DELHI SPECIAL POLICE ESTABLISHMENT, NEW DELHI

v.

LT. COL. S. K. LORAIYA

August 24, 1972

[J. M. SHELAT, D. G. PALEKAR AND S. N. DWIVEDI, JJ.]

Code of Criminal Procedure 1898, s. 549(1) *and rules made thereunder—Army Act* 1950, *ss.* 122 *and* 125*—Army officer charged with offences under I.P.C. and Prevention of Corruption Act* 1947 *by Special Judge—Procedure under s.* 549(1) *and r.* 3 *not followed—Charges whether liable to be quashed—Lapse of more than three years between commission of offences and framing of charges—Court martial whether has jurisdiction to try offences—Word 'jurisdiction' in s.* 549(1) *Cr. P.C. and s.* 125 *Army Act, meaning of.*

The respondent who was an army officer was alleged to have committed certain offences under the Indian Penal Code and the Prevention of Corruption Act 1947. The offences were alleged to have been committed in the year 1962. The special judge, Gauhati charged him with these offences in the year 1967. The High Court quashed the charges on the ground *inter alia* that the procedure in s. 549(1) Cr. P.C. and the rules made thereunder had not been followed. The appellant in appeal by special leave to this Court contended that since more than three years had elapsed between the commission of the offences and the framing of the charges the court-martial had in view of s. 122(1) of the Army Act ceased to have jurisdiction to try the said offences and therefore s. 549(1) and the rules made thereunder were not attracted to the case.

HELD: Section 549(1) Cr. P.C. is designed to avoid the conflict of jurisdiction in respect of offences which are triable by both the ordinary criminal court and the court-martial. The clause "for which he is liable to be tried either by the court to which this code applies or by a court-martial" qualifies the preceding clause "when any person is charged with an offence" in s. 549(1). Accordingly the phrase "is liable to be tried either by a court to which this Code applies or a court-martial" imports that the offence for which the accused is to be tried should be an offence of which cognizance can be taken by an ordinary criminal court as well as court-martial. The phrase is intended to refer to the initial jurisdiction of the two courts to take cognizance of the case and not to their jurisdiction to decide on merits. It was admitted that both the ordinary criminal court and the court-martial had concurrent jurisdiction with respect to the offences for which the respondent had been charged by the special judge. So s. 549 and the rules made thereunder were attracted to the case in hand. [1013H-1014C]

Again, sub-section (3) of s.122 of the Army Act provides that while computing the period of three years specified in sub-section (1), any time spent by the accused as a prisoner of war or in enemy territory, or in evading arrest after the commission of the offence, shall be excluded. On a con-joint reading of sub-ss. (1) and (3) of s.122 it is evident that the court-martial and not the ordinary criminal court has got jurisdiction to decide the issue of limitation. If the court-martial finds that it cannot try the offence on account of the expiry of three years from the commission of the offence the Central Government can under s.127 of the Act sanction the trial of the offender by an ordinary criminal court.

[1014D-F]

A

Section 125 of the Army Act provides that when a criminal court and a court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the commanding officer to decide before which court the proceedings shall be instituted. Section 125 supports the view that the court-martial alone has jurisdiction to decide the issue as to limitation. [1014H]

B

The word "jurisdiction" in s.125 really signifies the initial jurisdiction to take congnizance of a case. It refers to the stage at which proceedings are instituted in a court and not to the jurisdiction of the ordinary criminal court and the court-martial to decide the case on merits. Section 549(1) should be construed in the light of s.125 of the Army Act. Both the provisions have in mind the object of avoiding a collision between the ordinary criminal court and the court-martial. Both of them should receive
C the same construction. [1015B]

It was an admitted fact that in the present case the procedure specified in rule 3 was not followed by the Special Judge, Gauhati before framing charges against the respondent. Section 549(1) Cr.P.C. and rule 3 are mandatory. Accordingly the charges framed by the Special Judge against the respondent could not survive. [1013C]

D

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 79 of 1970.

Appeal by special leave from the judgment and order dated May 23, 1969 of the Assam & Nagaland High Court in Cr. Revision No. 31 of 1967.

E

D. Mukherjee, G. L. Sanghi and *R. N. Sachthey,* for the appellant.

A. S. R. Chari and *R. Nagaratnam,* for the respondent.

The Judgment of the Court was delivered by.

F

Dwivedi, J. The respondent, Lt. Col. S. K. Loraiya, is in the army Service. In November-December, 1962, he was posted as Commander, 625, Air Field Engineers, Tejpur. He was charged under s. 120B, Indian Penal Code read with s. 5(1)(e) and (d) and s. 5(2) the Prevention of Corruption Act and
G under ss. 467 and 471 I.P.C. by the Special Judge, Gauhati, appointed under the Prevention of Corruption Act, in respect of the offences alleged to have been committed by him in November-December, 1962, as Commander, 625, Air Field Engineers, Tejpur.

H

The trial started on June 7, 1966, but the charges were framed against him by the Special Judge on January 7, 1967. The respondent filed a 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. Hence this appeal by the Delhi Special Police Establishment, New Delhi, by special leave under Art. 136 of the Constitution.

The High Court quashed the charges for two reasons : (1) The charges were framed by the Special Judge without following the procedure specified in the Rules made under s. 549 Cr.P.C.; and (2) the trial was held in the absence of a sanction by the appropriate authority under s. 196A(2) of the Code of Criminal Procedure in respect of the offences under s. 5 of the Prevention of Corruption Act. The High Court took the view that such sanction was essential as the offence under s. 5 of the Prevention of Corruption Act is a non-cognizable offence.

Counsel for the appellant has submitted that both the reasons given by the High Court are erroneous. Taking up the first reason first, s. 5(1)(b) of the Criminal Law Amendment Act, 1966 could not give exclusive jurisdiction to the Special Judge, Gauhati to try the respondent. It is true that the trial started against him on June 7, 1966, but the charges were framed on January 7, 1967, *i.e.*, long after June 7, 1966. Section 5(1)(b) does not apply where charges are framed after June 7, 1966. So, *prima facie* both the ordinary criminal court and court-martial have concurrent jurisdiction to try the respondent for the aforesaid offences. And s. 549(1) Cr.P.C. applies to such a situation. The material part of s. 549(1) reads : "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.....shall be tried by a court 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 appropriate cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the regiment, corps.... or detachment to which he belongs or to the commanding officer of the nearest military..... station for the purpose of being tried by Court-martial."

The Central Government has framed under s. 549(1) Cr. P.C. rules which are known as the Criminal Courts and Courts Martial (Adjustment of jurisdiction) Rules, 1952. The relevant rule for our purpose is rule 3. 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

A 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 B 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.

It is an admitted fact in this case that the procedure specified C in rule 3 was not followed by the Special Judge, Gauhati before framing charges against the respondent. Section 549 (1) Cr.P.C. and rule 3 are mandatory. Accordingly the charges, framed by the Special Judge against the respondent cannot survive. But counsel for the appellant has urged before us that in the particular circumstances of this case the respondent is not 'liable to be tried' D by a Court-martial.

Section 122(1) of the Army Act, 1950, provides that no trial by court-martial of any person subject to the Army Act for any offence shall be commenced after the expiry of the period of three years from the date of the offence. The offences are alleged to have been committed by the respondent in November-December, E 1962. So more than three years have expired from the alleged commission of the offence. It is claimed that having regard to s. 122(1), the respondent is not liable to be tried by court-martial.

This argument is built on the phrase "is liable to be tried either by the court to which this Code applies or by a Court-F martial" in s. 549(1). According to counsel for the appellant this phrase connotes that the ordinary criminal court as well as the Court-martial should not only have concurrent initial jurisdiction to take cognizance of the case but should also retain jurisdiction to try him upto the last stage of conviction or acquittal. We are unable to accept this construction of the phrase.

G As regards the trial of offences committed by army men, the Army Act draws a threefold scheme. Certain offences enumerated in the Army Act are exclusively triable by a Court-martial; certain other offences are exclusively triable by the ordinary criminal courts; and certain other offences are triable both by the ordinary criminal court and the court-martial. In respect of the last category both the courts have concurrent jurisdiction. Section H 549(1) Cr. P.C. is designed to avoid the conflict of jurisdiction in respect of the last category of offences. The clause "for which he is liable to be tried either by the court to which this Code

applies or by a court-martial" in our view, qualifies the preceding clause "when any person is charged with an offence" in s. 549(1). Accordingly the phrase "is liable to be tried either by a court to which this Code applies or a court-martial" imports that the offence for which the accused is to be tried should be an offence of which cognizance can be taken by an ordinary criminal court as well as a court-martial. In our opinion, the phrase is intended to refer to the initial jurisdiction of the two courts to take cognizance of the case and not to their jurisdiction to decide it on merits. It is admitted that both the ordinary criminal court and the court-martial have concurrent jurisdiction with respect to the offences for which the respondent has been charged by the Special Judge. So, s. 549 and the rules made thereunder are attracted to the case at hand.

Again, sub-section (3) of s. 122 of the Army Act provides that while computing the period of three years specified in sub-section (1). any time spent by the accused as a prisoner of war or in enemy territory, or in evading arrest after the commission of the offence, shall be excluded. Or a con joint reading of sub-ss. (1) and (3) of s. 122, it is evident that the court-martial and not the ordinary criminal court has got jurisdiction to decide the issue of limitation. There it nothing on record before us to indicate that the respondent had not been evading arrest after commission of the offence. As the court-martial has initial jurisdiction to enter upon the enquiry in the case, it alone is competent to decide whether it retains jurisdiction to try the respondent inspite of sub-s.(1) of s. 122. The issue of limitation is a part of the trial before it. If the court-martial finds that the respondent cannot be tried on account of the expiry of three years from the date of the commission of the offence, he cannot be go scot free. Section 127 of the Army Act provides that when a person is convicted or acquitted by a court-martial, he may, with the previous sanction of the Central Government, be tried again by an ordinary criminal court for the same offence or on the same facts. So it would be open to the Central Government to proceed against the respondent after the court-martial has recorded a finding that it cannot try him on account of the expiry of three years from the date of the commission of the offence.

Section 125 of the Army Act provides that 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 to decide before which court the proceedings shall be instituted and if that officer decides that they should be instituted before a court-martial he will direct that the

A accused person shall be detained in military custody. Sections 122(1) and 125 both find place in Chapter X of the Army Act. Section 125 supports our view that the court-martial alone has jurisdiction to decide the issue of limitation under s. 122(1). The word "jurisdiction" in s. 125 really signifies the initial jurisdiction to take cognizance of a case. To put it in other words, it B refers to the stage at which proceedings are instituted in a court and not to the judisdiction of the ordinary criminal court and the court-martial to decide the case on merits. It appears to us that s. 549 (1) should be construed in the light of s. 126 of the Army Act. Both the provisions have 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. C

In the result, we are of opinion that the High Court has rightly held that as the charges were framed without following the procedure specified in the rules framed under s. 549(1) Cr. P.C., they cannot stand.

D As this finding of ours is sufficient to dispose of this appeal, we are not expressing any opinion on the correctness or otherwise of the second reason assigned by the High Court for quashing the charges.

The appeal is dismissed.

G.C. Appeal dismissed.