order of respondent No 1 is good on merits, I should not interfere in this case on technical grounds. At the same time he submitted that if I hold that the finding of the Labour Court, Jullundur, on issue No. 2 is either vitiated or is otherwise liable to be set aside, I should say so in order to save the parties from unnecessary further proceedings before the Labour Court, Rohtak. I am unable to agree with Mr. Anand Swarup in this respect. Once I hold that the Labour Court, Jullundur, had no jurisdiction to adjudicate upon the reference, there is no award in the eye of law before me into the question of correctness of which on merits I can go. To hold, as Mr. Anand Swarup wants me to do, that the award is good on merits, would be to uphold the order made by a tribunal without jurisdiction. Similarly if I were to hold that the finding on issue No. 2 is bad on merits it would amount to beating a dead horse, and would unnecessarily preclude the employee from his right to have the reference dealt with by a Labour Court having jurisdiction to do so on fresh and additional material, if he so desires. I, therefore, refrain from expressing any opinion on the merits of the controversy.

(15) For the foregoing reasons this writ petition is allowed, the impugned order of the State Government transferring the reference from the Labour Court, Rohtak, to the Labour Court, Jullundur, as well as the impugned award of respondent No. 1 are hereby set aside, the reference originally made by the Governor of Punjab is revived, and would now be dealt with and disposed of by the Labour Court, Rohtak, in accordance with law. As the contesting respondent is an employee, I make no order as to costs of the proceedings in this Court.

K. S. K.

FULL BENCH

Before Harbans Singh, Jindra Lal and A. D. Koshal, JJ.

AJIT SINGH,—*Appellant*

versus

THE STATE OF PUNJAB,—*Respondent*

Criminal Appeal No. 1215 of 1968.

Murder Reference No. 3 of 1969

January 28, 1970

Code of Criminal Procedure (*V of* 1898)—*Section* 549—*Air Force Act* (*XLV of* 1950)—*Sections* 124, 125 *and* 126—*Trial of an Air Force personnel for*

civil offences—Non-observance of provision of section 549 and rules framed thereunder—Such trial —Whether vitiated for lack of jurisdiction—Criminal Court not apprised of the applicability of section 549 to an accused person—Such Court—Whether to make an inquiry in respect thereto.

Held, that when section 549 of the Code of Criminal Procedure comes into play in the case of a member of the Air Force, it cannot be said that a Magistrate before whom he is produced would not have jurisdiction to take cognizance till the procedure laid down in the rules framed under the section has been gone through and the necessary order of the Central Government obtained in the case of a conflict between the Magistrate and the Air Force authorities. The Air Force Act does not stand in the way of the Magistrate "exercising his ordinary jurisdiction in the manner provided by law". The result is that section 549 of the Code and the rules framed thereunder must be looked upon as provisions which merely regulate the exercise by the Magistrate of that jurisdiction which already vests in him and cannot be treated as directions which must be followed by the Magistrate before he can "acquire" jurisdiction. The inherent jurisdiction which a Magistrate has to take cognizance of civil offences under the Code of Criminal Procedure is not taken away by any provisions of Air Force Act and of section 549 of the Code and the rules made thereunder. What those provisions envisage is concurrent jurisdiction in the criminal courts and the courts-martial and an arrangement for the proper exercise of such jurisdiction including, when necessary, a way of resolving a conflict of jurisdiction.

(Paras 8 and 10)

Held, that neither the policy of law nor the object underlying the provisions of section 549 of the Code and the rules framed thereunder would 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 without apprising it of facts attracting their applicability and thus get a chance to have the best of both worlds. 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.

(Para 13)

Case referred by the Division Bench consisting of the Hon'ble Mr. Justice Jindra Lal and the Hon'ble Mr. Justice A. D. Koshal on September 2, 1969 to a larger bench for decision of important questions of law involved in the case. After deciding the law points the larger Bench consisting of the Hon'ble Mr. Justice Harbans Singh, the Hon'ble Mr. Justice Jindra Lal and the Hon'ble Mr. Justice A. D. Koshal returned the case to Division Bench for final decision.

Appeal from the order of Shri Jagwant Singh, Additional Sessions Judge, Amritsar, dated the 30th November, 1968 convicting the appellant.

A. S. ANAND, HARPARSHAD AND K. D. SINGH, ADVOCATE, for the Appellants.

A. S. BAINS, DEPUTY ADVOCATE-GENERAL (PUNJAB), WITH N. S. CHHACHHI, for the Respondent, R. L. BATTA, ADVOCATE, for the Complainant.

ORDER

JINDRA LAL, J.—Ajit Singh alias Gurjeet Singh, son of Harbans of village Asal Autar has been sentenced to death on three counts under section 302, Indian Penal Code. He has been further convicted under section 307, Indian Penal Code, on eleven counts and sentenced to undergo rigorous imprisonment for seven years on each count. His co-accused, i.e., Ajit Singh, son of Sohan Singh, Harbhajan Singh alias Dayal Singh, Gurbax Singh and Pala Singh, who were tried with Ajit Singh alias Gurjeet Singh, for constructive liability for the offences for which Ajit Singh has been convicted, were given the benefit of the doubt by the learned Additional Sessions Judge and were acquitted.

During the pendency of this appeal and Murder Reference, the Public Prosecutor made an application under sections 428 and 561-A, Criminal Procedure Code, for additional evidence and personal appearance of the appellant in view of a ground taken by the appellant in the grounds of appeal that in any case in the circumstances of the case capital punishment was not called for. This was on account of some dispute raised with regard to the age of Ajit Singh. In the meantime additional grounds of appeal were submitted to this Court by Ajit Singh through jail. These were forwarded by the Superintendent, Central Jail, Amritsar, on the 25th of July, 1969. In the additional grounds of appeal it was urged that at the time of the commission of the offence the appellant was L.A.C in the Air Force and was on active service although on leave, and that under section 549, Criminal Procedure Code, and rule 3 of the Criminal Courts and Courts Martial (Adjustment of Jurisdiction) Rules, 1952, it was incumbent upon the Committing Magistrate and the learned Additional Sessions Judge to inform the competent Air Force authority in writing about the case against the appellant and to enquire, before proceeding with the appellant's case whether the said authority wanted to claim the appellant for trial by Court Martial. It was maintained that the provisions of rule 3 of Criminal Courts and Court Martial

(Adjustment of Jurisdiction) Rules, 1952, not having been complied with, the trial was vitiated.

While we were hearing the appeal on the 14th of August, 1969, it was pointed out that there was no evidence on the record of this case on the basis of which it could be asserted that the appellant at the time of the incident was in the Air Force so as to entitle him to trial by Court Martial. The hearing was adjourned to enable learned counsel for the appellant to place before this Court, if he was so advised, evidence by way of affidavit or otherwise in order to lay the basis for the ground taken before us. In view of the importance of the law point involved we directed the learned Advocate General to assist us in this matter himself.

We have heard learned counsel for the parties. Learned counsel for the appellant has pointed out the provisions of section 549, Criminal Procedure Code. This section provides for delivery to military authorities of persons liable to be tried by Court Martial and is in the following terms:—

> "(1) The Central Government may make rules, consistent with this Code and the Army Act, the Naval Discipline Act, the Indian Navy (Discipline) Act, 1934, and the Air Force Act and any similar law for the time being in force as to the cases in which persons subject to military, naval or air-force law shall be tried by a Court to which this Code applies, or by 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 regiment, corps, ship or detachment 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 Court-martial.
>
> (2) Every Magistrate shall, on receiving written application for that purpose by the commanding officer of any 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."

Attention was also drawn to the Air Force Act, 1950. Section 2 of the Air Force Act, 1950, is in the following terms:—

"The following persons shall be subject to this Act wherever they may be, namely:—

(a) officers and warrant officers of the Air Force;

(b) persons enrolled under this Act;

(c) persons belonging to the Regular Air Force Reserve or the Air Defence Reserve or the Auxiliary Air Force, in the circumstances specified in Section 26 of the Reserve and Auxiliary Air Forces Act, 1952;

(d) persons not otherwise subject to the air force law, who, on active service, in camp, on the march, or at any frontier post specified by the Central Government by notification in this behalf, are employed by, or are in the service of, or are followers of, or accompany any portion of the Air Force."

Section 4(i) of the Air Force Act specifies persons who are deemed to be on 'active service' as under:—

" 'active service' as applied to a person subject to this Act, means the time during which such person—

(a) is attached, or forms part of, a force which is engaged in operations against an enemy; or

(b) is engaged in air force operations in, or is on the line of march to, a country or place wholly or partly occupied by an enemy; or

(c) is attached to, or forms part of, a force which is in military occupation of any foreign country."

Section 9 gives power to the Central Government to declare persons to be on active service by a notification and is in the following terms:—

"Notwithstanding anything contained in clause (i) of section 4, the Central Government may, by notification, declare that any person or class of persons subject to this

Act shall, with reference to any area in which they may be serving or with reference to any provision of this Act or of any other law for the time being in force, be deemed to be on active service within the meaning of this Act."

Attention was also drawn to the Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1952, more particulary to rules 3, 4, 5 and 6, which are in the following terms:—

"3. Where a person subject to military, naval or Air Force is brought before Magistrate and charged with an offence for which he is liable to be tried by a Court-Martial, such Magistrate shall not proceed to try such person or to inquire with a view to his commitment for trial by the Court of Session or the High Court for any offence triable by such Court, unless—

(a) he is of opinion, for reasons to be recorded, that he should so proceed without being moved thereto by competent military, naval or Air Force authority, or

(b) he is moved thereto by such authority.

4. Before proceeding under clause (a) of rule 3, the Magistrate shall give a written notice to the Commanding Officer of the accused and until the expiry of a period of—

(i) three weeks, in the case of a notice given to a Commanding Officer in command of a unit or detachment located in any of the following areas of the hill districts of the State of Assam, that is to say—

(1) Mizo,

(2) Naga Hills,

(3) Garo Hills,

(4) Khasi and Jaintia Hills, and

(5) North Cachar Hills;

(ii) seven days in the case of a notice given to any other Commanding Officer in command of a unit or detachment located elsewhere in India, from the date of service of such notice he shall not (a) convict or acquit the accused

under sections 243, 254, 247 or 248 of the Code of Criminal Procedure, 1898 (Act 5 of 1898), or hear him in his defence under section 244 of the said Code; or

(b) frame in writing a charge against the accused under section 254 of the said Code ; or

(c) make an order committing the accused of trial by the High Court or the Court of Sessions under section 213 of the said Code; or

(d) transfer the case for inquiry or trial under section 192 of the said Code.

5. Where within the period of seven days mentioned in rule 4, or at any time thereafter before the Magistrate has done any act or made any order referred to in that rule, the Commanding Officer of the accused or competent military, naval or Air Force authority, as the case may be, gives notice to the Magistrate that in the opinion of such authority, the accused should be tried by a Court-martial, the Magistrate shall stay proceedings and if the accused is in his power or under his control, shall deliver him, with the statement prescribed in sub-section (1) of section 549 of the said Code to the authority specified in the said sub-section.

6. Where a Magistrate has been moved by competent military, naval or Air Force authority, as the case may be, under clause (b) of rule 3, and the Commanding Officer of the accused or competent military, naval or Air Force authority as the case may be, subsequently gives notice to such Magistrate that, in the opinion of such authority, the accused should be tried by a Court-martial, such Magistrate, if he has not before receiving such notice done any act or made any order referred to in rule 4, shall stay proceedings and, if the accused is in his power or under his control, shall in the like manner deliver him, with the statement prescribed in sub-section (1) of section 549 of the said Code to the authority specified in the said sub-section."

It is not disputed that the Central Government issued on the 5th of December, 1962, a notification No. S.R.O. 8-E in the following terms :—

"In exercise of the powers conferred by section 9 of the Air Force Act, 1950 (45 of 1950), the Central Government hereby declares that all persons subject to the said Act,

shall, however they may be serving, be deemed to be on active service within the meaning of the said Act, for the purposes of the said Act and of any other law for the time being in force."

Section 124 of the Air Force Act, 1950, 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 Chief of the Air Staff, the officer commanding any group, wing or station in which the accused prisoner 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 detailed in Air Force custody. Section 125 of Air Force Act is in the following terms:—

"(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 124 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."

Section 71 of the Air Force Act is in the following terms :—

"Subject to the provisions of section 72, 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 any 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."

Section 72 of the said Act is in the following terms:—

"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 said Government by notification in this behalf.

Explanation.—In this section and in section 71 "India" does not include the State of Jammu and Kashmir."

It is the contention on behalf of the appellant that in view of the provision mentioned above, the appellant must be deemed to be on active service although he was on leave and consequently the offence was triable by a Court-Martial and since no information was given to the appropriate officer to enable him to claim that the appellant should be tried by Court Martial, his trial is vitiated and he is entitled to acquittal.

It seems to be fairly clear that neither the learned Magistrate who committed the accused for trial nor the learned Additional Sessions Judge gave any notice to the appropriate officer requiring to exercise his option as contemplated by law. Before the Committing Magistrate nothing was disclosed which would indicate to him that the appellant was in the Air Force. It is only when the charge was framed against the appellant and his plea was taken that the appellant stated his age to be 18 years and service in I.A.F. When examined under the provisions of section 342, Criminal Procedure Code, at the trial he stated that he was an employee of the

Indian Air Force. Apart from these, there was no other material on the record during the trial that the appellant had anything to do with the Air Force.

An affidavit has, however, been produced before us sworn by Wing Commander K. S. Suri, dated 20th of August, 1969, wherein it is stated that Leading Aircraftsman Gurjeet Singh, son of Harbans Singh, is an Airman who is on the posted strength of his Unit with effect from 9th of July, 1966, having been enrolled in the Air Force on the 4th of October, 1963, and after the 5th of December, 1962, he was on active service in the Air Force,—*vide* declaration by the Central Government, dated 5th of December, 1962 (Notification S.R.O. 8-E, dated 5th of December, 1962).

Before us learned counsel for the appellant has urged that in view of non-compliance with section 549, Criminal Procedure Code, read with the rules made thereunder, the trial is vitiated because these provisions were mandatory in nature. To support his contention he has relied upon some authorities.

In re: *Captain Hugh May Stollery Mundy and another* (1), it was held by a Division Bench that where the attention of the Magistrate who tried the accused was not drawn to section 549, Criminal Procedure Code, or the rules framed thereunder and he did not act in accordance therewith, the trial was illegal and the conviction and sentence must be set aside. In this case the accused was an engine-room mechanic who had been sentenced to three months' rigorous imprisonment for an offence under section 304-A, Indian Penal Code, and rigorous imprisonment for one month under section 116, Motor Vehicles Act.

In *Awadh Behari Singh* v. *The State* (2), it has been held that when the mandatory provisions of section 549, Indian Penal Code, and the rules made thereunder are not complied with, the procedural defect is not merely an irregularity but is an illegality, which affects the jurisdiction of the Magistrate in the trial Court and in such case the conviction and sentence passed against the accused must be set aside. It was further held that rule 3 of Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules 1952, framed

(1) A.I.R. 1945 Mad. 289.
(2) A.I.R. 1967 Cal. 323.

under section 549, Criminal Procedure Code, must be strictly complied with before a military personnel can be tried by a Magistrate as it provides the jurisdiction of the Magistrate to try such personnel. In that case a Naik of the Indian Army was prosecuted under the Opium Act. The Company Commander, the competent military authority, wrote a "confidential" letter to the Deputy Commissioner of Excise asking him to try the accused under the civil law. The letter was made available to the Magistrate for trying the accused under section 549, Criminal Procedure Code, and the accused was convicted. The Division Bench of the Calcutta High Court set aside this conviction.

In Re: *Major F. K. Mistry* (3), it has been held that "where the Court fails in its duty to give notice to the commanding officer of the accused, the proceedings before the Magistrate relating to the recording of evidence, etc., would be illegal and without jurisdiction; and acquiescence on the part of the accused in an irregular or illegal proceeding would not regularise or legalise the proceedings. A charge so framed would be without jjurisdiction andn has to be quashed."

Two other authorities were relied upon *Emperor* v. *Jerry D. Sena* (4), and *Amarendra Chandra Chakravorty* v. *Garrison Engineer* (5),

The State relied upon *Major E. G. Barsay and others* v. *The State* (6). That was a case where one E. G. Barsay and others were tried before a Special Judge set up under the Criminal Law Amendment Act. It was held that it cannot be said that the rules framed under section 549, Criminal Procedure Code, will have to be followed by a Special Judge. It will be seen that this case hardly helps the State.

Reliance was mainly placed upon a judgment of the Full Bench of the Delhi High Court in *Joginder Singh* v. *State* (7). Dua, C.J., (as he then was) and Tatachari, J., came to the conclusion that violation of rules 3 and 4 of the Criminal Courts and Court-Martial

(3) 1949 (2) Madras Law Journal 44.
(4) A.I.R. 1945 Bom. 176.
(5) A.I.R. 1955 Cal. 340.
(6) A.I.R. 1958 Bom. 354.
(7) 1969 P.L.R. (Delhi Section) 61 (F.B.).

(Adjustment of Jurisdiction) Rules framed under section 549, Criminal Procedure Code, does not by itself deprive the Magistarte of his inherent jurisdiction, thereby automatically nullifying all subsequent proceedings and that the effect of the violation is to be determined on the facts and circumstances of each case keeping in view the nature of the violation and all other relevant factors. They relied upon the observations made by their Lordships of the Supreme Court in *Major E. G. Barsay* v. *State of Bombay* (8), S. K. Kapur, J,. however, came to a contrary conclusion and held that the observance of the above rules was obligatory and non-obserance thereof will result in an illegality vitiating the trial.

The points raised in this appeal and Murder Reference are of considerable importance. These points were not raised in some of the appeals which had been previously disposed of in this Court where Army and Air Force personnel had been convicted by the lower Court and we, therefore, consider that this is a fit case which should be heard by a larger Bench. We, therefore, direct that the papers of this case be placed before Hon'ble the Chief Justice for constituting a larger Bench. In view of the fact that the appellant been sentnced to death, this case be heard at a very ealry date.

A. D. KO;HAL, J.—I agree.

ORDER OF THE FULL BENCH

KOSHAL, J.—The facts giving rise ot this reference, along with the relevant provisions of law, are fully set out in the referring order dated the 2nd of September, 1969, (which shall be treated as part of this judgment) and need not be repeated here. I shall start directly with a discussion of the points requiring determination.

(2) The first such point was raised on behalf of the State with the argument that on the day of the occurrence the appellant being on leave from his Unit, he could not be said to be on "active service" within the meaning of notification No. S.R.O. 8-E, dated the 5th of December, 1962 (supra) issued by the Central Governnment under section 9 of the Air Force Act, 1950 (hereinafter to be referred to as the Act). It is urged that the words "wherever they may be serving" formng part of the notification would cover only such persons

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

as at the relevant point of time are actually engaged in performing the duties of their respective offices. This argument, which gives a restricted meaning to the word "serving", is unacceptable to us. In our opinion, the word must be construed in the wider sense in which a person employed by another is said to be serving him merely by reason of the relationship created by the employment. The word is not defined in the Act. Webster's Third New International Dictionary (1961 Edition) gives *inter alia*, the following meaning of the word "serve":

> "to be a servant: become employed in domestic service, at manual labour, or upon another's businss: * * *; to do service * * * *: to do military or naval service: be a soldier or sailor * * *: to hold an office: discharge a duty or function: act in a capacity * *."

(3) According to Corpus Juris Secundum (1952 Edition), Vol. LXXIX, the general meaning of the word "serve" is to perform service, and—

> "The word 'service' has a multiplicity and a variety of meanings and different significations. It is not a simple word with a simple meaning, leaving no room for construction, but rather it is a broad term of description, which varies in meaning according to the sense in which it is used and the context in which it is found, and the sense in which it is used must be determined from the context. Thus the courts have found it impracticable to attempt a definition by which to test every case that may arise."

It is further stated:

> "The word 'service' is also defined as meaning the being employed to serve another; the position of servant; the state of being a servant; the occupation, condition, or status of a servant; the work of a servant; the work of a slave, hired man, or employee: the attendance of an inferior, hired helper, slave, etc."

(4) There is thus no doubt that in one sense the word "serving" used in the notification would mean holding employment as distinguished from actually performing the duties of service and it is in that sense, I think, that the word has been used. It is not disputed

that if the appellant had actually been with his Unit at the time of the occurrence but had been off duty otherwise than while on leave, he would, though not discharging the functions of his office, fall within the ambit of the phrase "wherever they may be serving". If that be so, the restricted meaning sought to be given on behalf of the State to the phrase just mentioned cannot be accepted as that in which the Legislature used the phrase.

(5) Reliance on behalf of the State was placed on *State* v. *Datta traya Tulshiram Bhujbal* (9), in which a Naval Rating was committed for trial to the Court of Session for an offence under section 366, of the Indian Penal Code on the 24th of February, 1959, when he was admittedly on leave of absence in the Poona District. According to the learned Sessions Judge, the Committing Magistrate, in passing an order of committal, had ignored the provisions of section 549 of the Code of Criminal Procedure and the rules framed thereunder. He, therefore, referrd the case to the High Court for quashing the order of commitment. Rejecting the reference, Shah and Vyas, JJ., observed with regard to a contention that the conduct of the accused in abducting the victim of the rap might be regarded by the Naval authorities as prejudicial to good naval discipline, that it would be open to them to charge the accused for an offence under section 43 of the Indian Navy (Discipline) Act, XXXIV of 1934, and that if they so regarded the conduct of the accused, the ordinary tribunals of the State could have no jurisdiction to try him for the offence of rape :

> "In our view, there is no substance in that contention. Section 43 of the Act provides a penalty for any act, disorder or neglect to the prejudice of good order and naval discipline which is not spcified in sections 2 to 42. In order that an act, disorder or neglect may be regarded as prejudicial to good order and discipline, it must have some direct relation to the duty which is required to be performed by a person subject to Naval duty. In the present case the accused was on leave and he was not discharging any duty at the time of the commission of the offence. Every immoral act may in a larger sense be regarded as an act to the prejudice of good order or naval discipline but we do not think that the legislature intended by enacting section 43 which penalises

(9) I.L.R. 1956 Bom. 392

'miscellaneous offences' to render every act done by a person subject to Naval law, which may be regarded as an offence under the ordinary law of the land, or which may be regarded as contrary to good morals, punishable under section 43. Section 43, in our judgment, is intended to punish acts, disorders or neglects which tend to prejudice good order and naval discipline, and it is necessary that at the time of doing the act or being guilty of disorder or neglect th offender was on active duty.

As the accused was at the time of the alleged commission of the offenre not on artive duty, we ase unable to hold that the conduct of the accused falls within the terms of section 43 of the Indian Navy (Disdipline) Act, XXXIV of 1934."

This authority is of no help to the contention raised on behalf of the State inasmuch as the provisions of section 43 above-mentioned which are set out below have no relation to the language employed in and the substance of the notification in question.

"43. Every person subject to this act who shall be guilty of any act, disorder or neglect to the prejudice of good order and naval discipline not hereinbefore specified shall be dismissed from His Majesty's service, with disgrace, or suffer such other punishment as is hereinafter mentioned."

(6) In view of what I have already said, I would hold that the appellant was on active service within the meaning of the said notification on the date of the commission of the offences alleged against him, in spite of the fact that he was on leave from the Air Force.

(7) The next question calling for decision arises from the non-observance of the provisions of section 549 of the Code of Criminal Procedure and the rules framed thereunder. It is urged on behalf of the appellant that his committal and the trial held in pursuance thereof must be held to be without jurisdiction. According to his learned counsel, the Magistrate had no jurisdiction to begin, with, and that he could acquire jurisdiction only after a decision in his favour had been given by the Central Government in the case of a conflict between the Army authorities and the Magistrate. Reliance for the contention is placed on the authorities cited in that behalf in the order of reference. In my view, however, none of those authori-

ties can be said to have been correctly decided in view of the following observations of their Lordships of the Supreme Court in *Major E. G. Barsay* v. *State of Bombay* (8), in relation to the provisions of the Army Act, 1950 :

> "The scheme of the Act therefore is self-evident. It applies to offences committed by army personnel described in section 2 of the Act, 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. Further it enables, subject to certain conditions, an accused to be tried successively both by court-martial and by a criminal court. It does not expressly 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; nor is it possible to infer any prohibition by necessary implication. Sections 125, 126 and 127 exclude any such inference, for they in express terms provide not only for resolving conflict of jurisdiction between a criminal court and a court-martial in respect of the same offence, but also provide for successive trials of an accused in respect of the same offence.
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> Though the offence of conspiracy does not fall unedr section 52 of the Act, it, being a civil offence, shall be deemed to be an offence against the Act by the force of section 69 of the Act. With the result that 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. But the designated officer in section 125 has not chosen to exercise his discretion to decide before which court the proceedings shall be instituted. As he has not exercised the discretion, there is no occasion for the criminal court in invoke the provisions of section 126 of the Act, for the second part of section 126(1), which enables the criminal court to issue a notice to the officer designated in section 125 of the Act

to deliver over the offender to the nearest magistrate or to postpone the proceedings pending a reference to the Central Government, indicates that the said sub-section presupposes that the designated officer has decided that the proceedings shall be instituted before a court-martial and directed that the accused person shall be detained in military coustody. If no such decision was arrived at, the Army could not obviously be in the way of criminal court exercising its ordinary jurisdiction in the manner provided by law."

(8) It may be noted here that sections 125, 126 and 127 of the Army Act make provisions for army personnel exactly similar to those which sections 124, 125 and 126 of the Act make in respect of members of the Air Force so that the observations just quoted are applicable *mutati mutandis* to the latter set of sections and it must be held that when section 549 of the Code of Criminal Procedurce comes into play in the case of a member of the Air Force, it cannot be said that a Magistrate before whom he is produced would not have jurisdiction to take cognizance till the procedure laid down in the rules framed under the section has been gone through and the necessary order of the Central Government obtained in the case of a conflict between the Magistrate and the Air Force authorities. In view of the observations just above quoted, it must be held that the Air Force Act does not stand in the way of the Magistrate "exercising his ordinary jurisdiction in the manner provided by law", The result is that section 549 above mentioned and the rules framed thereunder must be looked upon as provisions which merely regulate the exercise by the Magistrate of that jurisdiction which already vests in him and cannot be treated as directions which must be followed by the Magistrate before he can "acquire" jurisdiction. This was also the view taken by a majority (Dua C. J. and Tatachari J.) in *Joginder Singh* v. *State* (7), on a detailed consideration of various provisions of the Army Act and the above quoted observations of their Lordships of the Supreme Court.

(9) In *Som Datt Datta* v. *Union of India and others* (10), the above view of the provisions of sections 125 and 126 of the Army Act was reiterated in the following words:

"The legal position, therefore, is that, when an offence is for the first time created by the Army Act, such as those

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

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 visualized 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 detailed in military custody; but if a criminal court is 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 whose order shall be final. These two sections of the army Act provide a satisfactory machinery to resolve the conflict of jurisdiction, having regard to the exigencies of the situation in any particular case."

(10) No room is left for doubt about the legal positton being that the inherent jurisdiction which a Magistrate has to take cognisance of civil offences under the Code of Criminal Procedure is not taken away by any provisions of the Army Act (and, therefore, of the Air Force Act), and of section 549 of the Code of Criminal Procedure and the rules made thereunder. What those provisions envisage is concurrent jurisdiction in the criminal courts and the courts-martial

and an arrangement for the proper exercise of such jurisdiction including, when necessary, a way of resolving a conflict of jurisdiction. *Awadh Behari Singh* v. *The State* (2), and *In re*: *Major F. K. Mistry* (3), which take a contrary view, cannot be accepted as laying down good law. *In re Captain Hugh May Stollery Mundy and another* (1), there is no discussion of the relevant provisions of law and all that is said is:

> "The attent on of the Magistrate who tried the accused was not drawn to section 549, Criminal Procedure Code, or the rules framed thereunder, and he did not act in accordance therewith. Consequently, the trial was illegal and the conviction and sentence must be set aside."

(11) If by the finding that the trial was illegal is meant that it was vitiated by inherent lack of jurisdiction, this authority must be held to have been overruled by *Major E. G. Barsay* v. *State of Bombay* (supra) (6) and the same would be true of *Emperor* v. *Jerry D' Sena* (4) which takes a view similar to that adopted in the Madras case.

6. I may also state here that *Amarendra Chandra Chakravorty* v. *Garrison Engineer* (5) is one of the cases mentioned in *Joginder Singh* v. *State* (supra) (7) laying down the law incorrectly in view of the verdict of the Supreme Court in *Major E. G. Barsay* v. *State of Bombay* (supra) (6). I have not been able to lay my hands on this authority which appears to have been mis-cited as *Amarendra Chandra Chakravorty v. Garrison Engineer* (5), reliance for the appellant, however, was placed mainly on the dissenting judgment of Kapur, J., in *Joginder Singh v. State* (7), the following observations wherefrom have een quoted with emphasis :

> "From the above discussion what emerges is this that under the Army Act as well as the Rules the first option lies with the army authorities to decide the forum of trial. The Magistrate gets jurisdiction only after a decision in his favour by the Central Government in case of a conflict between the army authorities and the Magistrate. To my mind, it clearly appears that a Magistrate cannot assume jurisdiction straightaway unless the army authorities have had an opportunity of deciding upon the forum. No doubt, the Magistrate can try again the accused person convicted or acquitted by the court-martial

but that too can be done with the previous sanction of the Central Government."

These observations no doubt lend great support to the case of the appellant but if I may say so with the greatest respect. they do not lay down the law correctly in view of the interpretation placed by their Lordships on the various relevant provisions of law. I may mention in this connection that while the majority of the Judges of the Full Bench were at pains to take note of and follow the observations of the Supreme Court decision in *Major E. G. Barsay* v. *State of Bombay* (*supra*) (6) not a mention of that decision was made by Kapur, J., whose judgment runs counter thereto and cannot be regarded as laying down the law correctly in view of what I have already said.

(12) I would accordingly hold that the contention raised on behalf of the appellant that the trial was vitiated by lack of jurisdiction in the Magistrate and the learned Additional Sessions Judge must be rejected as untenable.

(13) Another point raised on behalf of the appellant is that the trial was in any case vitiated by the illegality which cannot, according to him, 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. 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 visions 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 worlds. 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. This was also the view of the majority of the Full Bench in *Joginder Singh* v. *State*

(supra) (7) with which I respectfully agree. Delivering the judgment of the majority, Dua, C.J., observed :

> "The object and purpose of the Rules would appear to be to see that the members of the Armed Forces are not taken away from military duty without the concurrence of the Army authorities so that the defence of the country does not suffer. It is the larger public interest which is kept in view and the Army Authorities are given the right and the duty to determine the forum for the trial of the members of the Armed Forces. It is not meant to confer a right on the accused person different from other accused persons. The defence of the country, however, is truly not to be made to suffer because of ignorance of the Magistrates, or of the accused or the prosecution or even of the Army Authorities who may be unaware of the technicalities of the statutory rules. But this purpose can quite effectively be served if the Army Authorities are made fully aware of a criminal case against a member of the Armed Forces and they are afforded or have had an adequate and full opportunity to exercise the discretion of having the accused tried by a Court-martial. In order to achieve this objects, it does not seem to be an essential jurisdictional condition precedent to require literal and meticulous compliance with the form and the manner of notice prescribed in Rules 3 and 4 of the Rules, failure to do which would automatically by itself, without more, nullify the proceeding rendering the trial, the sentence and the resultant punishment as if tainted with absence of inherent jurisdiction.. Having had full knowledge of the charge and the opportunity to come to a decision on the question of the forum of trial, if the Army Authorities voluntarily deliver the accused to the civil authorities for trial, the statutory purpose and object may well ordinarily be held to have been accomplished."

And again—

> "In a case where the appropriate Army Authorities have intimated their decision to have the accused tried by a 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.*"

Dua, C.J., concluded :

"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."

(14) What then are the circumstances obtaining in the case with reference to which the question of illegality or otherwise of the trial of the appellant has to be determined ? As stated in the referring order, it is only when the charge was framed against the appellant and his plea was recorded that he stated his occupation to be service in the Indian Air Force. When he was examined in pursuance of the provisions of section 342 of the Code of Criminal Procedure, after the close of evidence at the trial, he again asserted that he was an employee of the Force. Apart from this, there was no material either with the Committing Magistrate or with the learned Additional Sessions Judge to indicate that the appellant had any thing to do with the Air Force. Neither of them was informed at any stage that the appellant was a regular Air Force employee having been enrolled as such under the Act or that he was on active service either in fact or by virtue of the legal fiction forming the basis of the notification above-mentioned and that, therefore, his case was covered by the provisions of clause (a) of section 72 read with those of section 9 and section 2 of the Act and of the said notification. Their failure to take note of the provisions of section 549 of the Code of Criminal Procedure and the rules framed thereunder arose neither out of deliberation nor of negligence. Even if it be said, however, that after the appellant had disclosed his occupation to the Committing Magistrate, the latter could hold further enquiry into the matter. I do not think that any useful purpose would thereby have been served as it appears that the Air Force authorities do not intend to claim a trial of the appellant by a Court-martial. In this connection I may refer to the affidavit dated the 20th of August, 1969, sworn by Wing Commander K. S. Suri and placed before the referring Division Bench which

states that the deponent is the Officer Commanding to whom the case of the appellant should have been referred by the Criminal Court in accordance with the provisions of section 124 of the Act read with section 549 of the Code of Criminal Procedure. Although a period of five months has elapsed since the affidavit was filed, Wing Commander Suri has not made a claim that the trial of the appellant should have been by a Court-martial. And Wing Commander Suri's failure in that behalf is understandable. The appellant was admittedly on leave from his Unit on the day of the occurrence and the victims of the offence alleged against him were persons not subject to Military, Air Force or Naval law. He was tried along with four others, his fifth co-accused having died before the case came up for trial. All his co-accused were persons not subject as aforesaid. It would thus be seen that the facts of the case are such as may, well have persuaded the higher Air Force authorities not to take any action with reference to the provisions of section 124 of the Act. Under the circumstances, I do not think the failure of the courts below in not observing the provisions of section 549 of the Code of Criminal Procedure and the rules made thereunder amounts to any illegality vitiating the trial, especially as no prejudice is shown to have been caused to the appellant in consequence, but would hold that it is a mere irregularity curable by what is contained in section 537 of the Code. I am accordingly of the opinion that the case be sent back to the Division Bench for hearing of the appeal on merits.

HARBANS SINGH, J.—I agree.

JINDRA LAL, J.—I also agree.

K.S.K.

FULL BENCH

Before R. S. Narula, R. S. Sarkaria and S. C. Mital, JJ.

SHAMSHER SINGH,—*Petitioner*

versus

THE PUNJAB STATE AND OTHERS,—*Respondents*

Civil Writ No. 1890 of 1966

February 19, 1970

Constitution of India (1950)—*Articles* 14, 15 *and* 16—*Scope of—Article* 15(3)—*Provisions of—Whether can be invoked for construing and determining the*