

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.48502 of 2017

Arising Out of P.S. Case No.-19 Year-2017 Thana-SAHPUR District-
PATNA

=====
Commanding Officer, Head Quarter, Recruiting Zone, (Bihar
& Jharkhand), Danapur Cant, Police Station-Danapur,
District-Patna, through Lt. Col. Prakhar Umakant Tiwari
(Administrative Officer).

.... Petitioner/s

Versus

1. The State of Bihar.
 2. Shri Rajesh Kumar Singh, Police Sub-Inspector, Shahpur
Police Station, District-Patna (Informant).
 3. Mr. Devale Pandarinath, S. No. 6394725A HAV/CLK.
 4. Mr. Shekhar Suresh Magadum, No. 6944995W HAV/CLK.
- Nos. 3 and 4 – ZRO, Danapur Cantt., Patna.

.... Opposite Party/s

=====

Appearance :

For the Petitioner/s : Mr. Kumar Priya Ranjan, Adv.

For the State : Md. Aslam Ansari, APP

=====

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

C.A.V. ORDER

6. 03-08-2018 The present petition under Section 407 of the
Code of Criminal Procedure, 1973 (*hereinafter referred to
as the **Cr.P.C.***) has been filed at the instance of the
Commanding Officer, Headquarters, Recruiting Zone,
Danapur Cantt., Patna, challenging the order dated



22.04.2017, passed by the learned Additional Chief Judicial Magistrate, Danapur (Patna) in connection with Shahpur P.S. Case No. 19 of 2017, dated 28.01.2017, instituted for the offences under Sections 420, 467, 468, 471/34 of the Indian Penal Code, whereby the prayer made on behalf of the petitioner for transferring the case of the newly added opposite party Nos. 3 and 4 (serving Army personnel) from the Ordinary Criminal Court to the Military Court, to be tried under the Army Act, 1950 (*hereinafter referred to as the Army Act*), has been refused.

2. A written report was submitted by opposite party No. 2, Sub-Inspector of Police, Shahpur Police Station on 28.01.2007, alleging that five named accused persons along with others were attempting to sabotage the appointment process in the Indian Army by arranging for fake documents and certificates for the purposes of such appointment, at the instance of the applicants. On the basis of the aforesaid written report, a case *vide* Shahpur P.S. Case No. 19 of 2017, as referred to above, was registered for investigation.

3. A petition was filed by opposite party No. 2 on 30/31.01.2017 before the learned court below seeking issuance of warrant of arrest against opposite party Nos.



3 and 4, as it was urged that sufficient materials had been collected against the aforesaid two opposite parties. One Munna Singh had disclosed the names of opposite party Nos. 3 and 4 in his confessional statement regarding their involvement in the occurrence.

4. It was in this context that on 27.03.2017, an application was preferred by the petitioner under Section 475 of the Cr.P.C. read with Section 125 of Army Act, before the learned Additional Chief Judicial Magistrate, Danapur (Patna), seeking transfer of the case of opposite party Nos. 3 and 4, both of whom being serving Army personnel, and committing them to the Commanding Officer for them to be tried by the Military Court in accordance with the Army Act.

5. The aforesaid prayer has been rejected by the order impugned on following two grounds, viz. (i) the offences do not pertain to the Army Act and (ii) no Rules in that regard have been framed by the Central Government as contemplated under Section 475 of the Cr.P.C. and Section 125 of the Army Act.

6. Mr. Kumar Priya Ranjan, learned Advocate appearing for the petitioner has submitted that both the aforesaid grounds are erroneous as the learned court below was not correct in saying that such a prayer could



be made only with respect to offences relating to the Army Act and not *civil offences* and that Rules with regard to transfer of the case of the Army personnel from the Ordinary Criminal Court to Military Court has already been framed which is known as the *Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1978* (hereinafter referred to as the Rules).

7. As opposed to the aforesaid contention raised on behalf of the petitioner, Md. Aslam Ansari, learned Additional Public Prosecutor has submitted that such a prayer could have been made by the petitioner only after charge-sheet in the case had been submitted by the investigating agency and the provisions of Section 125 of the Army Act and Section 475 of the Cr.P.C. do not get attracted when the investigation is continuing/pending.

8. Section 2 of the Army Act describes different categories of Army personnel, who are subject to the Army Act. A *civil offence* has been defined under Section 3 (ii) of the Army Act as an offence which is triable by Criminal Court and the Criminal Court, in turn, has been defined under Section 3 (viii) of the Army Act as a *Court of Ordinary Criminal Jurisdiction* in any part of India.



9. An offence under the Army Act means any act or omission punishable under the Army Act and it includes *civil offences* as defined above. Thus, a *civil offence* is triable by a Criminal Court as also by the Military Court. Almost all the *civil offences* are triable by Court-Martial except a few, which too have been defined and provided for in the Army Act.

10. Section 69 of the Army Act reads as follows:-

69. Civil offences.—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.

11. Closely following the aforesaid section, Section 70 of the Army Act has been enacted which reads as follows:-

70. Civil offence not triable by Court-Martial.—A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not 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.

12. A reading of Sections 69 and 70 of the Army Act makes it very clear that almost all *civil offences* are triable by Court-Martial, but for three specified offences, viz. (i) offence of murder against a person not subject to Military laws; (ii) offence of culpable homicide not amounting to murder against a civilian and (iii) offence of rape in relation to a civilian. For the aforesaid



offences also, Court-martial will have jurisdiction if the accused, who is subject to the Army Act, were in active service at the time of commission of the offence, or such offence had been committed at any place outside India or at a frontier post, specified by the Central Government by notification in that behalf.

13. Thus, a *civil offence* becomes triable by both, Ordinary Criminal Court as well as Court-Martial. It is in such circumstance that there is a possibility of conflict of jurisdiction.

14. In order to resolve such conflict, a scheme for resolution of such a conflict has been provided for under Sections 125 and 126 of the Army Act and Section 475 of the Cr.P.C.

15. For the sake of completeness, the aforesaid sections are being quoted hereinbelow for ready reference:-

(Army Act)

125. Choice between Criminal Court and Court-Martial.—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.

(Army Act)

126. 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 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 upon such reference shall be final.

(Cr.P.C.)

475. Delivery to commanding officers of persons liable to be tried by Court-martial.–(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 unit to which he belongs, or 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 situate within the State be brought before a Court-martial for trial or to be examined touching any matter pending before the Court-martial.

16. From a combined and simultaneous reading of the provisions of Sections 125 and 126 of the Army Act, on the one hand, and Section 475 of the Cr.P.C. on the other, it is found that when a Criminal Court intends to proceed against an accused, who is subject to the Army Act, it would have no jurisdiction to proceed except after giving a notice to the officers referred to in Section 125 of the Army Act, to either deliver over the offender to the nearest Magistrate or to postpone the proceedings pending a reference to be made to the Central Government and in that event, the order of the Central Government shall be final.

17. The Central Government has made Rules in exercise of the powers conferred under Section 475 of the Cr.P.C., viz. *Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1952*. The aforesaid Rules have been amended and now the amended Rules is known as *Criminal Courts and Court-martial (Adjustment*



of Jurisdiction) Rules, 1978.

18. The relevant provisions of the aforesaid Rules, viz. Rules 3, 4, 5, 6, 7, 8 and 9 read as follows:-

3. Where a person subject to military, naval, air force or Coast guard law, or any other law relating to the Armed Forces of the Union for the time being in force is brought before a Magistrate and charged with an offence for which is also liable to be tried by a Court Martial or Coast guard Court, as the case may be, such Magistrate shall not proceed to try such person or to commit the case to the Court of Sessions, unless :-

(a) he is moved thereto by a competent military, naval, air force or Coast guard authority; or

(b) he is of opinion, for reasons to be recorded, that he should so proceed or to commit without being moved thereto by such authority.

4. Before proceeding under Clause (b) of rule 3, the Magistrate shall give a written notice to the commanding officer or the competent military, naval or air force authority, as the case may be, of the accused and until the expiry of a period of fifteen days from the date of the service of the notice he shall not-

(a) convict or acquit the accused under Section 252, sub-sections (1) and (2) of Section 255, sub-section (1) of Section 256 or Section 257 of the Code of



Criminal Procedure, 1973 (2 of 1974), or hear him in his defence under Section 254 of the said Code; or

(b) frame in writing a charge against the accused under Section 240 or sub-section (1) of Section 246 of the said Code; or

(c) make an order committing the accused for trial to the Court of Session under Section 209 of the said Code; or

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

5. Where a Magistrate has been moved by the competent military, naval, air force or Coast guard authority, as the case may be, subsequently gives notice to such Magistrate that, in opinion of such authority, the accused should be tried by a Court Martial or Coast guard court as the case may be, such Magistrate if he had not taken any action or made any order under rule 4, before receiving the notice shall stay the proceedings and if the accused is in his power or under his control, shall deliver him together with the statement referred to in sub-section (1) of section 475 of the said Code to the officer specified in the said sub-section.

6. Where within the period of fifteen days mentioned in rule 4, or at any time thereafter but before the Magistrate takes any action or makes any order referred to in that rule, the



commanding officer of the accused or the competent military, naval, air force or Coast guard authority, as the case may be, gives notice to the Magistrate that in the opinion of such officer or authority, the accused should be tried by a Court Martial or Coast guard court as the case may be, the Magistrate shall stay the proceedings, and if the accused is in his power or under his control, shall deliver him together with the statement referred to in sub-section (1) of section 475 of the said Code to the officer specified in the said sub-section.

7. (1) When an accused has been delivered by the Magistrate under rule 5 or 6, the commanding officer of the accused or the competent military, naval, air force or Coast guard authority, as the case may be, shall as soon as may be, inform the Magistrate whether the accused has been tried by a Court Martial or Coast guard court as the case may be or other effectual proceedings have been taken or ordered to be taken against him.

(2) When the Magistrate has been informed under sub-rule (1) that the accused has not been tried or other effectual proceedings have not been taken or ordered to be taken against him, the Magistrate shall report the circumstances to the State Government which may, in consultation with the Central Government, take appropriate steps to ensure that the accused person is dealt with in accordance with law.



8. Notwithstanding anything in the foregoing rules, where it comes to the notice of a Magistrate that a person subject to military, naval, air force or coast guard law, or any other law relating to the Armed Forces of the Union for the time being in force has committed an offence, proceedings in respect of which ought to be instituted before him and that the presence of such person cannot be procured except through military, naval, air force or coast guard authorities, the Magistrate may by a written notice require the commanding officer of such person either to deliver such person to a Magistrate to be named in the said notice for being proceeded against according to law, or to stay the proceedings against such person before the Court Martial or coast guard court, as the case may be if since instituted, and to make a reference to the Central Government for determination as to the court before which proceedings should be instituted.

9. Where a person subject to military, naval, air force or coast guard law, or any other law relating to the Armed Forces of the Union for the time being in force has committed an offence which in the opinion of competent military, naval, air force or coast guard authority, as the case may be, ought to be tried by a Magistrate in accordance with the civil law in force or where the Central Government has, on a reference



mentioned in Rule 8, decided that proceedings against such person should be instituted before a Magistrate, the commanding officer of such person shall after giving a written notice to the Magistrate concerned, deliver such person under proper escort to that Magistrate.

19. Before the amendment of the *Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1952*, Section 4 did not include sub-Clause (d), viz. "make over the case for inquiry or trial under Section 192 of the said Code", which was added only in the amended Rules of 1978.

20. In ***Som Datt Datta Vs. Union of India & Ors. [AIR 1969 SC 414]***, while dealing with the provisions of the Army Act, especially Sections 125 and 126 thereto and Section 549 of the Code of Criminal Procedure, 1898, which corresponds to Section 475 of the Code of Criminal Procedure, 1973, the Supreme Court clarified that the provisions of Rule 3 of the *Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1952* referred to above, applied to such cases only where the police has laid the charge-sheet and the accused has been brought before the Magistrate after the charge-sheet has been submitted



against him. It was, thus, categorically held that Rule 3 of such Rules cannot be invoked in a case where the police had merely started investigation against a person subject to Army Act and had not submitted the charge-sheet against him.

21. A Division Bench of this Court in ***Ram Padarath Singh Vs. The State of Bihar through the Principal Secretary, Department of Home, Govt. of Bihar, Patna & Ors., reported in 2015 (1) PLJR (HC) 497***, has, however, held that the observations in ***Som Datt Datta*** (*supra*) was made when Rule 3 of the *Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1952* had not been amended. With the amendment in the Rules, in the year 1978, sub-Clause (d) has been added to Rule 4.

22. The amended Rule has already been quoted before.

23. Even at the risk of repetition, it is stated that Rule 4 refers to the orders which cannot be passed by a Magistrate, until the expiry of a period of 7 days from the date of service of notice to the Commanding Officer, *viz.* that no accused shall be convicted or acquitted under Sections 243, 245, 247 or 248 of the Code of Criminal Procedure, 1898 or be heard in his



defence under Section 244 of the said Code or frame a charge against the accused under Section 254 of the Code or make an order committing the accused for trial to the Court of *Sessions* and will not also make over the case for enquiry or trial under Section 192 of the Code of Criminal Procedure, 1973 (*newly added Clause (d) to the Rules*).

24. While explaining the aforesaid clause, *viz.* Rule 4 (d) of the Rules, the Division Bench of this Court in ***Ram Padarath Singh*** (*supra*) held that even when an investigation is pending and the Army authority decides to institute a proceeding before a Court-Martial, it can seek the custody of the accused if the accused is in judicial custody or in the police custody. While interpreting Rule 4 (d) of the Rules, the Division Bench was of the opinion that the judgment rendered by the Supreme Court in ***Som Datt Datta*** (*supra*) was on the basis of the unamended Rules in that regard which did not include Clause (d) of Rule 4 of the *Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1978*.

25. However, what is relevant is that even after the amendment in the *Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1952* and the



coming of the new Rules of 1978, the Supreme Court of India in ***S.K. Jha Commodore Vs. The State of Kerala and Ors. in Cr. Appeal No. 117 of 2010*** has approved and has followed the observation in ***Som Datt Datta (supra)*** that option as to whether the accused be tried before the Criminal Court or by a Court-Martial could be exercised only after the police had completed the investigation and submitted the charge-sheet and that the provisions of the Rules could not be invoked in a case where the police had merely started an investigation against a personnel, subject to Military, Naval or Air-Force law. In the aforesaid case, the Supreme Court approved the interpretation/application of Rule 4 of the *Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules*, as was espoused in ***Som Datt Datta (supra)***.

26. Thus, in view of the judgment of the Supreme Court in ***Som Datt Datta (supra)*** and its confirmation in ***S.K. Jha Commodore Vs. The State of Kerala and Ors. (Cr. Appeal No. 117 of 2010)*** and in other cases by the Supreme Court, Rule 3 of such Rules can only be invoked after the charge-sheet against an accused is submitted and not while investigation is pending.



27. In any view of the matter, the learned Additional Chief Judicial Magistrate, Danapur (Patna) was not correct in rejecting the prayer of the petitioner on the ground that no Adjustment of Jurisdiction Rules exist. This obviously is not correct. That apart, the learned Magistrate shall have the jurisdiction to take a call, supported by reasons that the present case requires to be tried/adjudicated by the Criminal Court. The learned Magistrate, but, shall not proceed in the matter till a notice in that regard is given to the Commanding Officer/competent authority as contemplated under Sections 125 and 126 of the Army Act, Section 475 of the Code of Criminal Procedure, 1973 read with the *Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1978*.

28. For the aforesaid reasons, the order impugned dated 22.04.2017 is, hereby, set-aside.

29. However, the petitioner would be at liberty to approach the learned Magistrate after the investigation in this case is completed and the charge-sheet is submitted. It will also be open for the Magistrate to take a call whether the offence be tried by the Criminal Court only. As and when such a petition shall be filed by the petitioner, the court below shall pass a reasoned order in



accordance with law, in the light of the provisions contained in Sections 125 and 126 of the Army Act, Section 475 of the Code of Criminal Procedure, 1973 read with the *Criminal Courts and Court-martial (Adjustment of Jurisdiction) Rules, 1978*.

30. With the aforesaid direction, the present petition is disposed of.

31. Any interim order/orders shall stand vacated.

(Ashutosh Kumar, J)

Praveen-II/-

U		T	
---	--	---	--

