of such notice, he shall not-

(a) acquit or convict the accused,

(b) frame in writing a charge against the accused, etc.

3. It is contended on behalf of Government that the procedure adopted by the Magistrate was erroneous because he should, after recording reasons, have proceeded to try the accused under Clause (a) of Rule 1 after giving notice to the Commanding Officer of the accused under Rule 2. It seems to us that this contention cannot be supported by the language of the two rules which undoubtedly is somewhat cumbrous. There are two courses open to the Magistrate, in a case governed by the said rules, before the trial by him of an accused person can be proceeded with. Either the Magistrate has to come to the opinion that he should proceed with the trial without being moved thereto by competent authority, and if he comes to that opinion he must record his reasons for arriving at such conclusion. But before he proceeds to try the accused, after coming to such conclusion, he must give notice to the Commanding Officer of the accused and wait for a period of five days from the date of the service of such notice. The second alternative procedure is that he is moved by competent

military, naval or air force authority and then he proceeds to try the accused. In this case it seems clear from the record that the Magistrate was not of opinion that he should proceed to try the accused without being moved thereto by competent military authority ; and therefore Rule 2 will not apply to the case. Then the only alternative which was left, so far as the Magistrate was concerned, was for the military authorities to move him to proceed to try the accused. For that purpose the learned Magistrate gave an opportunity to the prosecution to obtain the authority or permission of the military authorities. But though three or four adjournments were given for the purpose, the learned Magistrate received no communication from the military authorities asking him to proceed with the trial. That having been the state of things, it seems to us that the learned Magistrate was right in holding that there was no sufficient ground for proceeding with the trial. It cannot be said, in our opinion, that when he found that he was not moved by the military authorities he was bound to record reasons for trying the case himself and to proceed to try the accused. Clause (a) under Rule 1 gives the learned Magistrate discretion in the matter of coming to the conclusion that he should proceed to try the accused without being moved to by competent authority, and the exercise of such discretion cannot be dependent on whether he is moved by military authority or not. Nor was the Magistrate under any obligation to record reasons for not being of opinion that he should proceed with the trial. It seems to us, therefore, that the only course left for the Magistrate, when he was not moved by the military authorities and when he was not of opinion that he should himself try the accused, was to discharge the accused under Section 203 of the Criminal Procedure Code. The rule will, therefore, be discharged.