

**In Re: A.A. Paul**

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**Court :** Chennai

**Decided On :** Jul-27-1973

**Reported in :** 1974CriLJ375

**Judge :** N.S. Ramaswami, J.

**Appellant :** In Re: A.A. Paul

**Judgement :**

ORDER

**N.S. Ramaswami, J.**

1. The revision is against the order of the Special Judge, Madras, dismissing a petition purporting to be one under Section 251-A of the Criminal Procedure Code and Section 126 of the Army Act. The revision petitioner is the accused in C. G. No. 15 of 1972 on the file of the Special Judge, Madras. He was formerly an army personnel in that he was the Recruiting Officer in the Army. He retired from service on 3-9-1972. A charge sheet was filed against him on 19-10-1972 for an alleged offence under Section 5 (2) read with Section 5(1)(d) of Act II of 1947 and Section 161 of the Indian Penal Code on the ground that he had accepted illegal gratification on 3-6-1972. On that date namely, the date on which the offence is said to have been committed, the accused was in Army service. But. as I said, he retired on 3-9-1972 and the charge sheet itself was filed subsequent to the retirement. The case was taken up for trial and six witnesses have already been

examined by the learned Special Judge. At that stage. the accused filed the petition, out of which this revision has arisen, contending that the Special Judge having not followed the rules framed by the Central Government by virtue of Section 549 of the Criminal Procedure Code, the entire trial was vitiated and that the same should be stayed and the accused should be discharged. This contention was overruled by the learned Special Judge. Hence this revision.

2. The learned Counsel for the accused (revision petitioner) contends that in spite of the accused having retired from Army service, he must be deemed to be subject to the Army Act by virtue of Section 123 of the Army Act and so much so. the rules made by the Central Government under Section 549 of the Code of Criminal Procedure would be attracted.

3. There can be no doubt that if the accused is a person subject to Military law on the date on which the case was taken up by the learned Special Judge, who constitutes an ordinary Criminal Court, the relevant rules made ' by the Central Government by virtue of Section 549 of the Criminal Procedure Code have necessarily to be followed. Rules 3. 4 and 5 of the said rules are relevant and they contemplate the ordinary criminal Court before proceeding with the trial of the accused to give notice to the Commanding Officer of the accused concerned and take further steps as provided in the rules. In the present case, admittedly, the procedure laid down in the said rules have not been followed by the Special Judge, But the question is whether those rules apply to the case or not. I am quite clear that the accused in the case is not a person subject to Military. Naval or Air Force law on the relevant date and, therefore. Rules 3, 4 and 5 of the Central Government Rules made by virtue of Section 549 Cr. R C. have no application. Rule 3 starts with the following words:

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....

Therefore, it is clear that only if a person is subject to Military, Naval or Air Force law, the abovesaid rules would be attracted. Section 2 of the Army Act mentions persons who are subject to the said Act. Sub-section (2) of that Section says that

every person subject to the said Act shall remain so subject until duly retired, discharged, released, removed, dismissed or cashiered from the service. That means the accused in the present case, who was retired from service on 3-9-1972. is not a person subject to the Army Act. If that much is clear, then, undoubtedly the rules framed by the Central Government by virtue of Section 549 Crl. P. C. have no application to this case.

4. It is not the contention of the learned Counsel that the ordinary criminal Court has no jurisdiction at all to try the offence with which the accused stands charged. It is conceded that the jurisdiction is concurrent on the ordinary criminal Court and Court Martial. The only contention is that the criminal Court, namely, the Special Judge. Madras, has failed to follow the various rules framed by the Central Government by virtue of Section 549 Crl. P. C. But. if the accused is not a person subject to the Army. Naval or Air Force law then as I said, those rules have absolutely no application and the ordinary criminal Court cannot possibly follow those rules.

5. However, the learned Counsel for the accused contends that Section 123 Of the Army Act makes a deeming provision, by which the accused, though retired from service, must be held to be still subject to the Army Act. The relevant part Of Section 123 is as follows:

123 (T) Where an offence under this Act had been committed by any person while subject to this Act. and he has ceased to be so subject, he may be taken into and kept in military custody, and tried and punished for such offence as if he continued to be so subject.

(2) No such person shall be tried for an offence, unless his trial commences within six months after he had ceased to be subject to this Act: Provided that nothing contained In this sub-section shall apply to the trial of any such person for an offence of desertion or fraudulent enrolment or for any of the offences mentioned in Section 37 or shall affect the jurisdiction of a criminal Court to try any offence triable by such court as well as by a court-martial.

(Sub-sections (3) and (4) omitted)

This section is only an enabling provision by which an accused can be tried by a Court Martial in respect of an offence committed by him when he was subject to the Army Act. even after he retired from service and ceased to be subject to the Army Act. I am unable to understand as to how this provision in Section 123 would help the accused in his contention that he still continues to be subject to the Army Act. The learned Counsel lays stress on the words 'and tried and punished for such offence as if he continued to be so subject' occurring at the end of Sub-section (1) of the above section and contends that because of that provision, it must be deemed that the accused, even though retired from service, is still subject to the provisions of the Army Act. This is wholly untenable. If a person retired from service is deemed to continue to be subject to the Army Act. then, there is no need for making a provision saving that he shall be tried as if he continued to be so subject. The very words relied on by the learned Counsel clearly indicate that the accused contemplated under that Section is really not subject to the Army Act, but the procedure for the trial of such person should be the same as in the case of a person who is still subject to the Army Act. Even if we look into the relevant rules made by the Central Government, it would be clear that they do not apply to a person who is retired from service. Apart from the opening words in B. 3 indicating that the rules apply only to a person who is subject to Military. Naval or Air Force law there are other indications in the rules . which would Bo to show that those rules cannot possibly be applied to a person who is no longer in service. For instance, Rule 4 contemplates the ordinary criminal Court giving written notice to the Commanding Officer of the accused. Unless the accused is ill service on the relevant date, there cannot possibly be a Commanding Officer for him. I asked the learned Counsel for the accused (revision petitioner) as to who the Commanding Officer for the accused as on the relevant date is. The learned Counsel is unable to answer this question. However, he says that whoever was the Commanding Officer on the date on which the accused retired from service must be deemed to be the Commanding Officer of the accused as on the relevant date. This is certainly not acceptable. Rule 5 also refers to the Commanding Officer of the accused or the competent Military, Naval or Air Force Authority of the accused. After a person retired from Army service, there is no question of any Commanding Officer or any Military authority exercising any control over him. There can be no

doubt that the rules framed by virtue of Section 549 Crl. P. C. have no application to the present case. There is absolutely no merit in the preliminary objection raised on behalf of the accused before the learned Special Judge and there is no merit in this revision petition either. Accordingly, it is dismissed. The learned Special Judge should proceed with further trial of the accused as expeditiously as Possible.

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