

HIGH COURT OF JAMMU AND KASHMIR AT
JAMMU

LPAOW No.19/2012

Date of order:23.05.2012

Captian Vinod Kumar & anr.

Vs.

State of J&K

Coram:

Hon'ble Mr. Justice Virender Singh, Acting Chief
Justice.

Hon'ble Mr. Justice Mohammad Yaqoob Mir, Judge.

Appearing counsel:

For the Appellant(s) : Mr. B. S. Slathia, Sr. Advocate with
Mr. Ashish Arora, Adv.

For the Respondent(s) :

1) Whether to be reported in
Press, Journal/Media : No

2) Whether to be reported in
Digest/Journal : Yes

Per Virender Singh-ACJ.

1. Delay in dispensation of justice, more often than not, is occasioned because of procedural wrangles. The case on hand is of that type.
2. The present two petitioners are facing trial in case FIR No.47/1998 registered at Police Station Mandi, Poonch, on 25.09.1998 for offences punishable under Sections 376, 456 and 342 RPC.
3. The factual matrix of the prosecution case needs to be noticed in the start.

4. The petitioners are members of Armed Forces, petitioner No.1 is a Captain in 8th Btn. JAKLI of the Army and petitioner No.2 a Havaldar in said Btn. The allegation against them is that on the night intervening 22nd and 23rd September, 1998, they while posted at Army Post Poonch, Chaktaro, accompanied by other army personnel allegedly broke into residential house of one Noor Mohammad son of Khan Alam resident of Chaktaro, separated male members of the family from the ladies, whisked them away and committed repeatedly rape on two female members of that family aged 18 and 24 years. The occurrence was got lodged by Noor Mohammad. Superintendent of Police, Poonch directed Dy.S.P. Headquarter, Poonch to verify and take necessary legal action. In turn, SHO Police Station, Poonch registered the case against the petitioners under Sections 376/348/342/148 RPC.
5. During the investigation of the case, statements of the victims (names not being disclosed) were recorded under Sections 164 Cr.P.C. before Judicial Magistrate

1st Class, Poonch. The prosecutrix aged 18 years depicted the details as to how petitioner No.1 with the help of petitioner No.2, during the night of occurrence, allegedly disrobed her and committed rape on her a few times within one hour or so. The second prosecutrix in her statement stated as to how petitioner No.2 allegedly stripped her and forcibly committed rape on her in presence of her three year and one and a half years old children.

6. Assistance of experts was also sought during the investigation and ultimately, the challan was presented against the petitioners before Chief Judicial Magistrate, Poonch in April, 1999.
7. Chief Judicial Magistrate, Poonch on 05.06.1999 issued a notice to the Commanding Officer of 8th Btn. JAKLI asking for the option of the army authorities as regards to the trial of the petitioners, so as to know as to whether the accused to be tried by the Court-martial or by the Criminal Court. On 28.06.1999, one Shri Satish Dua, Commanding Officer, informed the Chief Judicial Magistrate, Poonch the decision of the army,

not to try the petitioners by Court-martial. Thereafter, the case was committed to the Court of Sessions for trial.

8. The trial Judge, on the basis of the charge-sheet submitted by the Investigating Agency and the other material attached thereto, found it to be a case of framing charge against both the petitioners under Sections 454, 342, 376 RPC and, accordingly, they were charged on 23.10.1999. On their denial to admit the charge, the prosecution case was set down for recording of prosecution evidence, which was closed on 06.03.2002 and both the petitioners were then confronted with the incriminatory material appearing in the prosecution case in terms of Section 342 Cr.P.C (State Code).
9. When the trial was posted for recording evidence, the petitioners filed a Criminal Transfer Application bearing Cr.T.A. No.19/2003, which was allowed by the High Court on 31.07.2003 and the case was withdrawn from docket of Sessions Judge, Poonch and transferred to the Sessions Court, Jammu, which in turn was

transferred to 2nd Additional Sessions Judge, Jammu for trial.

10. What needs to be mentioned here that after the present case was transferred to 2nd Additional Sessions Judge, Jammu for about two years, no effective proceedings were taken and on 08.02.2005, an application came to be filed by the petitioners, taking a plea that the consent earlier given by Commanding Officer, 8th Btn. JAKLI was not in terms of the Army Act, as both the petitioners were serving under 'Poonch Brigade' and no consent from Brigade Commander of 'Poonch Brigade' was sought. Precisely objection raised by the petitioners was that the committal was bad by the learned Chief Judicial Magistrate, Poonch. The learned trial Court did not agree with the plea raised by the petitioners, as such, dismissed the said application. In short, the application moved by the petitioners for dropping the proceedings was rejected by the trial Court vide order dated 08.01.2005.
11. Both the petitioners, being aggrieved of the order of rejection dated 08.01.2005, knocked the door of the

High Court vide Criminal Revision No.05/2005 reiterating their stand taken before the trial Court. The High Court ultimately vide order dated 02.04.2009 accepted the Revision Petition observing that the Committal Court, where the challan was filed, had not sought the consent from the competent officer in terms of Rule-4 of Army Rules and that Sh. Satish Dua, Commanding Officer, 8th Btn. was not competent to exercise option. It was further held that notice ought to have been gone to the Brigade Commander of the petitioners.

12. After the acceptance of revision petition, the entire case was remitted to the Committal Court (Chief Judicial Magistrate, Poonch) for its disposal under law. The learned Judge once again served a fresh notice on Brigade Commander of the Brigade, in which the petitioners were posted, for exercising the option in terms of the relevant provisions of the Army Act. The concerned Commander vide his reply dated 13.03.2010 conveyed his decision to the Court for not trying the petitioners by Court-martial and consented for their

trial by Criminal Court upon which the case was once again committed to the Court of Sessions in terms of Section 205-D Cr.P.C. The Sessions Court thereafter took up the matter for hearing on 18.03.2010. Before the trial court could move ahead, the petitioners once again approached the high Court with a prayer for transfer of the case from Sessions Judge, Poonch to Sessions Judge, Jammu, in which the proceedings were stayed and finally on 10.08.2010, the said application was allowed, consequently the case transferred to Sessions Court, Jammu. Since no date was fixed by the High Court directing the parties to appear before the Sessions Judge, the petitioners avoided to appear on next ten (10) hearings also. In these circumstances, the trial Court was left with no option but to direct issuance of non-bailable warrants against the petitioners to secure their presence. Before the non-bailable warrants of arrest could be executed, the petitioners filed OWP No.256/2012 in this Court seeking quashment of the entire proceedings before the trial Court in wake of High Court judgment dated

02.04.2009 passed in Criminal Revision No.05/2005, taking the plea that the entire trial stood vitiated *ab initio*.

13. The learned Writ Court did not find favour with the plea taken by the petitioners in the aforesaid writ petition and ultimately dismissed the same vide order dated 02.03.2012 with a direction to the trial Court to proceed with the trial expeditiously. Both the petitioners, being aggrieved of the said order of learned Writ Court, have now filed the present Letters Patent Appeal, which is at admission stage.
14. Since the trial Court proceedings are not stayed by this Court, both the petitioners are appearing before the trial Court, as stated by Mr. Slathia at the bar.
15. This is how that the present case is still at its threshold even after thirteen (13) years of registration of the case.
16. We have heard Mr. Slathia, learned senior counsel, assisted by Mr. Arora, Advocate, and gone through the impugned judgment of the Writ Court.
17. It has been vehemently argued by Mr. Slathia, learned

senior counsel, that once while disposing of Criminal Revision No.05/2005 on 02.04.2009, this Court held that the proceedings before the trial Court are vitiated, nothing was left in the matter to proceed further, as no cause survives thereafter. He submits that continuation of trial, in these circumstances, would render the High Court judgment passed in the criminal revision petition “nugatory”. In short, Mr. Slathia submits that the entire trial be abandoned and stopped.

18. Mr. Slathia in his wisdom has made an attempt to give this case a different complexion in terms of Section 122 of the Army Act, 1950 wherein the maximum period prescribed in giving the consent by the authority is three years stating that in the present case, after the earlier consent held to be bad against the provisions of the Army Act, the Court could not even ask the army authorities for taking fresh decision as to whether the case of the petitioners was to be tried by the Court-martial or Criminal Court (Civil Court). He submits that the entire exercise carried out by learned Chief Judicial Magistrate, Poonch, as such, is in futility.

Therefore, according to the learned senior counsel, entire trial in this case stands vitiated and proceedings further with it, would amount to infringement of constitutional right of the petitioners enshrined under Article 21 of the Constitution of India.

19. In support of his arguments, Mr. Slathia has relied upon the following judgments of Hon'ble Supreme Court :-

- i) AIR 2001 SC 2552 titled Dhurandhar Prasad Singh V. Jai Prakash University; and*
- ii) AIR 2011 SC 1222 titled Md. Sukur Ali v. State of Assam*

20. We are not inclined to accord our agreement with the submissions advanced by Mr. Slathia at the bar.

21. At the very outset, we have felt the necessity of reproducing the last three Paras of the judgment passed by the learned Single Judge in Criminal Revision No.05/2005:-

“19. After going through the record, it reveals that the trial Court has assumed the jurisdiction without complying with the requirement of Sections 125 and 126 of the Army Act read with Rules 3 and 4 of the aforesaid rules. In this case, the Magistrate had issued notice to the commanding officer of the unit, who has given the option that the accused be

tried by criminal court. The only question required to be seen is that while exercising his power under section 126 read with rule 4, the Magistrate has complied with the requirement of law. Compliance with the procedure prescribed by the Act and the Rules mentioned herein supra, is mandatory requirement and any proceeding undertaken by the learned Trial Judge without complying the mandatory procedure would vitiate the trial before the ordinary criminal court and the entire proceedings be rendered null and void. This being the essential question of initial jurisdiction of ordinary criminal Court to try the accused unless the procedures prescribed by the rules are complied with, ordinary criminal Court would not have initial jurisdiction in regard to the matter.

20. The offence for which the accused is to be tried should be an offence of which cognizance be taken by an ordinary criminal court as well as Court-martial. In order to avoid conflict of jurisdiction in respect of such offences, the procedure mandated by sections 125 and 126 of the Army Act read with Rules 3 and 4 of the aforementioned rules, has to be complied with, which has not been done in the present case. The trial court exercised the jurisdiction, which did not vest in it.

21. For the reasons stated hereinabove, the order of committal made by the Chief Judicial Magistrate on the basis of which the trial against the accused was

commenced by the 2nd Additional District and Sessions Judge, Jammu, shall stand vitiated. Consequently the order of the 1st Additional District and Sessions Judge is set aside. Revision petition is accordingly allowed alongwith connected Cr.M.P.

22. It is very clear that the High Court while setting aside the trial Court order dated 08.01.2005 in the aforesaid criminal revision petition had set aside the committal order and not the proceedings before the Chief Judicial Magistrate, on which the cognizance was already taken.
23. It goes without saying that a Criminal Court has jurisdiction to try any accused subject to the Army Act like any other accused facing trial. However, the Army Act for the purposes of trial of army personnel puts certain restrictions on such power before the Court proceeds to try the cases. In terms of Section 125 of the Army Act, the competent Army Officer has the option to get the accused tried by the Court-martial and if he in his wisdom decides that a particular case of a army personnel is not to be tried by Court-martial, a decision is conveyed to the Criminal Court for the trial

of the accused in accordance with the Criminal Code. Therefore, before the ordinary Criminal Court proceeds to try army personnel, an option is sought from the competent authority. After the consent is accorded, then in that eventuality, the jurisdiction vests in the criminal court to try the accused like any other accused.

24. In case the arguments of Mr. Slathia are accepted by us, in that eventuality, an army personnel would go Scott free without facing the trial irrespective of seriousness of the offence, for which he is charged. Crime does not die in this manner.
25. What we gather from the judgment rendered in Criminal Revision No.05/2005 by this Court was that the notice was not given in the requisite format and the option was exercised by the Commanding Officer of the petitioners' Unit and not the Brigade Commander of the Brigade, where the petitioners were posted. In these circumstances, this Court held that the committal order dated 28.06.1999 was inconsequential. It is not held by the Revisional Court that the entire

proceedings from the initial stage, when the charge-sheet was presented or the petitioners entered their appearance, stood vitiated. In para 20 of the said judgment, it is observed that the Committal Court had to adopt the procedure mandated by Section 125 and 126 of the Army Act read with Rules-3 and 4 of the Army Rules, which exercise was not done in the present case and, therefore, the Court exercised the jurisdiction, which did not vest in him. On these observations, the committal order made by the Chief Judicial Magistrate stood vitiated. It is thereafter the matter was remitted to Chief Judicial Magistrate, Poonch, who proceeded strictly in accordance with law by serving a fresh notice of the Brigade Commander and when the concerned authority declined to get the petitioners tried by the Court-martial and consented for their trial by the Criminal Court, the case was committed to the Court of Sessions by Chief Judicial Magistrate.

26. We do not find any illegality in the process adopted by the Committal Court so as to hold the entire trial bad

ab initio or to say that the trial needs to be stopped and abandoned.

27. We have also examined the present case in terms of Section 122 of the Army Act, 1950, which deals with period of limitation for trial by Court-martial of any person subject to the Army Act in which the maximum period is prescribed as three years, as Mr. Slathia has made an attempt to take advantage from this Section.
28. Section 122 of the Army Act reads:

“122. Period of limitation for trial.-(1) Except as provided by sub-section (2), no trial by Court-martial of any person subject to this Act for any offence shall be commenced after the expiration of a period of three years [and such period shall commence.-

(a) on the date of the offence, or

(b) where the commission of the offence was not known to the person aggrieved by the offence or to the authority competent to initiate action, the first day on which such offence comes to the knowledge of such person or authority, whichever is earlier; or

(c) Where it is not known by whom the offence was committed, the first day on which the identity of the offender is known to the person aggrieved by the offence or to the authority competent to initiate

action, whichever is earlier.]

- (2) The provisions of sub-section (1), shall not apply to a trial for an offence of desertion or fraudulent enrolment or for any of the offences mentioned in Sec.37.*
- (3) In the computation of the period of time mentioned in sub-section (1), any time spent by such person as a prisoner of war, or in enemy territory, or in evading arrest after the commission of the offence, shall be excluded.*
- (4) No trial for an offence of desertion other than desertion on active service or of fraudulent enrolment shall be commenced if the person in question, not being an officer, has subsequently to the commission of the offence, served continuously in an exemplary manner for not less than three years with any portion of the regular Army.”*

29. Chapter X of the Army Act is a complete Chapter in itself dealing with the kinds of Court-martial and the procedure to be adopted to hold Court-martial. It is only Section 125 of the Army Act which determines the choice between the Criminal Court and Court-martial where the Criminal Court and the Court-martial each have jurisdiction in respect of an offence. Discretion of choice lies with the Officer Commanding.

30. Plain reading of Section 122 makes it very clear that if

any offence has to be tried by the Court-martial only, the period of limitation shall be three years. So far, so good. But it can not be said that if the Criminal Court has to try an offence, it lacks jurisdiction to try it after three years.

31. We see it yet from another angle. Had the Army authority wanted to try the case of the present petitioners by Court-martial only, section 122 was straight away attracted and any delay beyond that could give cause to the petitioners to challenge that action. But in the present case, the Brigade Commander declined to get the petitioners tried by Court-martial and consented for their trial by Criminal Court. This would not put any statutory bar on Criminal Court to stay its hands to try the case. Therefore, Mr. Slathia cannot derive any advantage from the provisions of Section 122 of the Army Act.
32. We may note here that the judgments cited by Mr. Slathia, in support of his contentions, are not applicable to the facts of the present case.
33. In *Dhurandhar Prasad Singh's* case (Supra), the issue

was with regard to the abatement of suit on the death of party and devolution of interest during the suit. In the said case, their lordships while dealing with Section 23 of Contract Act have drawn the distinction between the expression 'void' and 'voidable'. In our considered view, the facts of that case have no bearing upon the facts of present case, at all.

34. In *Md. Sukur Ali's* case (Supra), criminal case against the accused was decided in the absence of the counsel. In that eventuality, their lordships observed that it was violation of Article 21 of the Constitution of India envisaging protection of life and personal liberty. In the said case, their lordships while referring to different judgments of Hon'ble Supreme Court and Supreme Court of U.S. allowed the appeal, set aside the impugned judgment of the High Court and remanded the matter to the High Court for fresh decision. The fact situation in the case on hand is altogether different. It is not a case in which the petitioners are being tried for the same offence once again after full-fledged trial, therefore infringement of their

constitutional right. May be at the cost of repetition, the entire controversy in this case is with regard to the consent to be accorded by the Army authority to try the accused in criminal Court or Court-martial, the each having the jurisdiction. On this count alone, the Revisional Court held the committal proceedings to be not in accordance with the provisions of Section 125 of the Army Act. Therefore, the entire trial against the petitioners cannot be held to bad, being in violation of Article 21 of the Constitution.

35. As a sequel to the aforesaid discussion, finding no merit in the instant Letters Patent Appeal, the same is dismissed at admission stage itself.
36. We are conscious of the fact that while dismissing the writ petition, the learned Single Judge has directed the trial Court to proceed in the matter expeditiously to ensure that the justice is done without any further delay and to wrap up the trial within six months from the date of passing of the order i.e, 2nd March, 2012. However, picking up the thread from there, we deem it appropriate to direct Director General of Police, Jammu

and Kashmir also to ensure that all the prosecution witnesses appear on the date fixed by the trial Court so that further delay is not attributable to the State in conclusion of the trial, which is already on very tardy pace and calls for its logical end at the earliest.

37. Registrar Judicial of Jammu Wing to convey copy of this order to Director General of Police, Jammu and Kashmir.

(Mohammad Yaqoob Mir)
Judge

(Virender Singh)
Acting Chief Justice

Jammu
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Ram Murti

The judgment is pronounced by me in terms of Rule 138 (4) of the Jammu and Kashmir High Court Rules, 1999.

Jammu
23-05-2012

(Virender Singh)
Acting Chief Justice