
(1975) 05 CAL CK 0024

Calcutta High Court

Case No: None

Capt. U.R. Roy
Choudhury

APPELLANT

Vs

The State

RESPONDENT

Date of Decision: May 29, 1975

Acts Referred:

- Army Act, 1950 - Section 122, 125, 126, 127, 52
- Constitution of India, 1950 - Article 136
- Criminal Procedure Code, 1973 (CrPC) - Section 188, 197, 200
- Penal Code, 1860 (IPC) - Section 1, 109, 120B, 409, 467

Citation: (1976) CriLJ 796 : 79 CWN 804

Hon'ble Judges: N.C. Talukdar, J; A.N. Banerjee, J

Bench: Division Bench

Judgement

A.N. Banerjee, J.

These two appeals arising out of the same judgment were heard together and would be governed by the following judgment:

On 11-7-67, Dy. Supdt. of Police, Special Police Establishment, Division C.B.I., Calcutta filed a petition of complaint before the Judge of 4th Additional Special Court, Calcutta, against three accused persons viz. (1) Capt. Usha Ranjan Roy Choudihury (accused/appellant in Criminal Appeal 308/72), (2) Major Ramchandrar Rangnath Hoshing (respondent in Govt. Appeal) and (3) Lt. Col. Birendra Nath Mazumdar (respondent in Govt. Appeal) u/s 120-B read with Section 5 (2) of Act II of 1947 and u/s 5 (2)/5 (1) (c) and (d) of Act II of 1947. Along with such petition of complaint sanction order of the President of India u/s 6 (1) (a) of the Act II of 1947 and Section 197, Cr.P.C. and the certificate of the Political Officer, Sikkim, u/s 188, Cr.P.C. were also filed. On a perusal of the petition of complaint and on a consideration of the allegation made thereunder, the learned Judge took cognizance of the offence and issued process against the aforesaid

three (persons. The learned Judge in taking cognizance of offences referred to the allotment order made by the Government regarding the case to his court. After the accused persons had put in their appearances, evidences were recorded and charges were framed against them. All of them were charged u/s 120-B/409, I.P.C. The accused U. R. Roy Choudhury was further charged under Sections 477-A, 467 and on different counts u/s 409, I.P.C. The accused Ramchandar Rangnath Hoshing was also charged u/s 109/467, I.P.C. The accused Biren-dra Nath Mazumdar was also charged on different counts u/s 409, I. P.C. The learned Judge of the Special Court by his judgment dated 28-9-72 found the accused Usha Ranjan Roy Choudhury guilty of the offences under Sections 409, 467 and 477-A, I.P.C. and sentenced him to R.I. for 8 years and to a fine of Rupees 30,000, in default, to R.I. for another 18 months u/s 409, I.P.C. and for two years under each of Sections 467, 477-A, I.P.C. The sentences were ordered to run concurrently. He acquitted all the three accused persons of the charge of conspiracy u/s 120-B and also found the accused Birendra Nath Mazumdar and Ramchandra Rangnath Hoshing to be not guilty of the other respective charges framed against them. Accordingly, B, N. Mazumdar and Ramchandra Rang Nath Hoshing were acquitted. Being aggrieved by such judgment, the Government preferred the present appeal against the order of acquittal in favour of the said two persons and also against an order of acquittal in respect of the charge u/s 120-B, I.P.C. The accused U. R. Roy Choudhury filed a separate appeal against the order of conviction and sentence against him. Thus, these two appeals came to be heard together. The facts leading on to the prosecution may be briefly stated as follows:

The 3 accused persons who are Army Officers belong to 10 Infantry Division which was a part of the greater army formation viz. 33 Corps. There were other units in the said 10 Infantry Division. During the Chinese invasion of a portion of eastern part of India in 1962, the said division was moved into Silkkim. The Divisional Headquarter was also shifted there, as the division had to make arrangement for maintenance of supplies and provisions to the forces posted at different strategic points For such purpose, the division had its own arrangement of funds. The fund was operated under a Supply and Service Imprest Accounts sanctioned by the General Officer Commanding for the Headquarter of the Division. The accused Lit. Col. B. N. Mazumdar was appointed as Imprest Holder in respect of Rupees 1,00,000 at any given time and also the Sanctioning Authority in respect of expenses under this Account, There was a Field Cashier for maintaining Cash and Accounts of the said imprest money. The accused Capt. Usha Ranjan Roy Choudhury was the Field Cashier. The remaining accused Major Ramchandra Rang Nath Hoshing was Commander of the 100 composite Platoon which evidently was under the 10 Infantry Division. The prosecution alleges that the Imprest Holder Lt Col. B, N. Mazumdar and the Field Cashier Capt. U. R. Roy Choudhury entered into criminal conspiracy for misappropriating the imprest money by misuse of their official power. The present case concerns only with expenses relating to hire of mules and labourers by the units concerned. The procedure adopted by the accused persons for the purpose of misappropriation of the imprests money was of four types. Firstly, where no mule was

employed by certain user units the Lt. Col. B. N. Mazumdar issued fictitious sanction orders according to sanctions authorising employments of certain number of mules for fictitious purpose and Capt. U. R. Roy Choudhury prepared completely false forged muster rolls showing fictitious payments of huge amounts of money and thus misappropriated between them the whole amount. Secondly, in the event of some units actually having used mules for certain purposes Lt. Col. Mazumdar made sanctions in respect of those employments of mules by either increasing the number of days of employment or the number of mules over what were actually employed. Capt. U. R. Roy Choudhury supported him by preparing false muster rolls showing such payments. Thirdly, where payments for the employment of the labourers were made Lt. Col. Mazumdar dishonestly made by either showing inflated number of labour employed and/or showing inflated rate of employment or number of days employed. The Field Cashier supported such payments with the preparation of false muster rolls showing higher amounts of money spent for labour payments than what were actually paid. Thus the balances were misappropriated. Fourthly, where the money was advanced to any particular unit for the employment of labour or mules, higher amount was shown as paid. The accused Major Ramchandrarangnath Hoshing joined conspiracy by taking advances from the Field Cashier for making payment to labourers employed by his unit 100 composite Platoon of which he was a Commandar, He dishonestly assisted the Field Cashier by making false and inflated muster rolls showing higher amounts than were actually paid by him and caused submission of blank muster rolls to the Field Cashier.

2. Such was the nature of the allegation as made by the prosecution, on the basis of which the accused persons were charged and tried with the result as indicated above.

3. The defence of the accused persons was that they have nothing to do with the allegation as made by the prosecution. Mr. S. D. Banerjee, senior advocate with Mrs. J. Nag, Mr. Nirmalendu Basu, Mrs. Rajkumari Singh, Miss Pritam Kaur Khatri, Miss Runu Roy Choudhury and Miss Parbati Basu appearing for the respondents 1 and 3, and Mr. S. D. Banerjee with Mrs. J. Nag, Mr. Chinraoy Choudhury, Miss Pritam Kaur Khatri and Miss Runu Roy Choudhury appearing for the appellant Capt. U. R. Roy Choudhury contended that the entire proceedings before the learned Judge of the Special Court including the orders of conviction must be quashed inasmuch as no valid sanction u/s 197, Cr. P. C. was taken in respect of the offences u/s 409, I.P.C., cognizance was taken in contravention of mandatory provision of Section 200, Cr. P.C. and the Judge of Special Court, assumed Jurisdiction without complying with the provisions of the Army Act.

4. Mr. S. R. Dutta, learned Advocate with Mr. J. N. Nanda appearing for the respondent No. 2 supported the argument of Mr. Banerjee.

5. Mr. J. N. Ghosh, learned Advocate with Mr. S. M. Sanyal appearing for the appellant in the Govt Appeal No. 5/73 and for the State in the Criminal Appeal No. 308/72, submitted that the aforesaid objections were taken before the trial court and the learned trial Judge had negatived such objections in an elaborate discussion in his judgment Mr. Ghosh

contended that he agreed with the views of the trial Judge regarding the aforesaid objections.

6. We were taken through the judgment and the entire evidence on record. Before we can think of entering into the merits of the case we consider it proper that we should dispose of all the preliminary objections raised by Mr. Banerjee. We will first deal with the question regarding the Special Court assuming jurisdiction in contravention of the provisions of the Army Act and the Rules framed u/s 549, Cr. P. C, 1898, by the Central Government. There can be no manner of doubt that the offences alleged come within the purview of Section 52 of the Army Act, 1950. Therefore, such offences could be also tried by the court martial. It is only with regard to the offences as enumerated u/s 70 of the said Act, the Court Martial has no jurisdiction to try an offender governed by the Army Act, 1950. When the choice is between criminal court and court martial, Section 125 of the Act is applicable. The said section lays down:

When a criminal court and 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.

7. Section 126 of the said Act: (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 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 in such reference shall be final.

8. u/s 127 of the Army Act 1950. A person convicted or acquitted by a court martial may, with the previous sanction of the Central Government, be tried again by a criminal court for the same offence, or on the same facts,

9. In a case where prima facie both the ordinary criminal court and court martial have concurrent jurisdiction to try the offender Section 549 (1), Cr. P. C, 1898 applies. The said section lays down that the Central Government may make Rules consistent with this Code and the Army Act as to the cases in which persons subject to military law would be tried by the court to which this Code applies or by a court martial. The Central Government has framed u/s 549 (1), Cr.P.C. Rules which are known as the Criminal Courts and Courts Martial (Adjustment of Jurisdiction) Rules, 1952. Rule 3 is relevant for our purpose. It

requires that when a person subject to military, naval or air force law is brought before a Magistrate on accusation of an offence for which he is liable to be tried by a court martial also, the Magistrate shall not proceed with the case unless he is requested to do so by the appropriate military authority. He may, however, proceed with the case if he is of opinion that he should so proceed with the case without being requested by the said authority. Even in such a case the Magistrate has to give notice to the Commanding Officer and is not to make any order of conviction or acquittal or frame charges or commit the accused until the expiry of 7 days from the service of notice. The Commanding Officer may inform the Magistrate that in his opinion the accused should be tried by the Court Martial. Subsequent rules prescribe the procedure which is to be followed where the Commanding Officer has given or omitted to give such information to the Magistrate. A plain reading of the aforesaid provisions of law makes it clear that such provisions are mandatory and 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. 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. Mr. Ghose contended that Section 549 (1), Cr.P.C. and the rules framed thereunder referred to the Magistrate and not to a Judge of the Special Court and that as such the provision thereof would not be applicable in the present case. We are unable to agree with such contention. We have already noticed how the relevant provisions of the Army Act, 1950, referred to a criminal court and not to a particular category of criminal court. The very language of Section 549 (1), Cr.P.C. refers to the powers of the Central Government to make rules consistent with the Code of Criminal Procedure and the Army Act. There can be thus no manner of doubt that Section 549 (1), Cr.P.C. must be read with Section 125 of the Army Act and the rules framed under Section 549 (1), Cr.P.C. must be also consistent with the provisions of Section 125 of the Army Act. Accordingly, we are led to hold that Section 549 (1), Cr.P.C. and the rules framed thereunder also included the Judge of Special Court. While we are on this point, we may profitably refer to a decision of the Supreme Court reported in [Delhi Special Police Establishment, New Delhi Vs. Lt. Col. S.K. Loraiya](#), . The said decision (Delhi Special Police Establishment, New Delhi v. S. K. Loraiya also related to a case where the accused who was governed by the Army Act was being prosecuted before a Judge of the Special Court u/s 120-B, Indian Penal Code read with Section 5(1)(c) and (d) and Section 5(2) of the Prevention of Corruption Act and under Sections 467 and 471, I.P.C. The Special Judge, Gauhati framed charges under the aforesaid Sections 1 against the accused. He went on revision against the framing of the charges in the High Court of Assam and Nagaland. The High Court allowed the revision and quashed the charges. Against such order of the High Court, Delhi Special Police Establishment, New Delhi, preferred an appeal to the Supreme Court by special leave under Article 136 of the Constitution. The High Court quashed the charge for two reasons: (1) The charges were framed by the Special Judge without following the procedure specified in the Rules made u/s 549, Cr.P.C. and (2) the trial was held in the absence of a sanction by the appropriate authority u/s 196-A (2), Cr.P.C. It was held by the Supreme Court in that case that Section 549 (1), Cr.P.C. and the Rule 31 thereunder were mandatory and accordingly,

the charges framed by the Special Judge against the accused could no survive. It was further held in that case that Section 549 (1), Cr.P.C. should be construed in the light of Section 125 of the Army Act, 1950. Their Lordships observed, "Both the provisions toeve in mind the object of avoiding a collision between the ordinary criminal court and the court martial. So both of them should receive a similar construction." Accordingly, the order of the Afisem High Court quashing the charges was upheld by the Supreme Court. We respectfully agree with the principle f law as enunciated in the above case in so far as the present case is concerned. It is an undisputed fact that the provisions of Section 549 (1), Cr.P.C. and the rules framed thereunder and also Section 125 of the Army Act, 1950, were not complied with, Mr. Ghose argued that in view of the provision of Section 122 of the Army Act which provides for a period of limitation of three years, only the court martial could have no jurisdiction and as such there was no point in complying with the aforesaid provisions and that as such the trial could not be said to be without jurisdiction. We are unable to agree with such contention. The very judgment of the Supreme Court upon which we have placed reliance- repels such argument. It was held that the question of limitation is a matter for the decision of the court martial and not the ordinary criminal court. We also respectfully agree with such views. It was also urged by Mr. Gihose that as the investigation in this case started on a letter written by the Brigadier of the Division concerned to the police for investigation it would indicate by implication that the Army authority opted for the trial of the accused persons by the ordinary criminal court. We are also unable to agree with such contention. It is true that a letter was written to S.P.C.B.I., Calcutta Division for investigation and it was written on behalf of Brigadier in-charge of Headquarter 33 Corps (vide Ext, 146). The letter reads as follows:

Dear Sir,

1. Please refer to Memo No. 8940 dated 28 August 1963 from Shri R, K. Bhattaoharyya, Superintendent of Police, D.E.B., Darjeeling.
2. At appendix "A" please find a copy of the investigation that had been carried by us. We request you to take over the case and submit your detailed report to us at your earliest convenience.

This letter does not indicate that the Army Authorities were voluntarily giving up their option to try the accused person in a court martial. On the other hand the very fact that detailed report regarding investigation made by the police was being asked for, would go to show that theArmy Authorities had not at that stage contemplated of having the case tried by an ordinary criminal court. Thus in view of our above discussion we cannot but hold that the learned Judge of the Special Court acted without jurisdiction in taking cognizance of the case and in proceeding with the trial resulting in conviction of one of the accused and in acquittal of the other two accused persons. The entire proceeding before him was without jurisdiction and as such null and void.

10. In view of our above finding we do not propose to enter into the merits of the case and also the question regarding non-compliance of the mandatory provisions of Section 200, Cr.P.C. and want sanctions u/s 197, Cr.P.C. in so far as the charge u/s 409, I.P.C. is concerned. We thus make it clear that none of our observations will affect the merits of the case.

11. In the result, we quash the entire proceedings including the order of conviction and sentence of the accused appellant as passed against the appellant in case No. 5/61 in the court of the Judge, Calcutta, 4th Additional Special Court. Accordingly, Government Appeal No, 5/ 1973 stands dismissed and Criminal Appeal No. 308/1972 is disposed of. All the accused persons be discharged from their respective bail bonds. Fines, if paid, be refunded.

N.C. Talukdar, J.

12. I agree.