

Roshan Lal Vs. State

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Court : Delhi

Decided On : Jun-27-1969

Reported in : 1971CriLJ554

Judge : H.R. Khanna, J.

Acts : [Army Act, 1950](#) - Sections 69

Appeal No. : Criminal Appeal No. 34 of 1968

Appellant : Roshan Lal

Respondent : State

Advocate for Pet/Ap. : Dharam Pal Sood,; Chabildas,; O.P. Sharma and;

Judgement :

H.R. Khanna, J.

(1) Roshan Lal and Mela Ram, both aged 22. years, have been convicted by learned Sessions Judge, Kangra, under section 376 Indian Penal Code, and each of them has been sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs. 200.00 or in default to undergo rigorous imprisonment for a further period of six months. Roshan Lal has filed appeal No. 34 of 1968 while Mela Ram has filed appeal No. 26 of 1968. This judgment would dispose of both the appeals. After discussing the evidence and holding that the

offence of rape against the accused had been fully proved. His Lordship proceeded as follows :

ARGUMENThas also been advanced on behalf of Mela Ram by Mr. Malhotra that as he was employed in the Army at the time of the present occurrence he could be only tried before a Court Martial. Reference in this connection has been made to Section 2 of the Army Act which provides inter alias that a person enrolled under the Act shall be subject to that Act, Section 3(i) of the Act defines 'active service'. 'Civil Offence' has been defined in clause (ii) of that section as meaning offence which is triable by a criminal Court. According to notification dated November 28, 1962 under Section 9 of the Act the Central Government has declared that all persons subject to the Act. who are nto on active service under clause (i) of section 3, shall be deemed to be on active service within the meaning of the Act. Sections 69 and 70 deal with civil offences and reads as under :-

'69.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.

70.A person subject to this Act who commits an offence of murder against a person nto subject to military, naval or air force law, or of culpable homicide nto amounting to murder against such a person or of rape in relation to such a person shall nto be deemed to be guilty of an offence against this Act and shall nto 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.'

(2) Sections 125 and 126 make provision about the choice of trial by a criminal Court and court-martial, and the procedure to be applied. The two sections read as under :-

'125.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.(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 confluence with the requisition, or shall forthwith refer 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.'

(3) The different provisions of the Army Act were considered by the Supreme Court in the case of Major E. G. Barsey v. State of Bombay : 1961 CriLJ828 . Major Barsey in that case had been convicted under section 120-B of the Indian Penal Code and Section 5(2) of the Prevention of Corruption Act after he was died

in the court of Special Judge, Poona. Contention was advanced on behalf of Major Barsey in the Supreme Court that a criminal Court could not have jurisdiction to try the offence unless requisite notice was given to the officer referred to in section 125 of the Act. The Contention was repelled. Subba Rao, J' as he then was, speaking for the Court observed-

'SECTION 125 presupposes that in respect to 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 Act. Under the scheme of the said two provisions, 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, he may issue the requisite notice under section 126 either to deliver over the offender to the nearest magistrate or to postpone the proceedings pending a reference to the Central Government. On receipt of the said requisition, the officer may either deliver over the offender to the said court or refer the question to proper court for the determination of the Central Government whose order shall be final. These two sections provide a satisfactory machinery to resolve the conflict of jurisdiction, having regard to the exigencies of the situation.'

(4) It was further observed-

'(18)The scheme of the Act therefore is self evident. It applies to offences committed by army personnel described in section 2 of the Act: it creates new offences with specified punishments, imposes higher punishments to pre-existing offences, and enables civil offences by a fiction to be treated as offences under the Act; it provides a satisfactory machinery for resolving the conflict of jurisdiction. Further it enables, subject to certain conditions, an accused to be tried successively both by court-martial and by a criminal court. It does not expressly bar the jurisdiction of criminal courts in respect of acts or omissions punishable

under the Act, if they are also punishable under any other law in force in India; nor is it possible to inter any prohibition by necessary implication. Sections 125, 126 and 127 exclude any such inference, turn they in express terms provide not only for resolving conflict of jurisdiction between a criminal court and a court-martial in respect of a same offence, but also provide for successive trials of an accused in respect of the same offence.' It was also observed-

'THE appellant and the other accused were charged in the present case. among others, for having been parties to a criminal conspiracy to dishonestly or fraudulently misappropriate or otherwise convert to their own use the military stores and also for dishonestly or fraudulently misappropriating the same. The said acts constitute offences under the Indian Penal Code and under the Prevention of Corruption Act. They are also offences under Section 52 of the Army Act. Though the offence of conspiracy does not fall under section 52 of the Act. it, being a civil offence, shall be deemed to be an offence against the Act by the force of Section 69 of the Act. With the result that the offences are triable both by any ordinary criminal court having jurisdiction to try the said offences and a court-martial. To such a situation sections 125 and 126 are clearly intended to apply. But the designated officer in section 125 has not chosen to exercise his discretion to decide before which court the proceedings shall be instituted. As he has not exercised the discretion, there is no occasion for the criminal court to invoke the provisions of Section 126 of the Act. for the second part of Section 126(1). which enables the criminal court to issue a notice to the officer designated in section 125 of the Act to deliver over the offender to the nearest magistrate or to postpone the proceedings pending a reference to the Central Government, indicates, that the said sub-section presupposes that the designated officer has decided that the proceedings shall be instituted before a court-martial and directed that the accused person shall be detained in military custody. If no such decision was arrived at. the Army Act could not obviously be in the way of a criminal court exercising its ordinary jurisdiction in the manner provided by law.'

(5) A view similar to that expressed in Major Barsey's case was taken by their Lordships of the Supreme Court in the case of *Som Datt Datta v. Union of India* and others. : 1969 CriLJ663 , about the effect of the sections.

(6) Coming to the facts of the present case I find that the offences of rape of Swaran Lata is also triable by court-martial according to Section 70 of the Army Act because Mela Ram should be deemed to be on active duty in view of the notification under section 9 of the Act. The material on the record, however, indicates that Hc Gian Singh was sent by Si Mohinder Singh (Public Witness 20) along with in authority letter Exhibit Public Witness 15 'A' addressed to the Commanding Officer, 16 Punjab Regiment, for the arrest of Mela Ram. According to Hc Gian Singh (Public Witness 15) he arrested Mela Ram accused on August 31, 1966 with the permission of the military authorities. There is nothing to show that the designated officer has exercised his discretion under Section 170 section 125 of the Act that Mela Ram should be tried by a court-martial. On the contrary the fact that the military authorities handed over Mela Ram to the police and did not detain him in military custody shows that they had no objection to his trial before the criminal court. Further, as there has been no exercise of discretion in terms of Section 125 of the Act, 'there is' in the words of their Lordships 'no occasion for the criminal Court to invoke the provisions of section 126 of the Act.' Both criminal Court as well as the court-martial had jurisdiction to try Mela Ram for the offence of rape. The competent military authorities having not decided to have the trial of Mela Ram by a court-martial it is manifest that the criminal Court was competent to try Mela Ram.

(7) It may also be mentioned that Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1952 have been issued by the Central Government in exercise of the powers conferred by sub-section (1) of section 549 of the Code of Criminal Procedure. In the case of Joginder Singh v. State 1969 DIT 1, the accused, who was subject to Army Act, had been convicted in a case under section 376, Indian Penal Code, by Assistant Sessions Judge. On appeal the conviction of the accused was affirmed by the learned Sessions Judge. The accused then came up in revision to the High Court and it was urged that there had been violation of Rules 3 and 4 of the Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules and as such the trial was vitiated. The matter was referred to a Full Bench. Dua. C.J., who spoke for the majority held :

".....the violation of rules 3 and 4 of the Rules does not seem to us by itself to deprive the Magistrate of his inherent jurisdiction, thereby automatically nullifying all subsequent proceedings and the effect of such violation has to be determined on evaluation of all the facts and circumstances of each case.'

(8) In view of the above, I am of the opinion that the conviction of Mela Ram accused cannot be set aside because of his being tried in a criminal court and not by a court-martial.

(9) As regards the sentence, I find that the accused committed a heinous offence. The material on record shows that Swaran Lata was aged between 11 and 12 years at the time of the present occurrence. The evidence of Public Witness 14 Sudarshan Kumar. Head Teacher of Government Primary School, Dilbari, shows that at the time Swaran Lata was admitted in the school her date of birth was given by her father as May 15th 1955 vide Exhibit Public Witness 14 'A, copy of the form filled in at that time. Exhibit Public Witness 13/A is the copy of the transfer certificate when Swaran Lata was admitted in Government High School. Bharwain. In that certificate too her date of birth was mentioned to be May 15, 1955. According to Dr. Nanda. who examined Swaran Lata. her age was 12 years, and she had not started her menstruation. The evidence of the doctor further shows that as a result of this occurrence Swaran Lata became psychologically disturbed. Swaran Lata's father Hans Raj (PW 16) has deposed that her date of birth is May 15, 1955. In view of the fact that the two accused committed rape on a girl of tender years, I am of the opinion that no interference in their sentence is called for. I, therefore, maintain the conviction and sentence of the two accused. The appeals consequently fail and are dismissed,