

Kundan Singh Vs. the State of Rajasthan

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Court : Rajasthan

Decided On : Sep-19-2000

Reported in : 2001(1)WLN135

Judge : N.N. Mathur and; D.N. Joshi, JJ.

Appeal No. : D.B. Criminal Appeal Nos. 205 of 1992 and 365 of 1993

Appellant : Kundan Singh

Respondent : The State of Rajasthan

Advocate for Pet/Ap. : Mr. H.S.S. Kharlia

Disposition : Appeal allowed

Judgement :

N.N. Mathur, J.

1. These two appeals are directed against the judgment dated 18.5.1992 of the learned Additional Sessions Judge, Raisinghnagar, in Sessions Case No. 29/1988 convicting the appellant of the offence under Section 302 IPC and sentenced to imprisonment for life and to pay a fine of Rs. 200/- and in default of payment of fine to further undergo two year's rigorous imprisonment. Appellant has also been convicted on the offence under Section 27 of the Arms Act and sentenced to three year's R.I. and to pay a fine of Rs. 200/- and in default to further undergo one

month's R.I. Both the substantive sentences have been ordered to run concurrently. While the accused appellant has preferred the appeal challenging the conviction and sentence, the State has preferred the appeal for enhancement of the sentence.

2. The prosecution case as disclosed during the trial is as follows:

3. Appellant Sub-Inspector Kundan Singh, Platoon Commander in Border Security Force, was posted at K.K. Tiba on the international border between India and Pakistan on 31st July, 1988. He was put to trial for the charge of Kidnapping and murder of Omprakash and Ram Narain, residents of village 15-H. On 31st July, 1988, P.W. 18 Shri B.P. Ingley, Deputy Commandant, 122 Battalion, Border Security Force, lodged an F.I.R. Ex.D.8 at 9 A.M. at Police Station, Ghadsana stating inter alia that on the preceding night within the zone of 100 metre inside the international border on the outpost of K.K.Tiba, P.W.I Constable Lakhvir Singh, P.W. 2 Home Guard Pune Khan and P.W. 3 Constable Philip Khajoor were on duty. At about 11 P.M., on hearing a gunfire, he went out to alert all the Outposts, with his patrolling party, which consisted of constable Tara Chand and P.W. 15 C.P.L. Narpat Singh. At about 11.55 P.M., they noticed some suspicious movement near the border. They challenged the intruders trespassing the international border. On which the intruders shot two fires from 12 bore gun and ran towards Pakistan. In self defence, the outpost party fired 15 round of 9 MM, 11 round of 7.62 MM and 8 round of 303 on account of which two intruders died on the spot and some of them taking advantage of the darkness, succeeded in escaping. On this information, police registered a case for offence under Section 307 IPC and Section 27 of the Arms Act. On the same day at 11.15 P.M., another written report Ex.P.8 was lodged by the villagers of 17H. stating that two persons of village 15-H namely Ram Narain and Om Prakash at about 10 P.M. had gone to village 16-H 'B' for opening water outlet. In the way, they were caught by appellant Kundan Singh and 2-3 constables posted at K.K. Tiba of Border Security Force. The deceased Ram Narain and Omprakash were carrying with them a lantern, Kassi, watches and 'Khes'. They were asked to sit down. Appellant Kundan Singh and one constable went to the house of P.W. 7 Baghel Singh and consumed liquor at his house. They told Baghel Singh that they have caught two persons of

Sarpanch Mahendra Singh. They also alleged to have stated that they would kill them. This was overheard by P.W. 4 Ses Karan, who was returning after purchasing 'Bidi' from the shop. He also alleged to have overheard that Baghel Singh was threatened by the accused appellant Kundan Singh that if he disclosed that fact to anybody, he would be killed. They also stated that deceased Ram Narain and Omprakash residents of 17-H were taken towards the outpost near the canal and shot dead by Kundan Singh and other sepoy. It was also stated that the Border Security Force people did not allow them to go near the dead bodies. On this information, police registered a case for the offences under Section 302, 364 IPC and Section 27 of the Arms Act and proceeded with the investigation. It revealed during investigation that Kundan Singh killed Omprakash and Ram Narain three kilometres inside the international border and a fake case of encounter was prepared. It also revealed that when accused Kundan Singh, who was Platoon Commander of Outpost K.K. Tiba, killed Ram Narain and Omprakash, Lakhvir Singh, Philip Khajoor, Narpat Singh and Pune Khan were also with him. After usual investigation, police laid charge sheet against the appellant for the offences under Sections 364, 302 IPC and Section 27 of the Arms Act.

4. Appellant denied the charges levelled against him and claimed trial. The prosecution in support of the case examined eighteen witnesses and produced number of documents. In statement under Section 313 of the Code of Criminal Procedure, appellant denied the correctness of the prosecution evidence appearing against him. He stated that the alleged eye witnesses are giving false statements against him under the pressure of the police so that they may not be charged for murder of Ram Narain and Omprakash. He also stated that when he was incharge of the outpost at K.K. Tiba, there was curfew; on the border during night. Nobody was permitted in the border area. There were oral directions that a full vigilance be kept so that not terrorists may cross the border. He established outposts at various places and posted jawans on those outposts. In the night at about 11.30 from the side of the border pillar No. 379/3, there was a gun shot fire. He went out with his patrolling party to alert jawans posted on different outposts. When he reached near 15-H, he noticed a suspicious movement from the border side. They took the position and in defence, fired, on account of which two persons

died on the spot and other intruders taking advantage of the darkness, succeeded in escaping towards Pakistan. He immediately informed the Company Commander Shri Hari Chand, Mahendra Singh, Assistant Commandant, reached on the spot. They made an enquiry from everyone and also inspected the site. In the morning, Battalion Commander Shri Murlidhar arrived. He also enquired into the matter. The Dy. Commandant Shri Ingle gave information of the incident to the police. He produced the said F.I.R. Ex.D.8. He also stated that he did not know Omprakash and Ram Narain. He was posted in the area only one week before. He also stated that a large number of persons had assembled. There was lot of pressure on the police of the villagers. Thus is satisfy the villagers and their political leaders, a false case has been foisted against him.

5. Analysing the evidence, the learned Judge acquitted the appellant of the offence under Section 364 IPC but convicted him of the offence under Section 302 IPC and Section 27 of the Arms Act and sentenced him as noticed above.

6. We are taken through the judgment and entire evidence on record. Before we proceed to deal with the merits of the case, we consider it proper to dispose of the contention raised by the learned Counsel with respect to jurisdiction of the sessions court to try the case. It is contended by Mr. H.S.S. Kharlia learned Counsel for the appellant that the whole trial is vitiated because prior to the commencement of the trial, the learned Magistrate did not comply with the mandatory provisions of Rule 4 of Criminal Courts & Border Security Force Courts (Adjustment of Jurisdiction) Rules, 1969, hereinafter referred-to as 'the Rules of 1969'. He has referred to Section 475 of the Code of Criminal Procedure and Sections 46, 47, 80 and Section 2 (a) & (d) of Border Security Force Act, 1968, hereinafter referred-to as 'the Act of 1968'. In support of the contention, learned Counsel has heavily placed reliance on a decision of the Calcutta High Court in Capt. U.R. Roy Choudhury v. State reported in 1976 Cri. L.J. 796. He has also referred to two decisions of this Court i.e. Ran Singh Dudee v. Union of India and Ors. reported in 1998 (2) RLW (Raj.) 1002, Murari Lal v. K.C. Aneja reported in 1992 Cri. L.J. 2082, a decision of the Punjab & Haryana High Court in Sepoy/Lans Naik Rajbir Singh v. State of Haryana reported in 1996 A.I.H.C. 2053 and a decision of the Kerala High Court In Re : State of Kerala reported in 1996 Cri. L.J.

1549.

7. On the other hand, learned Public Prosecutor has submitted that the provisions of Rule 4 of the Rules of 1969 were not required to be followed as the Border Security Force itself had handed-over the custody of the appellant to the civil Police. This shows that the B.S.F. was not interested in trying the appellant under the provisions of the B.S.F. Act. Learned Counsel has placed reliance on two decisions of the Apex Court viz; Joginder Singh v. State of Himachal Pradesh reported in : 1971 CriLJ511 and Balbir Singh v. State of Punjab reported in : (1995)1SCC90 .

8. We have given careful consideration to the arguments advanced by learned Counsel for the parties.

9. In order to appreciate the contentions, it is necessary to notice some of the provisions of the B.S.F. Act, 1968, Criminal Courts & Border Security Force Courts (Adjustment of Jurisdiction) Rules, 1969 and the Code of Criminal Procedure.

10. Section 47 of the Act of 1968 reads as follows:

47. Civil offences not triable by a Security Force Court.-A person subject to this Act who commits an offence of murder or of culpable homicide not amounting to murder against, or of rape in relation to, a person not subject to this Act shall not be deemed to be guilty of an offence against this Act and shall not be tried by a Security Force Court, unless he commits any of the said offences.

(a) while on active duty; or

(b) at any place outside India; or

(c) at any place specified by the Central Government by notification in this behalf.

11. This provision lays down that where a person subject to the Act of 1968, is charged with the offences listed therein while on active duty, shall not be deemed to be guilty of an offence against the Act and could be tried by a Security Force Court.

12. The question arises as to whether the accused appellant was on active duty at the time of commission of offence. Active duty has been defined in Section 2(l)(a) of the Act of 1968, which reads as follows:

2. Definitions.-(1) In this Act, unless the context otherwise requires,-

(a) 'Active Duty', in relation to a person subject to this Act, means any duty as a member of the Force during the period in which such person is attached to, or forms part of, a unit of the Force-

(i) which is engaged in operations against an enemy, or

(ii) which is operating at a picket or engaged on patrol or other guard duty along the borders of India, and includes duty by such person during any period declared by the Central Government by notification in the Official Gazette, as a period of active duty with reference to any area in which any person or class of persons subject to this Act may be serving.

13. It is not in dispute that at the relevant time, the accused appellant was on guard duty alongwith the border of India, as a member of the Force, as such, he was in active service.

14. The next question that arises for our consideration is as to what the ordinary criminal court is required to do, when a person on active duty of the Border Security Force is brought before a Magistrate for any of the offences listed in Section 47 of the Act of 1968. In this context, Section 475 of the Code of Criminal Procedure and Sections 80 and 81 of the Act of 1968 deserves to be noticed.

15. Section 475 of the Code of Criminal Procedure reads as follows:

475. (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, naval 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 nearest military, naval or air force station, as the case may be, for the 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 purpose 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 situated within the State be brought before a Court-martial for trial or to be examined touching any matter pending before the Court-martial.

16. This provision provides for delivery to the Commanding Officer of the person liable to be tried by the Security Force Court. It recognises rule making power of the Central Government under the B.S.F. Act and any other law relating to the Armed Forces of the Union as to the case in which the persons subject to the military, naval or Air Force Law or such other law to be tried by a Court to which this Code applies or by a court martial. Section 475 further contemplates that where a 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 the Code applies or by a court martial, such Magistrate shall, in conformity with the rules and in proper cases, deliver him together with the statement of the offence of which he is

accused, to the Commandant of the Unit for the purpose of being tried by a Security Force Court.

17. Sections 80 and 81 of the Act of 1968 read as follows:

80. Choice between Criminal Court and Security Force Court.-When a Criminal Court and a Security Force Court have each jurisdiction in respect of an offence, it shall be in the discretion of the Director-General, or the Inspector-General or the Deputy Inspector-General within whose command 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 shall be instituted before a Security Force Court, to direct that the accused persons shall be detained in Force custody.

81. Power of criminal Court to require delivery of offender-(1) When a criminal Court having jurisdiction is of opinion that proceedings shall be instituted before itself in respect of any alleged offence, it may, by written notice, require the officer referred to in Section 80 at his option, either to deliver over the offender to the nearest Magistrate to be proceeded against according to law, or to postpone/proceedings, pending a reference to the Central Government.

(2) In every such case the said officer shall either deliver over the offender in compliance with the requisition, or shall forthwith 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.

18. Section 141 of the Act of 1968 empowers the Central Government to frame the rules on the various subjects enumerated therein including Sub-Clause 2(k) i.e. any matter necessary for the purpose of 'carrying this Act into execution, as far as it relates to investigation, arrest, custody, trial and punishment of the offence triable or punishable under the Act'. The Central Government has framed the rules known as Criminal Courts and Border Security Force Courts (Adjustment of Jurisdiction) Rules, 1969 in exercise of powers conferred by Clause (k) of Sub-section (2) of Section 141 of the Border Security Force Act, 1968.

19. The Rules 3 and 4 of the Rules of 1969 reads as follows:

3. Trial of person subject to the Act-Where a person subject to the Act is brought before a Magistrate and charged with an offence for which he is liable to be tried by a Border Security Force Court, such a Magistrate shall not proceed to try such person or to inquire with a view to his commitment for trial by the Court of Sessions or the High Court for any offence triable by such Court, unless:

(a) he is of opinion, for reasons to be recorded in writing that he should so proceed without being moved thereto by the competent authority; or

(b) he is moved thereto by such authority.

4. Notice by Magistrate.-Before proceeding under Clause (a) of Rule 3, the Magistrate shall give written notice to the commandant of the accused and until the expiry of a period of:

(i) three weeks, in the case of a notice given to a Commandant in command of a unit or detachment located in any of the following areas, that is to say, -

(a) State of Nagaland;

(b) Mizo Hill, Garo Hill, Khasi and Jaintia Hill and North Cachar Hill Districts of Assam, or

(ii) ten days in the case of a notice given to any other Commandant in command of a unit or detachment located elsewhere in India, from the date of the service of such notice, he shall not,-

(a) convict or acquit the accused under Section 243 or Section 245 or Section 247 or Section 248 of the Code of Criminal Procedure, 1898 (5 of 1898) or hear him in his defence under Section 244 of the said Code; or

(b) frame in writing a charge against the accused under Section 254 of the said Code; or

(c) make an order committing the accused for trial by the High Court or the Court of Sessions under Section 213 of the said Code; or

(d) transfer the case for inquiry or trial under Section 192 of the said Code.

20. A combined reading of Section 475 Cr. PC and Rules 3 and 4 of the Rules of 1969 makes it clear that when a person subject to the Border Security Force (on active duty) is brought before a Magistrate and charged with an offence then such Magistrate shall not try such person or to commit the case to the court of Sessions, unless the Commandant is moved by the Magistrate. Section 80 of the Act 1968 contemplates that when there is the concurrent jurisdiction of the criminal court and the Security Force Court, it shall be the discretion of the Director General or the Inspector General or the Dy. Inspector General within whose command 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 shall be instituted before a Security Force Court, to direct that the accused person shall be detained in Force custody.

21. Section 81 contemplates that when a Criminal court having jurisdiction is of the 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 80 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. Sub-section (2) of said Section states that in every such case, the said officer shall either deliver over 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 of the Central Government whose order upon such reference shall be final. The restricted provisions namely Section 475 Cr.PC, Section 80 of the Act of 1968 coupled with Rules 3 and 4 of the Rules of 1969 make it clear that whenever a person subject to the Act of 1968 is brought before a Magistrate, it would be incumbent upon the Magistrate to address a notice to the Commandant of the accused and after receipt of the response of the Commandant, he shall decide whether accused can be committed to the Sessions Court or tried by Civil Court.

The object of giving notice as envisaged in the Act of 1968 and the Rules to the authorities is to make them fully aware of the pendency of the criminal case against the members of the Force and afford them an opportunity to exercise their discretion of having the members of the Force either tried by the court-martial or to allow the ordinary criminal court to proceed with them.

22. The provisions of the Act and the Code are held to be mandatory in character by various decisions of this Court and other courts. In *Balbir Singh v. State of Punjab* reported in : (1995)1SCC90 , the Apex Court has traced the logic for giving first option to the Force authorities under the Act to decide whether the accused (on active duty) should be tried by the Security Force Court or the Criminal Court, which is extracted as follows:

The defence of the country being of paramount importance, the Air Force Authorities, would know best as to whether the accused should be tried by the court-martial or by the ordinary criminal court because the trial by the ordinary criminal court would necessarily involve a member of the force being taken away for trial by the ordinary criminal court and not being available to the Authorities and the like considerations. 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.

23. In *Delhi Special Police Establishment, New Delhi v. S.K. Loraiya* reported in : 1973 CriLJ33 , the Special Judge, Gauhati framed charges against an officer governed by the Army Act for the offence under Section 5(l)(c) and (d) and Section 5(2) of the Prevention of Corruption Act and under Sections 467 and 471 IPC. However, the High Court of Assam and Nagaland quashed the charges on the ground that they were framed without following the procedure specified in the rules made under Section 549 Cr. P.C. of the Old Code (Sec. 475 of the New Code). The matter was carried to the Supreme Court by way of Special Appeal under

Article 136 of the Constitution. The Apex Court held that Section 549(1) Cr. P.C. and the Rule 3 thereunder were mandatory and accordingly the charges framed by the Special Judge against the accused could not survive. This decision was followed by the Division Bench of the Calcutta High Court in Capt. U.R. Roy Choudhury v. State reported in 1976 Cri. L.J. 796. After referring to the relevant provisions, the court held that the provisions of Section 549 (1) Cr. P.C. and the rules made there under are mandatory in nature and they are to be complied with before an accused who is subject to military, naval or air force law can be tried by an ordinary criminal court. The court further held that non-compliance of such mandatory provisions will make a trial before an ordinary criminal court without jurisdiction and, as such, the entire proceedings would be null and void.

24. A learned Single Judge of this Court in Murari Lal v. K.C. Aneja reported in 1982 Cri. L.J. 2082 held that ordinarily, in a case where the accused person is subject to military, naval or air force law and charged with an offence for which he is liable to be tried by a court-martial, a Magistrate is not competent to proceed to try such person and if he holds a different opinion then he has to record reasons for so proceeding and in that case before proceeding he has to give a written notice to the Commanding Officer of the accused.

25. In a recent decision of this Court in Ran Singh Dudee v. Union of India reported in 1998 (2) RLW Raj. 1002, the learned Single Judge held that when a person subject to Army Act is brought before a Magistrate charged with an offence for which he is liable to be tried by a court martial, then such Magistrate, unless he is moved by the competent military officer referred-to in Section 125 of the Army Act to proceed against the accused under the amended Cr.P.C. 1973, shall before so proceeding give written notice to the Commanding Officer of the accused and until the expiry of fifteen days from the date of service of such notice, shall not proceed to try such person or to inquire with a view to his commitment for trial by the Court of Sessions for any offence triable by such court.

26. The Apex Court in Superintendent and Remembrancer of Legal Affairs, West Bengal v. Usha Ranjan Roy Choudhary reported in : 1986 CriLJ1248 held that the ordinary criminal court would have no jurisdiction to take cognizance of the case

and to try the accused, an Army man in a matter where the procedure prescribed by the Rules has not been complied with. The Court further held that initial lack of jurisdiction to take cognizance and try the case would of logical necessity vitiate the trial and the order of conviction and sentence would be liable to be quashed as a result thereof.

27. The judgment in Joginder Singh's case (supra) relied upon by the learned Public Prosecutor is clearly distinguishable and has no application to the facts of the present case. In the said case, the court on analysing the evidence found that the Inspector of Police after recording the statements of some of the witnesses proceeded to cantonment area and contacted the officer commanding of the Punjab Regiment but he did not succeed in getting the custody. He was told that the custody of the accused cannot be given without obtaining the permission from the Headquarters. However, the Commanding Officer assisted the Police Inspector in carrying out the identification parade of the accused. It was also found that after having full knowledge of the charge against the accused and the investigation having been conducted by the police, the competent authority ultimately released the accused from the military custody and delivered to the civil authorities for being tried according to law. In these circumstances, the court held that the competent authority had handed over the accused to civil authorities for being tried after former had considered the question of so handing him over after consultation with the Headquarters. The court held that in these circumstances, the designated officer under Section 125, who had the discretion in the first instance to decide that the accused should be tried before a court martial, had decided to the contrary. In these circumstances, there was no occasion to follow the procedure under Section 126 or Rule 4.

28. Another case, relied upon by the prosecution i.e. Balbir Singh's case (supra) is not only distinguishable but it supports the accused appellant. It is categorically held in Balbir Singh's case (supra) that the action of the Army authorities in calling for a detailed police report at the investigation stage could not amount to the Authorities under the Act exercising the option not to try the accused by the Court-martial and the Army Authorities could not be said to have voluntarily abandoned their option to try the accused in court-martial. Thus, it is evident that simply

because the Force Authorities have given the custody of the accused to the police for investigation, it cannot be said that the Force Authorities have abandoned the discretion to try the accused by the Force Court. Such a discretion can be exercised only by the authorities provided under Section 80 of the Act of 1968 and at an stage when the accused is produced before the court for trial.

29. In the instant case at the initial stage of investigation, the custody of the accused appellant was given by the officers of the Border Security Force but this does not mean that a decision was taken not to try the accused by a Force Court. After the investigation was complete and when the accused was produced before the learned Magistrate, it was incumbent upon him to give notice to the Commandant of the concerned Unit in accordance with the provisions of Rules 3 and 4 of the Rules. It is also significant to notice that the discretion was to be exercised by the officer of the rank of Director General or the Inspector General or the Deputy Inspector General within whose command the accused was serving as provided under Section 80 of the Act. The custody of the accused at the initial stage was with none of the said authorities as contemplated under Section 80 of the Act. Thus, we have no hesitation in holding that the entire trial of the accused appellant Kundan Singh and conviction and sentence recorded is vitiated for non-compliance of provisions of Rules 3 and 4 of the Rules. The Criminal Court, who tried the accused appellant, lacked the jurisdiction.

30. As we have found that the trial of the accused appellant is wholly without jurisdiction, it is not necessary to go into the merits of the case. As we have found the conviction of the accused bad in law, the State Appeal automatically becomes infructuous.

31. In view of the aforesaid discussion, the appeal filed by the accused appellant Kundan Singh is allowed and the judgment dated 18.5.1992 passed by the Additional Sessions Judge, Raisinghnagar, is quashed and set aside. Appellant Kundan Singh is acquitted of the offences under Sections 302 IPC and 27 of the Arms Act. He shall be released forthwith, if he is not required in any other case. The State Appeal stands dismissed as having become infructuous.

