REVISIONAL CRIMINAL

Before P. S. Pattar, J.

THE STATE OF PUNJAB,—*Petitioner*

versus

NIRMAL SINGH, ETC.—*Respondents.*

Cr. R. No. 28-R of 1972.

November 27, 1972.

Border Security Force Act (XLVII of 1968)—Sections 47, 80, 81 and 141(2)(k)—Criminal Courts and Border Security Force Courts (Adjustment of Jurisdiction) Rules (1969)—Rules 3 and 5—Employee of Border Security Force on active duty committing an offence triable both by Criminal Court and Security Force Court—Option to decide the forum for trial—Whether lies with the Border Security Force Authorities—Criminal Court—Whether can assume jurisdiction straightaway without reference to Border Security Force Authorities.

Held, that when an offence committed by an empolyee of the Border Security Force on active duty within the meaning of section 47 of the Border Security Force Act, 1968 is triable by a Criminal Court and also by Security Force Court constituted under the Act and both the Courts have concurrent jurisdiction to try the case, provisions of sections 80 and 81 of the Act, which are mandatory, provide a satisfactory machinery to resolve the conflict of jurisdiction. According to these provisions and rules 3 and 5 of the Criminal Courts and Border Security Force Courts (Adjustment of Jurisdiction) Rules, 1969 framed by the Central Government under section 141(2)(k) of the Act, the first option lies with the Border Security Force Authorities to decide the forum of the trial of the case. If those authorities within whose command the accused person is serving or such other officer as may be prescribed, decides that the offenders shall be tried by a Security Force Court then the accused persons should be detained in Force custody and tried by the Security Force Court. However, if the criminal court having jurisdiction to try the case is of opinion that the proceedings shall be instituted before itself then the Presiding Magistrate of the Court shall give notice in writing requiring the aforesaid officers of the Border Security Force to deliver the offenders to him or to refer the matter to the Central Government for decision. On receipt of this intimation from the Magistrate, the officer concerned of the Border Security Force, shall either deliver the offender to that Court or shall refer the matter for decision to the Central Government whose orders shall be final. Hence the first option lies with the Border Security Force Authorities to decide the forum of the trial and the Magistrate gets jurisdiction only after the decision

in his favour by the Central Government is made, in case of conflict between him and the Border Security Force Authorities. The Magistrate cannot assume jurisdiction straightaway unless the Border Security Force Authorities have had opportunity of deciding the forum of trial.

(Para 18)

Case reported under section 438 of the Criminal Procedure Code by Shri Avtar Singh, Additional Sessions Judge, Amritsar,—vide his order dated 15th February, 1972 for revision of the order of Shri H. C. Singla, Judicial Magistrate, 1st Class, Patti, dated 6th January, 1972 dismissing the application of the Commandant, 24th Battalion, B.S.F., Khem Karan and ordering the commitment of the respondents for trial in the Court of Sessions for offences punishable under sections 302 and 307 read with section 34 of the I.P.C.

Kuldip Singh, Advocate, *for the Union of India.*

H. C. Garg, Advocate, *for* S. S. Chopra, Advocate, *for the Punjab State.*

K. L. Bhagat, Advocate, *for* G. S. Chawla, Advocate, *for Respondent No.* 1.

Amarjit Chaudhry, Advocate, *for respondents* 2 *and* 3.

Y. P. Gandhi, Advocate, *for the complainant.*

ORDER

PATTAR, J.—By order dated 15th February, 1972, the additional Sessions Judge, Amritsar made a recommendation to the High Court to quash the commitment order dated 6th January, 1972 of the Judicial Magistrate, by which he committed the respondents, Nirmal Singh, Joginder Singh and Shingara Singh, who are employees of the Border Security Force to stand their trial in the Court of Session under sections 302 and 307 read with section 34 of the Indan Penal Code and that the Prosecution be directed to refer the matter to the Border Security Force Authorities under section 80 of the Border Security Force Act, 1968 for the institution of the proceedings against the respondents in the Court of their choice.

(2) The facts of this case are that on 19th February, 1971 at about 5-30 a.m. Baj Singh, his father Mehal Singh, Karam Singh and Bachan Singh of village Kals went to their fields or irrigating

the same and at that time, Bachan Singh deceased and Baj Singh were sitting on a mare while Mehal Singh was ahead of them. Karam Singh was following the mare with a *kassi* in his hands. When they reached near the hut of Arjan Singh in their field, they heard a voice to the effect that they should stop there. On hearing that voice, Mehal Singh turned the mare to that direction and said that they were going to take turn of their water. The three respondents, Nirmal Singh, Joginder Singh and Shingara Singh, who are employees of the Border Security Force started firing at them and one bullet struck Bachan Singh and as a result he and Baj Singh fell down from the back of the mare. Mehal Singh also received a bullet injury and fell down on the ground. The respondents were recognised as employees of the Border Security Force as that time the sun was about to rise. Baj Singh and Karam Singh ran towards their village and contacted Gehal Singh Sarpanch and brought him to the place of occurrence along with other villagers and they found Bachan Singh lying dead. The dead body of Bachan Singh was taken to Khem Karn. All the respondents went away towards Harbhajan Picket on the Indo-Pakistan Border. Harbans Lal, Sub-Inspector, Incharge Police Post Khem Karn recorded the statement, Exhibit P.C., of Baj Singh and on its basis a case was registered in Police Station Valtoha. The dead body was sent for post-mortem examination. Mehal Singh was sent to V.J. Hospital, Amritsar where he was medically examined. After the completion of the investigation, Darshan Singh Sub-Inspector filed challan against the respondents on 17th May, 1971.

(3) An application was made before the Magistrate on 13th December, 1971 by the Commandant 24th Battalion, Border Security Force, Khem Karn stating that the respondents were the employees of the Border Security Force and that the D I.G. Police, B.S.F., Punjab, had decided that they should be tried by the Security Force Court and, therefore, according to section 80 of the Border Security Force Act and the rules framed thereunder, the Security Force Court had jurisdiction to try the accused and consequently the three accused may be handed over to them for being tried by the Border Security Force Court. This application was made on 18th December, 1971 when the evidence of the prosecution had already been recorded. The Judicial Magistrate, Patti heard arguments of the counsel for the accused and the State Government and he dismissed the aforesaid application of the Commandant, Border Security Force and committed the accused to stand their

trial under sections 302 and 307 read with section 34, Indian Penal Code in the Court of the Session.

(4) The respondents filed a revision petition against this commitment order alleging that the order of the Judicial Magistrate was wrong and incorrect and without jurisdiction and, therefore, it may be quashed in view of the provisions of sections 80 and 47 of the Border Security Force Act, 1968. The Additional Sessions Judge after hearing the counsel for the parties came to the conclusion that the order of the Judicial Magistrate was illegal and may be quashed and he made a recommendation to that effect to this Court.

(5) Arguments were addressed by the counsel for the State of Punjab, counsel for the Union of India, the counsel for the respondents accused and also for the complainant.

(6) Section 47 of the Border Security Force Act (No. 47 of 1968) (hereinafter called 'the Act') reads as follows:—

> "A person subject to this Act, who commits an offence of murder or of culpable homicide not amounting to murder against, or of rape in relation to, a person not subject to this Act, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a Security Force, Court, unless, he commits any of the said Offences,—
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> (*a*) while on active duty; or
>
> (*b*) at any place outside India;
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> (*c*) at any place specified by the Central Government by notification in this behalf."

Section 80 of that Act reads as follows:—

> "When a criminal court and a Security Force Court have each jurisdiction in respect of offence, it shall be in the discretion of the Director-General, or the Inspector-General, or Deputy Inspector-General within whose command the accused person is serving or such other Officer as may be prescribed, to decide before which court

the proceeding shall be instituted, and, if that officer decides that they shall be instituted before a Security Force Court, to direct that the accused person shall be detained in Force custody."

Section 81 of the Act runs as follows:—

"(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 80 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."

The challan in this case was filed in Court against the respondents on 17th May, 1971 and the case was adjourned to 21st May, 1971 for delivering copies of the documents mentioned in section 173(4), Criminal Procedure Code to the accused. However, the copies were incomplete and the case was adjourned to 16th June, 1971 and thereafter to 26th June, 1971. The Magistrate was on leave on the latter date and then the case was adjourned to 29th June, 1971. An application was made on 3rd June, 1971 by the counsel for the accused that all the three accused were employees of the Border Security Force and, therefore, this case was triable by the Security Force Court and the case may be transferred to that Court. The Magistrate on 3rd July, 1971 passed the following order:—

"The parties want to argue the case. To come up on 12th July, 1971 for arguments by the parties as to whether the enquiry in this case is to be initiated by this Court."

However, on 12th July, 1971, the Magistrate was on leave and then the case was adjourned for arguments on the above application of the

accused to 4th August, 1971. On the latter date, the following order was passed:—

> "To come up on arguments on the application on 17th August, 1971."

Arguments were not heard on 17th August, 1971 and then the case was adjourned to 30th August, 1971 for the same purpose. On that date, the defence counsel was not ready for arguments on the application and the adjournment was granted at his request and it was directed that he should bring the relevant provisions of the Border Security Force Act on the next date; otherwise no further adjournment would be given and the case was adjourned to 14th September, 1971. On the latter date, i.e., 14th September, 1971, the following order was passed :—

> "The learned defence counsel states that he does not want to press the application at this stage and would like to withdraw the same. He, however, stated that he reserves the right to move the proper authority in this regard at the appropriate time. In view of this, the application is hereby treated as withdrawn."

The case was thereafter adjourned to 27th September, 1971 and the Magistrate directed the prosecution to deliver complete copies of the documents as required by section 174(4), Criminal Procedure Code to the accused. Thereafter, the Magistrate started his proceedings and recorded the statement of one prosecution witness on 15th October, 1971. The statements of two prosecution witnesses were recorded on 3rd November, 1971 and that of one witness was recorded on 15th November, 1971. Application was made by the Commandant of the Border Security Force, 24th Battalion, Khem Karn on 18th December, 1971 alleging that the three accused were employees of the Border Security Force and, therefore, according to section 80 of the Border Security Force Act, 1968, the D.I.G. Border Security Force has decided that they should be tried by the Security Force Court and that they may be handed over to the Security Force Court. As mentioned above, this application was rejected and the accused were committed to stand their trial in the Court of the Session.

(8) It is thus clear from the records of the Committing Magistrate that an application was made in his Court on 3rd June, 1971

soon after the filing of the challan stating that the accused were employees of the Border Security Force and, therefore, they may be transferred for being tried by Security Force Court. This application of the accused is at page 19 of Nathi B of the file of the Magistrate. Again, there is copy of the order dated 18th June, 1971 of the Sessions Judge, Amritsar releasing Shingara Singh accused on bail and there is a mention in this order that all the three accused were employees of the Border Security Force. Under these circumstances, it was incumbent on the Magistrate to have complied with the provisions of sections 80 and 81 of the Border Security Force Act and he should have given a notice under section 81 of the Act requiring the officers referred to in section 80 of the Act to ascertain their wishes whether they wanted that the accused should be tried by the Security Force Court or not. In the instant case, the Magistrate was moved to act under these sections 80 and 81 but he did not take action and proceeded with the commitment proceedings.

(9) The Central Government in exercise of the powers conferred by clause (k) of sub-section (2) of section 141 of the Border Security Force Act, 1968 framed rules, called the Criminal Courts and Border Security Force Courts (Adjustment of Jurisdiction) Rules, 1969. Its rule 3 says that where a person subject to the Act, is brought before a Magistrate and charged with an offence for which he is liable to be tried by a Border Security Force Court, such a Magistrate shall not proceed to try such person or to inquire with a view to his commitment for trial by the Court of Sessions or the High Court for any offence triable by such Court. Before proceeding with the inquiry or trial of the case, he shall give notice to the Commandant of the accused and unless a period of three weeks has expired, he shall not proceed with the case. Rule 5 of those rules says that on receipt of notice from the Magistrate, the Commandant of the accused or the competent authority shall give notice to the Magistrate that in their opinion, the accused should be tried by a Border Security Force Court, that the Magistrate shall stay proceedings and if the accused is in his power or under his control, then shall deliver him with the statement prescribed in sub-section (1) of section 549 of the Code of Criminal Procedure to the authority specified therein. In the instant case, it is admitted that the respondents are employees of the Border Security Force and it is not denied that they were on active duty within the meaning of section 47 of the Act when they committed the offence. Consequently, the Magistrate was bound to give notice to the competent authorities

mentioned in section 80 of the Act and the rules framed under the Act but he did not do so in spite of the fact that an application had been made by the accused bringing to his notice that they were members of the Border Security Force.

(10) In *Som Datt Datta* v. *Union of India* (1), their Lordships of the Supreme Court observed as follows:—

> "The legal position, therefore, is that when an offence is for the first time created by the Army Act, such as those created by sections 34, 35, 36, 37 etc., it would be exclusively triable by a Court-martial, but where a civil offence is also an offence under the Act or deemed to be an offence under the Act, both an ordinary criminal court as well as a Court-martial would have jurisdiction to try the person committing the offence. Such a situation is visualised and provision is made for resolving the conflict under sections 125 and 126 of the Army Act. Section 125 presupposes that in respect of an offence both a criminal Court as well as a Court-martial have each concurrent jurisdiction. Such a situation can arise in a case of an act or omission punishable both under the Army Act as well as under any law in force in India. It may also arise in the case of an offence deemed to be an offence under the Army Act. Under the scheme of the two sections, in the first instance, it is left to the discretion of the officer mentioned in section 125 to decide before which Court the proceedings shall be instituted, and, if the officer decides that they should be instituted before a Court-martial, the accused person is to be detained in military custody; but if a criminal court if of opinion that the said offence shall be tried before itself, it may issue the requisite notice under section 126 either to deliver over the offender to the nearest Magistrate or to postpone the proceedings pending a reference to the Central Government. On receipt of the said requisition, the Officer may either deliver over the offender to the said Court or refer the question of proper Court for the determination of the Central Government Court for the determination of the Central Government whose order shall be final. These two sections of the

(1) A.I.R. 1969 S.C. 414.

Army Act provide a satisfactory machinery to resolve the conflict of jurisdiction, having regard to the exigencies of the situation in any particular case."

(11) *In Major E.G. Barsay* v. *State of Bombay* (2) the Supreme Court held as under:—

"The Army Act applies to offences committed by army personnel described in section 2; it creates new offences with specified punishments, imposes higher punishments to pre-existing offences, and enables civil offences by a fiction to be treated as offences under the Act; it provides a satisfactory machinery for resolving the conflict of jurisdiction. It does not expressly or by implication bar the jurisdiction of criminal Courts in respect of acts or omissions punishable under the Act, if they are also punishable under any other law in force in India. Section 52 does not create new offences, but only prescribes higher punishments if the said offences are tried by a Court-martial. Where the accused are charged for having been parties to a criminal conspiracy to dishonestly or fraudulently misappropriate or otherwise convert to their own use the military stores and also for dishonestly or fraudulently misappropriating the same, the said acts constitute offences under the Indian Penal Code and under the Prevention of Corruption Act; they are also offences under section 52. Though the offences of conspiracy does not fall under section 52 it being a civil offence, shall be deemed to be an offence against the Act by the force of section 69. The offences are triable both by an ordinary criminal Court having jurisdiction to try the said offences and a court-martial. To such a situation, sections 125 and 126 are clearly intended to apply. If the desgnated officer in section 125 has not chosen to exercise his discretion to decide before which Court the proceedings shall be instituted, there is no occasion for the Criminal Court to invoke the provisions of section 126. Section 126 (1) pre-supposes that the designated officer has decided that the proceedings shall be instituted before a Court-martial and directed that the accused person

(2) A.I.R. 1961 S.C. 1762.

shall be detained in military custody. If no such decision was arrived at, the Army Act could not obviously be in the way of a criminal Court exercising its ordinary jurisdiction in the manner provided by law."

(12) To the same effect was the law laid down in *Kartar Singh Sardar Jit Singh* v. *Emperor* (3), *C. Ramanujan* v. *State of Mysore* (4), and *Major Gopinathan* vs. *State of Madhya Pradesh and another*, (5).

(13) All these rulings are under the Indian Army Act. The provisions of the Indian Army Act discussed in these rulings are similar to the provisions of sections 47, 80 and 81 of the Border Security Force Act, 1968. According to these authorities, once the Border Security Force Authorities had decided that the case should be decided by them, then the Magistrate should have delivered the offender to the Force Authority for trial by the Security Force Court. But in the instant case, although the Magistrate was informed in the beginning soon after the filing of the challan that the accused were the members of the Border Security Force, he did not take any action under the aforesaid provisions of law and the rules framed under section 141 of the Border Security Force Act by the Central Government. Consequently the recommendations made by the Additional Sessions Judge must be accepted and the commitment order should be quashed.

(14) As against this, Mr. Y.P. Gandhi, counsel for the complainants, relied upon *Ajit Singh* v. *State of Punjab* (6) to show that the recommendations of the Additional Sessions judge should be declined because the irregularity committed by the Magistrate was curable under section 537 of the Code of Criminal Procedure. The facts of this case were that neither the Magistrate nor the learned

(3) A.I.R. 1946 Lah. 103 (F.B.).

(4) 1962 (2) Cr. L.J. 389.

(5) A.I.R. 1963 M.P. 249.

(6) I.L.R. (1970) 2 Pb. & Hr. 69 (F.B.)=A.I.R. 1970 Pb. & Hr. 35 (F.B.).

Additional Sessions judge was apprised of the facts, which would make the provisions of section 549, Criminal Procedure Code and the rules framed thereunder applicable. There were four accused in that case and out of these only one was employee of the Air Force. The fact that he was in service of the Air Force was brought to the notice of the Magistrate only at the time of recording his statement after framing charge against him and in the Sessions Court at the time of his examination under section 342, Criminal Procedure Code after a close of the evidence of the trial. Apart from this, before was no material before those Courts that the accused had anything to do with Air Force or that he was on active service. The accused have committed by the Magistrate to stand their trial in the Court of the Session. The three accused, who were not employees of the Air Force were acquitted by the Additional Sessions Judge but Ajit Singh who was an employee of the Air Force was convicted. Before the High Court, it was contended on behalf of the appellant that the trial was vitiated by the illegality, which could not be considered as a mere irregularity arising from the Magistrate not following the procedure prescribed by section 549 of the Code of Criminal Procedure and the rules framed thereunder. On these facts, Koshal J., who spoke for the full Bench observed as follows :—

> "In this point also, I find no substance. Neither the Magistrate nor the learned Additional Sessions Judge was apprised of the facts which would make the said provisions applicable. It is not disputed that neither the policy of the law nor the object underlying the legal provisions just above-mentioned would appear to make it incumbent on every criminal Court taking cognizance of an offence to start with an enquiry as to whether the accused before it is or is not a person subject to Military, Naval or Air Force Law and also one to whom those provisions would apply. Nor could it be intended that an accused person could take the benefit of those provisions after he had gone through a trial ending in a conviction by the ordinary Criminal Court and thus get a chance to have the best of both words. It would, therefore, depend on the circumstances of each particular case as to whether a trial held in breach of the said provisions would be considered illegal and, therefore, liable to be quashed, or to be suffering from a mere irregularity not vitiating it."

(15) Similar was the law laid in *Joginder Singh* v. *State* (7). It was further observed in this Full Bench authority of the Delhi Court as under :—

> "In a case where the appropriate Army Authorities have intimated their decision to have the accused tried by Court-martial, it may be that the trial or inquiry by the Magistrate without securing a favourable determination from the Central Government would be liable in a given case to be quashed as illegal by the higher authorities, but this may not necessarily mean that the Magistrate has acted without jurisdiction, rendering the proceedings *non est*.
>
> As a result of the foregoing discussion, the violation of rules 3 and 4 of the rules does not seem to us by itself to deprive the Magistrate of his inherent jurisdiction, thereby automatically nullifying all subsequent proceedings and the effect of such violation has to be determined on evaluation of all the facts and circumstances of each case."

(16) According to these two authorities, it would depend on the circumstances of each particular case as to whether a trial held in breach of the provisions of section 549, Criminal Procedure Code and the rule framed thereunder and also the provisions of the Indian Army Act would be considered illegal and, therefore, liable to be quashed or to be suffering from a mere irregularity not vitiating it.

(17) Both these authorities are distinguishable and do not apply to the facts of the present case. In the instant case, as observed above, the challan was filed against the respondents on 17th May, 1971 in the Court of Magistrate and an application was made by the counsel on 3rd June, 1971 stating that they were employees of the Border Security Force and, therefore, this case should be transferred for trial to the Security Force Court but the Magistrate did not take any action and did not comply with the mandatory provisions of sections 47, 80 and 81 of the Border Security Force Act, 1968. Again, an application was made on 18th December, 1971 by the Commandant of the 24th Battalion stating that it had been decided by the D.I.G., Police Border Security Force that this case should be tried by the Security Force Court but the same was rejected by the Magistrate on wholly untenable grounds.

(7) 1969 P.L.R. 61 (F.B.).

(18) The legal position, therefore, is that when an offence committed by an employee of the Border Security Force is triable by a criminal Court and also by Security Force Court, constituted under the Border Security Force Act, 1968, and both the Courts have concurrent jurisdiction to try the case, the provisions of sections 80 and 81 of the Border Security Force Act, 1968, provide a satisfactory machinery to resolve the conflict of jurisdiction. According to these provisions and the rules framed by the Central Government under section 141 of the Border Security Force, Act, the first option lies with the Border Security Force authorities, to decide the forum of the trial of the case. If those authorities, viz. the Director General, or the Inspector Genreal or the Deputy Inspector General, within whose command the accused person is serving or such other officer as may be prescribed, decides that the offenders shall be tried by a Security Force Court then the accused persons should be detained in Force custoday and tried by the Security Force Court. However, if the criminal Court having jurisdiction to try the case of opinion that the proceedings shall be instituted before itself then the Magistrate shall give notice in writing requiring the aforesaid officers of the Border Security Force to deliver the offenders to him or to refer the matter to the Central Government for decision. On recepit of this intimation from the Magistrate, the officer concerned of the Border Security Force, should either deliver the offender to that Court or shall refer the matter for decision to the Central Government whose order shall be final. It follows that the first option lies with the Border Security Force authorities to decide the forum of the trial and the Magistrate gets jurisdiction only after the decision in his favour by the Central Government is made, in case of conflict between him and the Border Security Force authorities. The Magistrate could not assume jurisdiction straight away unless the Border Security Force authorities have had opportunity of deciding the forum of trial.

(19) For the reasons given above it is held that the proceedings before the Magistrate and the commitment order passed by him were illegal and are liable to be quashed. As a result the recommendation made by the Additional Sessions Judge Amritsar are accepted, the order of commitment passed by the Judicial Magistrate, is set aside and it is directed that the respondents-accused should he handed over to the Border Security Force authorities for institution of the proceedings against them in the Security Force Court.

B.S.G.