Supreme Court of India
Joginder Singh vs State Of Himachal Pradesh on 30 November, 1970
Equivalent citations: 1971 AIR 500, 1971 SCR (2) 851
Author: C Vaidyialingam
Bench: Vaidyialingam, C.A.

PETITIONER:
JOGINDER SINGH

Vs.

RESPONDENT:
STATE OF HIMACHAL PRADESH

DATE OF JUDGMENT:
30/11/1970

BENCH:
VAIDYIALINGAM, C.A.
BENCH:
VAIDYIALINGAM, C.A.
SHELAT, J.M.

CITATION:
1971 AIR 500 1971 SCR (2) 851
1970 SCC (3) 513
CITATOR INFO :
R 1971 SC1120 (20)

ACT:
Army Act, 1950, ss. 70, 125 & 126(1)--Criminal Court and Court-Martial (Adjustment of Jurisdiction) Rules 1952, r. 4-Army mancharged with rape-Concurrent jurisdiction of Court Martial and Criminal Court-Offender handed over by military authorities to Civil Authorities--Tried and convicted by Assistant Sessions Judge-Trial is legal and--valid-When discretion under s. 125 to hold Court Martial is not exercised by military authorities and offender is handed over to Civil authorities provisions of s. 126(1) and r. 4 are not attracted.

HEADNOTE:
The appellant was a Lance Naik in a military regiment. He was appointed as Granthi of a temple used by military personnel. While working as such he was charged with an offence under s. 376 of the Indian Penal Code. The police officer investigating offence held an identification parade with the permission of the military authorities and thereafter the appellant was handed over to the civil authorities to stand his trial. The Assistant Sessions Judge convicted

him. The Sessions Judge dismissed his appeal. The appellant then filed a criminal revision in the High Court where it was contended on his behalf that according to notification dated November 28, 1962 issued by the Ministry of Defence, Government of India, the appellant must be considered to have been on active service on the material date and consequently the appellants' trial should have been before a court martial. It was further urged that if the Assistant Sessions Judge decided to proceed with the trial it was obligatory on him to have given notices to the Commanding Officer of The Army under s. 126(1) of the Army Act read with r. 4, and since these provisions had not been complied with the appellant's trial and conviction were null and void. The High Court dismissed the revision petition. With certificate the appellant appealed to this Court.

HELD : Since the appellant was alleged-to have committed rape in relation to a person who was not subject to military, naval or air law, under s. 70 of the Army Act he would be normally, triable by the ordinary criminal court but by virtue of notification dated November 28, 1962 he must be deemed to have been on active service on the material date. Therefore. this was a case where both the court martial and the ordinary criminal court had concurrent jurisdiction to try the appellant. [863 H]

The provisions of the Army Act and the decisions of this Court make it clear that in respect of an offence which could be tried both by a criminal court as well as a court martial, ss. 125, 126 and- the rules have made suitable provisions to avoid a conflict of jurisdiction between the ordinary criminal court and the court martial. But it is to be noted that in the first instance the discretion is left to the officer mentioned in s 125 to decide before which court the proceedings should be instituted. Hence the officer commanding the army, army corps, division or independent brigade in which the accused person is serving, or such other officer as may be prescribed, will have to exercise his discretion and' decide under s. 125 in which court the proceedings shall be instituted.

858

It is only when he has so exercises his discretion and decides that the proceedings should be instituted before the court martial that the provisions of s. 126(1) come into operation. If the designated officer does not exercise his discretion and decide that the proceedings should be instituted before a court martial the Army Act would not be in the way of criminal court exercising its ordinary jurisdiction in the manner provided by law. [865 H-866 C]

In the present case surrender of the accused by the military authorities to the civil authorities to be dealt with the latter, after being made aware of the nature of the offence alleged against the appellant was clear indication that the decision of the military authorities was that the appellant need not be tried by a court martial and that his

trial could take place before the criminal court. Under these circumstances there was no occasion to follow the procedure under s. 126 or r. 4 as the military authorities had made abundantly clear that the appellant need not be tried by the court martial. That being so it would have been altogether superfluous for the magistrate to give notice as required by the said provisions. [870 A-D]
The High Court was therefore right in holding that there had been substantial compliance with the provisions of the Act and the rules and hence the trial of the appellant and his conviction by the Assistant Sessions Judge we're valid and legal. [870 D-E]
Som Datt Datta v. Union of India, [1969] 2 S.C.R. 177, Major F. G. Barsay v. State of Bombay, [1962] 2 S.C.R. 195 and Ram Sarup v. Union of India, [1964] 5 S.C.R. 931, applied.
In re Captain Hugh May Stollery Mundy & Anr. A.I.R. 1945 Mad. 289, In re Major F. K. Mistry, 1949 2 M.L.J. 44, C. Ramanujan v. State of Mysore, A.I.R. 1962 Mys. 196, Major Gopinathan v. State of Madhva Pradesh A.I.R. 1963 M.P. 249, Awadh Behari Singh v. State, A.I.R. 1967 Calcutta 323 and Ajit Singh v. State of Punjab, A.I.R. 1970 Punjab & Haryana 351, referred to.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 34 of 1969.

Appeal from the judgment and order dated July 26, 1968 and September 27' 1968 of the Delhi High Court, Himachal Bench at Simla in Cr. Revision No. 26 of 1968.

R. L. Kohli, for the appellant.

V. C. Mahajan and R. N. Sachthey, for the respondent. The Judgment of the Court was delivered by Vaidialingam J. In this appeal, on certificate issued by the Delhi High Court, the appellant who is governed by the Army Act, 1950 (hereinafter refered to as the Act) challenges the legality of his trial and conviction for an offence under s. 376 I.P.C. by the Assistant Sessions Judge, Nahan. The main attack levelled against the proceedings is that the material provisions of the Army Act read with the Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1952 (hereinafter referred to as the Rules) framed by the Central Government under S. 549 (1) Cr. P.C. have not been complied with by the Assistant Sessions Judge. The prosecution case is briefly as follows :

The appellant was a military personnel attached to Punjab Regiment No. 24, which moved to Nahen on March 3, 1967. The appellant was a Lance Naik and was appointed as a temporary Granthi of the Katcha-Johar temple used by the military personnel. One Jiwa Nand with his wife and children was living close by the temple. On March 8, 1967 at about 8.30 a.m. Gayatri Devi aged about 10 years and daughter of Jiwa Nand was called by the appellant and when she came near him she was taken inside the adjoining room where the appellant had forcible sexual intercourse with her. The victim

narrated the occurrence to her mother and sister. When Gayatri Devi, her mother and certain others were proceeding towards the Cantonment to complain to the military authorities, they met 4 or 5 Sikh gentlemen and Gayatri Devi pointed out the appellant in that group as the one who had misbehaved with her. The Sikh gentlemen, who were in military uniform declined to permit Gayatri Devi and others to go inside the Cantonment area on the ground that the entry into the same was prohibited to nonmilitary personnel. Later on the father of Gayatri Devi took her to the police station and lodged a report Ex. 12/A. The accused pleaded alibi and denied the offence. He also let in defence evidence. The learned Assistant Sessions Judge accepted the prosecution case and disbelieving the plea of the appellant convicted him of the offence under s. 376 I.P.C. and sentenced him to three years rigorous imprisonment. The appeal filed by the appellant was dismissed by the learned Sessions Judge, who confirmed the conviction and sentence. The appellant filed a criminal revision No. 26 of 1968 before the Delhi High Court, challenging his conviction and sentence passed by the learned Assistant Sessions Judge and as confirmed by the learned Sessions Judge. The learned Chief Justice before whom the criminal revision came for hearing held that, the conviction of the appellant for the offence under S. 376 I.P.C. and the sentence imposed on him by the two subordinated courts on facts were justified and did not require any interference. However, a plea was taken before the learned Chief Justice on behalf of the appellant that according to a notification issued by the Ministry of Defence, Government of India dated November 28, 1962, the appellant on the material date must be considered to have been on active service. Based on this notification it was further urged that the appellants trial should have been before a Court Marbal and that if the Assistant Sessions Judge decided to proceed with the trial, he should have given the required notice to the Commanding Officer of the Army as is mandatory under s. 126(1) of the Act read with r. 4. As those provisions have not been complied with, the appellant's trial and conviction were illegal and null and void. The learned Chief Justice was, however, inclined to take the view that the omission by the Assistant Sessions Judge to follow the procedure indicated above does not affect his jurisdiction to conduct the trial.

In view of certain decisions of the High Courts wherein an opinion has been expressed that non-compliance with the provisions of the Act and the Rules vitiates the trial of a military personnel by the criminal courts, the learned Chief Justice referred the matter, by his order dated June 25, 1968, to a Full Bench. The Full Bench which consisted of the learned Chief Justice Kapoor and Tatachari, JJ. heard the criminal revision case. The learned Chief Justice and Tatachari, J. after a very elaborate reference to the material provisions of the Act and the relevant Rules held that the magistrates, before conducting a trial of a military personnel and to normally, conform to the relevant provisions of the, Act and the Rules. But they held that in respect of offences for the trial of which both the Court Martial and an ordinary Criminal Court had concurrent jurisdiction, the mere omission by a magistrate, before conducting the trial, to issue the necessary notice under r, 4 will not vitiate the proceedings as being illegal. Kapoor, J., on the other hand, disagreed with the majority opinion and held that under the Act read with the Rules, the first option to try a military personnel lies with the Army authorities and they have to decide the forum of the trial and that the magistrate will get jurisdiction only after a decision in his favour by the Central Government in case of a conflict between the army authorities and the Magistrate. The learned Judge further held that a magistrate cannot assume jurisdiction straightaway without providing an op- portunity to the military authorities, to decide the forum. The learned Judge accordingly held that the observance of

the Rules is obligatory and non-observance thereof makes the trial illegal. In accordance with the majority judgment, the High Court by its order dated July 26, 1968 held that nonobservance of rr. 3 and 4 of the Rules does not by itself deprive the magistrate of his inherent jurisdiction or make the proceedings conducted by him null and void. The High Court further held that the effect of the violation isto be determined on the facts and circumstances of each case keepingin view the nature of the violation and all other relevant factors. After expressing opinion on the legal aspects, the case was remitted to the Single Judge for final disposal.

The matter came again before the learned Chief Justice, who by his order dated September 27, 1968 held that the trial by the Assistant Sessions Judge without conforming to the provisions of r. 4 has not caused any failure of justice to the appellant in this case. The learned Chief Justice further held that in view of certain circumstances it is legitimate to infer that there has been substantial compliance with,the statutory provisions. Finally the learned Chief Justice hold that the conviction of the appellant was proper and dismissed the revision filed by the appellant.

Mr. Kohli, learned counsel for the appellant, has reiterated the same objections taken on behalf of the appellant before the Delhi High Court. According to Mr. Kohli, the offence in this case being one which could be tried, both by the Court Martial and the ordinary Criminal Court, it was for the competent officer to decide, in the first instance, whether the appellant is to be tried by a Court Martial. If the criminal court was of the opinion that, the proceedings should be instituted before itself in respect of the offence alleged, it should have followed the, mandatory provisions contained in s. 126 of the Act read with rr. 3 and 4. Under s. 549(1) Cr. P.C. the magistrate was bound to have regard to the rules. In this case inasmuch as the said procedure had not been followed and the appellant accused was tried straightaway by the criminal court, the trial is illegal and void. Being a question of jurisdiction the objection raised by the appellant before the High Court goes to the root-of the matter and vitiates the entire proceedings.

Mr. V. C. Mahajan, learned counsel for the State, on the other hand, urged two contentions : (i) as held by the High Court there has been a substantial compliance with the provisions of the Act and the Rules in this particular case and hence the trial by the Assistant Sessions Judge is legal and valid, and (ii) even assuming that there has been a breach of the rules, such a violation is at the most only an irregularity and not on illegality, and as no prejudice has been shown to have been caused to the accused by such an irregular proceeding held by the Assistant Sessions Judge, the conviction is legal.

At the outset we may state that the question regarding the competency of the criminal court to try the appellant does not appear to have been raised before the learned Assistant Sessions Judge. It is no doubt seen, that the learned Assistant Sessions Judge, appears to have made enquiries from the counsel appearing for the appellant and the State, regarding the position of the appellant who was in military employ. The public prosecutor drew the attention of the Court to S. 70 of the Act and appears to have pointed out that as the Punjab Regiment No. 24 to which the appellant was attached was not on active service', the appellant could be tried by the ordinary criminal court.

On behalf of the appellant it was urged that in view of the declaration of Emergency, the appellant must be deemed to be on active service'. But this contention was not accepted by the Court. Nahan station where the Punjab Regiment was then stationed being a rest station, the court proceeded with the trial reserving liberty to the counsel for both the parties to raise any further point before the close of the trial to establish that the appellant must be considered to be on active service. Obviously neither party cared to place any material before the Court and the trial was proceeded with resulting in the conviction of the appellant Mr. Kohli, learned counsel for the appellant, has drawn our attention to certain decisions of the High Courts in support of his contention that a trial held by a magistrate without conforming to the provisions of the Act and the Rules is illegal and not a mere irregularity. Those decisions are : In re Captain Hugh May Stollery Mundy and another(1), Major F. K., Mistry (2) C. Ramanujan v. State of Mysore(3), Major Gopinathan v. The State of Madhya Pradesh and another(4) and Awadh Behari Singh v. The State (5).

On the other hand, Mr. Mahajan drew our attention to the Full Bench decision of the Punjab and Haryana High Court re- ported in Ajit Singh v.State of Punjab (6) wherein the High Court has held that the trial suffers not from an illegality but only an irregularity. Such an irregularity does not render the trial liable to be set aside, unless it is shown that prejudice has been caused to the accused. In view of certain decisions of this Court, to which we will presently refer and having regard to the particular circumstances of this case, we do not think it necessary to consider the question whether non-observance of the Rules by the magistrate trying and convicting a person who is governed by the Act is illegal or only irregular. The scheme of the Act and the Rules have been considered in three decisions of this Court, which are being referred to presently and hence we do not think it necessary to either quote ss. 125 and 126 or S. 549 Cr. P.C. We will, however, refer to the relevant rules at the appropriate stage. They have been referred to in particular in the latest decision of this Court in Som Datt Datta v. Union of India and others(7).

There. is no controversy that the appellant is one subject to the Act as a person enrolled under the Act under S. 2(1)(b), Sec-

(1) A.I.R. 1945 Madras 289.(2) 1949 2 M.L.J. 44. (3) A.I.R. 1962 Mysore 196. (4) A.I.R. 1963 M.P. 249. (5) A.I.R. 1967 Calcutta 323 (6) A.I.R. 1970 Punjab & Haryana 351.

(7) [1969] 2 S.C.R. 177 tion 3, (i) defines on active service'. Over and above that power is given to the, Central Government under s. 9, by notification, to declare any person or class of persons subject to the Act and who may be deemed to be on active service' within the meaning of the Act. The Government of India, Ministry of Defence, had issued the following notification on November 28, 1962 "In exercise of the powers conferred by Section 9 of the Army Act, 1950 (46 of 1950), the Central Government hereby declare that all persons subject to that Act, who are not on active service under clause(1) of section 3 thereof, shall, where ever they may be serving be deemed to be on active service within the meaning of that Act for the purpose of the said Act and of any other law for the time being in force."

By virtue of this notification it follows that on the material date Punjab Regiment No. 24, to which the appellant was attached though. it was at Nahan, which was a rest station, must be considered to

have been on active service. This notification was issued in the year 1962. Unfortunately, it was not brought to the notice of the learned Assistant Sessions Judge, notwithstanding the specific enquiry he made about the position of the accused.

Section 70 of the Act runs as follows "A person subject to this Act who commits ail offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of An offence against this Act and shall not be tried by a court-martial, unless he commits any of the said offences-

(a) while on active service, or

(b) at any place outside India, or

(c) at a frontier post specified by the Central Government by notification in this behalf."

As the appellant was alleged to have committed rape in rela- tion to a person who was not subject to military, naval or air law, under s. 70, normally he could be tried by the ordinary criminal court, but inasmuch as he was on active service at the time of the alleged offence, the court- martial also get jurisdiction to try the appellant. Therefore. this is a case where both the court-martial and the ordinary criminal court had concurrent jurisdiction to try the appellant. To meet such a situation suitable provisions have been made in ss. 125,'126 of the Act and the Rules framed under s.549 Cr.P.C. In Major E. G. Barsay v. The State of Bombay(1) the jurisdiction of the Special Judge to try an officer who was subject to the, Army Act was questioned. No doubt the ultimate decision of the Court rested on a construction of the provisions of the Prevention of Corruption Act, 1947 and the jurisdiction of the Special Judge to try the military officer in that case was upheld. But in dealing with the contention- raised on behalf of the appellant therein that the Special Judge had no jurisdiction to take cognizance of, the offences with which the accused was charged and that he should have been tried only by a court-martial under the Act, this Court had to consider the scheme of the Act.

After holding that the Act does not expressly bar the jurisdiction of the criminal court in respect of the acts or omission punish.able under the Act if they are also punishable under any other law in force in India, this Court held that ss. 125, 126 and 127 excluded any inference about prohibition regarding jurisdiction of the criminal courts and those sections 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.. This Court has further laid down that ss. 125 and 126 provide a satisfactory machinery to resolve the conflict of jurisdiction having regard to the exigencies of the situation. This decision in our opinion, lays down that there is no exclusion of jurisdiction of the ordinary criminal courts in respect of. offences which are triable also by the court-martial.

In dealing with the Act, this Court in Rain Sarup v. The Union of India and another(2) has observed that there, could be a variety of circumstances which may influence the decision as to whether the

offender is to be tried by the court-martial or by the ordinary criminal court and the military officers, who are charged with the duty of exercising discretion are to be guided by the circumstances and the exigencies of the service, maintenance of discipline in the army, speedier trial, nature of the offence and the person against whom the offence is committed. In Som Datt Datta v. Union, of India ad others (3) this Court has again elaborately considered the scheme of the Act as well as the Rules. Dealing with sections 125 and 126, at page 183 this Court observes "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 the case of an act "or omission punishable both (1) [1962] 2S.C.R.195. (2) [1964] 5 S.C.R.931.

(3) [1969] 2 S.C.R. 177.

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 s. 4 25 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 is of opinion that the said offence shall be tried before itself it may issue the requisite notice under S. 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 de-

termination 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."

A reference to the Act particularly to Chapter VI, which comprises of ss. 34 to 70, under the heading offences', the, position that emerges according to the above decisions is that under Chapter VI there are three categories of offences, namely, (1) offences committed by a person subject to the Act, triable a court-martial in respect whereof specific punishments have be unassigned; (2) civil offences committed by the said person at any place in or beyond India, but deemed to be offences committed; under the Act and, if charged under S. 69 of the Act, triable by a court- martial; and (3) offences of murder and culpable homicide not amounting to murder or rape committed by a person subject to the Act against a person not subject to the military law. Subject to a few exceptions, they are not triable by court-martial, but are triable only by ordinary criminal courts. The said categorisation of offences and tribunals necessarily bring about a conflict of jurisdiction. Where an offence is for the first time created by the Army Act, such as those created by ss. 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 matrial would have jurisdiction to try the person committing the. offence. It is further clear that in respect of an offence which could be tried both by a criminal court as well as a court- martial sections 125, 126 and the Rules, have made suitable provisions to avoid a.

13-L694Sup CI/71 conflict of jurisdiction between the ordinary criminal courts and the court-martial. But it is to be noted that in the first instance, discretion is left to the officer mentioned in s. 125 to decide before which court the proceedings should be instituted. Hence the Officer commanding the army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed will have to exercise his discretion and decide under s. 125 in which court the proceedings shall be instituted. It is only when he so exercises his discretion and decides that the proceedings should be instituted before a court-martial, that the provisions of s. 126(1) come into operation. If the designated officer does not exercise his discretion and decide that the proceedings should be instituted before a court-martial, the Army Act would not obviously be in the way of a criminal court exercising its ordinary ex-jurisdiction in the manner provided by law.

We will presently show that in the case before us the desig- nated officer in s. 125 has not chosen to exercise his discretion and decided before which court the proceedings should be instituted and in particular he has also not decided that the proceedings should be instituted before, a court-martial. When that is so, in our opinion, there was no occasion for the Criminal Court in this case to adopt the procedure laid down in s. 126 of the Act. This view finds support from the second part of s. 126(1) which requires the criminal court to issue a notice to the officer designated :in S. 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. This is a clear indication that s. 126(1) presupposes that the designated officer has decided under s. 125 that the proceedings shall be instituted before a court-martial and has also directed that the accused person shall be detained in military custody.

As the facts on which we are basing our conclusion that there was no necessity for the criminal. court in question to adopt the procedure laid down in s. 126 of the Act, will have also bearing on the construction of the relevant rules, it is desirable to refer to the relevant rules relied on by the appellant.

The rules have been framed by the Central Government under s. 549(1) Cr. P.C. That section provides for the Central Government making rules consistent with the Criminal Procedure Code and the Acts mentioned therein in respect of offences which could be tried by an ordinary criminal court or by a court-martial. It enjoins upon a magistrate when any person is brought before him, in respect of such an offence, to have due regard to the rules and to deliver him in proper cases to the appropriate officers mentioned therein, for being tried by a court-martial. The material rules that are to be referred are rr. 2, 3, 4, 5 and 8. Rule 2 defines the expressions "commanding officer", "competent military authority", "competent naval authority" and "competent Air Force authority". Rules 3, 4,5, and 8 axe as follows Rule 3. "Where a person subject to military, naval or Air Force law is brought before a 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 Sessions or the High Court for any offence triable by such Court, unless

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

(b) he is moved thereto by such authority. Rule 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 the service of such notice, he shall not-

(a) convict or acquit the accused under section 243, 245, 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 for trial by the High Court or the Court of Ses- sions under section 213 of the said Code; or

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

Rule 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 pro- ceedings 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.

Rule 8. Notwithstanding anything in the foregoing rules, where it comes to the notice of a Magistrate that a person subject to military, naval or Air Force law has committed an offence, proceedings in respect of which ought to be instituted before him.,and that the reasons of such person cannot be procured except through military, naval or Air Force authorities, the Magistrate may by a written notice require the Commanding Officer of such person either to deliver such person to a Magistrate to be named in the said notice for being proceeded against according to law, or to stay the Central Government for determination as to the martial, if since instituted, and to make a reference to the Central Government for determination as to the Court before which proceedings should be instituted."

The main contention that has been urged by Mr. Kohli, on behalf of the appellant is that in this case the Assistant Sessions Judge had no jurisdiction to proceed with the trial of the appellant as he has not complied with the provisions of rr. 3 and 4. From a perusal of rr. 3 and 4, the scheme of these two rules appears to us to be that the magistrate shall not proceed to try a military personnel unless he forms an opinion for reasons to be recorded to proceed with the trial without being moved by the competent authority or the magistrate has-been so moved by the com-

petent military authority; but before a magistrate decides to proceed with the trial without being moved by the competent authority, he is obliged to give a written notice to the Commanding Officer of the accused and is further enjoined not to pass any of the orders enumerated as (a) to

(d) in Rule 4, till the expiry of the said period of the notice mentioned in clauses (1) and (2). According to Mr. Kohli the criminal court has not been moved by the competent military authority to conduct the trial before it. The magistrate has not also framed an opinion that he should try the accused without being moved by the competent military authority. Even assuming that he has formed such an opinion, he has not given the requisite notice and waited for the required period under r. 4. Hence it is argued that the criminal court has acted illegally in proceeding with the trial of the appellant. We are not inclined to accept this contention of the learned counsel. Rule 4 is related to cl. (a) of r. 3 and will be attracted only when the magistrate proceeds to conduct the trial without having been moved by the competent military authority. It is no doubt true that in this case the Assistant Sessions Judge has not given a written notice to the Commanding Officer as envisaged under r. 4. But, in our view, that was unnecessary. When the competent military authorities, knowing full well the nature of the offence alleged against: the appellant, had released him from mili- tary custody and handed him over to the civil authorities, the magistrate was justified in proceeding on the basis that the military authorities had decided that the appellant need not be tried by the court-martial and that he could be tried by the ordinary criminal court.

We will now refer in some detail to the particular circumstances in this case which will show that there has been no violation of the Act or the Rules. The High Court has pointed out that the District Inspector of Police. P.W. 12, has stated that after recording the statements of some of the witnesses he proceeded to the Cantonment area and contacted the officer commanding the Punjab Regiment No. 24. The said witness has also stated that with the permission of the said officer he interrogated' the accused and examined his person. The Commanding Officer was not willing to hand over the accused till he obtained permission from the head- quarters. The Commanding Officer assisted P.W. 12 in carrying out the identification parade of the accused. The High Court has further stated that after having full knowledge of the charge against the appellant and the investigation that was being conducted by the police, the competent authority ultimately released the appellant from military custody and delivered him to the civil authorities for being tried according to law.

From these circumstances, in our opinion, it is legitimate to hold that the competent authority had Handed over the appellant to the civil authorities for being tried after the former had considered the question of so handing him over after consultations with the headquarters. In these circumstances, it follows that the designated officer under s. 125, who had the discretion in the first instance to decide that the appellant should be tried before a court- martial had decided to the contrary.

Surrender of the ac- cused to the civil authorities to be dealt with by the latter, after being made aware of The nature of the offence against the appellant, is a clear indication that the decision of the military authorities was that the appellant need not be tried by a. court-martial and that his trial can take place before the criminal court. Under these circumstances there was no occasion to follow the procedure under r. 126 or r. 4 as the military authorities had made abundantly clear that the appellant need not be tried by the court-martial, That being so, it would have been altogether superfluous for the magistrate to give the notice as required by the said provisions, Rules 5 and 8 have no application to the facts of this case.

We agree with the High Court that there has been a substan- tial compliance with the relevant provisions of the Act and the Rules and hence the trial of the appellant and his, conviction by the learned Assistant Sessions Judge are valid and legal.

In the result, the. appeal fails and is dismissed.

G.C. Appeal dismissed.