

2023 SCC OnLine Mad 4769 : (2023) 2 LW (Cri) 255

In the High Court of Madras
(BEFORE R.N. MANJULA, J.)

State Rep. by the Inspector of Police ... Petitioner;

Versus

Commandant, Air Force Administrative College ...
Respondent.

Crl.O.P. No. 23403 of 2021 and Crl.M.P. No. 13845 of 2021

Decided on July 20, 2023, [Reserved on 01.03.2023]

Advocates who appeared in this case :

For Petitioner : Mr. A. Gopinath, Government Advocate (Crl. Side)

For Respondent : Mr. R. Rajesh Vivekananthan

PRAYER : This Criminal Original Petition has been filed under Section 482 of Cr. P.C., to set aside the order dated 23.10.2021 passed by I Additional District & Sessions Court, Coimbatore in Criminal Revision Petition No. 22 of 2021 partly allowed with modification order passed by CMP. No. 20197 of 2021 on the file of the Judicial Magistrate, Additional Mahila Court, Coimbatore.

The Order of the Court was delivered by

R.N. MANJULA, J.:— This Criminal Original Petition has been filed to set aside the order dated 23.10.2021 passed by I Additional District & Sessions Court, Coimbatore in Criminal Revision Petition No. 22 of 2021 which has been partly allowed by modifying the order passed by the learned Judicial Magistrate, Additional Mahila Court, Coimbatore, dated 30.09.2021 made in C.M.P. No. 20197 of 2021.

2. Heard the learned Government Advocate (Crl. Side) for the petitioner and the learned counsel for the respondent and perused the materials available on record.

3. This Criminal Original Petition has been filed by the State represented by the Inspector of Police, All Women Police Station Central, Coimbatore City. The petitioner has registered a case against one Amitesh Harmukh in Crime No. 9 of 2021 of All Women Police Station Central, Coimbatore City for the offence under Section 376(1) IPC.

4. The defacto complainant and the accused are the flight lieutenants in Indian Air Force and they were undergoing a Professional Knowledge Course for seven weeks at the Air Force Administrative College (hereinafter referred as AFAC), Coimbatore from 16.08.2021. On 09.09.2021, after an evening party at the Officers Mess in AFAC

with the course officers, the defacto complainant fell asleep at Room No. 303 in P-43 Block, Officers Mess on the night intervening 09.09.2021 and 10.09.2021. The room was locked from outside by her friend. The accused trespassed into her room around 00.30 hours on 10.09.2021 and committed an offence of rape on her. The defacto complainant was unconscious and she was not in a state to offer resistance. After the occurrence, the accused slept next to the victim in the same bed. The victim's room mate came to the room at around 01.30 a.m. on the same night without knowing the presence of the accused. At about 03.06 hours the friend of the de-facto complainant received a call from her course-mate and asked where the accused was. When she woke up to attend the call, she realized that the accused was sleeping next to her. Even during that time, the victim was not conscious enough to converse well or to give proper answers to her friend.

5. On 10.09.2021, the accused sent a Whatsapp message to the defacto complainant's friend and on getting her permission, he came to their room and confessed about the offence to the defacto complainant's friend and another person. Defacto complainant's friend recorded the confession given by the accused. On 11.09.2021, the defacto complainant preferred a written complaint against the accused to the Air Force Administrative College Authorities (in short AFAC). As per the advice of the officers, the victim had undergone medical examination at the Air Force Hospital on 11.09.2021 at around 19.00 hours. However, she suffered humiliation at the hands of the doctors therein.

6. A *prima facie* fact finding Court of Inquiry was formed to inquire into the matter. Due to the pressure given to the de-facto complainant, she was forced to withdraw the complaint twice. The biological specimen collected from the victim during the medical examination and the semen stained bed sheet taken from the place of occurrence were kept in the Air Force Hospital and they were not sent for forensic examination till 23.09.2021. The accused was roaming freely in the AFAC premises and he was even allowed to sit along with the victim in the classes. Having not satisfied with the way the complaint was handled by the AFAC authorities, the victim preferred a police complaint on 20.09.2021 and consequently a case in Crime No. 09 of 2021 was registered under Section 376(1) IPC.

7. The petitioner started investigation by going to the scene of occurrence and by examining the witnesses. During that course, the accused was also arrested at 14.22 hours at Room No. 4, P-43 Block, Officers' Mess, AFAC. Prior arrest information was given to AFAC Authorities orally. The grounds of arrest were communicated to the accused in compliance of Section 41-B and 41-D of Cr. P.C. and a

written intimation was given to AFAC Authorities, but they omitted to give acknowledgement. The petitioner was allowed to take custody of the accused after a long delay. After the accused was arrested, he was produced before the Judicial Magistrate, Additional Mahila Court, Coimbatore, on the same night. The accused was kept under judicial custody till 30.09.2021.

8. On 25.09.2021, the respondent filed a petition seeking custody of the accused under Section 124 of Air Force Act, 1950 r/w Section 475 Cr. P.C. and the Criminal Courts and Court Martial (adjustment of jurisdiction) Rules, 1978. Hence the custody of the accused was handed over to the air force authorities by the learned Magistrate by an order dated 30.09.2021 passed in C.M.P. No. 20197 of 2021.

9. The learned Magistrate did not consider the objections raised by the petitioner and also the request for seeking police custody. The order of the Magistrate was challenged before the Principal District and Sessions Court, Coimbatore in Criminal Revision Petition No. 22 of 2021. But the said petition was partly allowed with modification vide an order dated 23.10.2021. However, the order of the learned Magistrate to hand over the custody of the accused to Air Force Authorities was not revised. Aggrieved over the said order, this Criminal Original Petition has been preferred.

10. The learned Government Advocate (Crl. Side) appearing on behalf of the petitioner submitted that the order for handing over the accused to the custody of the Air Force was granted in accordance with Section 124 of Air Force Act r/w Section 475 Cr. P.C. and Section 3 & 4 of the Criminal Courts and Court Martial (adjustment of jurisdiction) Rules, 1978; but the above provisions and rules are applicable only when the charge sheet is filed and the cognizance is taken by the learned Magistrate; hence handing over the accused to the authorities of the Air Force is pre-matured.

11. It is further submitted that the Hon'ble Supreme Court has made the above position clear in *S.K. Jha Commadore v. State of Kerala*, reported in (2011) 15 SCC 492 and it has held that the rules framed by the Central Government with regard to the handing over the custody applies to a case where the police has completed investigation and the accused was brought before the Judicial Magistrate after submission of the charge sheet and the said provisions cannot be invoked in a case where the police has just started the investigation; while passing the above order, the Hon'ble Supreme Court has referred the dictum laid down in the case of *Som Datt Datta v. Union of India* reported in AIR 1969 SC 414; the same point is further clarified in *Army Headquarters v. CBI*, reported in (2012) 6 SCC 228; in the case of *Adm Commandant v. State of Odisha*, reported in 2020 SCC OnLine Ori 873, it has been held that giving custody of Naval Officer cannot be considered at the

preliminary enquiry stage of the police and only after submission of the police report.

12. It is further submitted that the power of the Court to require delivery of the offender under Section 125 of the Act either before itself or to the Officer concerned will also arise only after the charge sheet is filed; the learned Sessions Judge has erred in directing the petitioner to prepare two sets of material evidence and submit one set of such evidence to the Court Martial for trial under the Air Force Act, 1950; the law mandates that only the officer in-charge of the police station to complete the investigation and file a final report before the jurisdictional Magistrate and he alone can take cognizance of the offence on a police report.

13. The learned counsel for the respondent submitted that the accused was tried before the Court Martial and was convicted for the offence and hence this Criminal Original Petition itself has become infructuous; the letter of the respondent for invoking Section 124 of Air Force Act was made even before receiving the intimation about the arrest of the accused; the arrest was effected in an illegal and arbitrary manner by violating all the legal norms; the accused was forcefully taken away from the premises of AFAC on the pretext of medical examination; the proper legal remedy for the police authorities is to approach the Court of competent Magistrate and not to give illegal pressure to the Air Force Authorities for taking custody of the accused by misrepresenting the facts; the respondent sought the custody of the accused from the Magistrate before whom the accused was produced.

14. The Air Force authorities were not willing to allow the custody of the accused to police because of the inhuman treatment meted out to some accused persons in the past like Sathankulam custodial death case (death of Jayaraj and Bennix in custody) and a custodial death of Prabhakaran, a physically challenged person in Namakkal District are a few incidents where the Tamil Nadu police had committed acts of atrocities against arrested persons and it had drawn adverse criticism both from the High Court and the Supreme Court; the request for taking back the accused to Air Force jurisdiction for further action under Air Force law did not amount to moving an application under Rule 6 of the Criminal Courts and Court Martial (adjustment of jurisdiction) Rules, 1978, as the circumstances warranted in the said provision did not exist; the accused was handed over to Air Force Authorities *vide* a reasoned order dated 30.09.2021, passed by the Additional Mahila Court, Coimbatore in CMP. No. 20197 of 2021; the accused was taken by the Air Force authorities on 30.09.2021 for further action and the Court of Inquiry continued the investigation.

15. The Court of Inquiry could not proceed the investigation without the presence of the accused; so handing over the accused to the

custody of the Air Force authorities is just and proper; the Court of Inquiry completed its investigation on 14.10.2021 and the accused was charged for various acts of indiscipline including the offence of rape; the report has recommendations for taking disciplinary action also under the Air Force law; on 26.10.2021, the accused was attached to Air Force Station Jalahalli, Bengaluru for disciplinary action under Air Force law; subsequently, the disciplinary proceedings were initiated against the accused which has resulted in convening a General Court Martial on 16.12.2021 under Section 110 of the Air Force Act to conduct a full-fledged trial by following the procedure laid down under Air Force law.

16. The General Court Martial convened under Air Force Law has the powers of punishment equivalent to that of a Sessions Court and the trial shall be deemed to be a judicial proceedings under Section 151 of the Air Force Act as well as Section 2(i) of Cr. P.C.; the General Court Martial is not under the supervision or the territorial jurisdiction of the High Court; the General Court Martial has commenced the trial on 16.12.2021 and 18 prosecution side witnesses have been examined; the charges against the accused were inclusive of the offences under Sections 376(1), 354, 354(B), 451 of IPC and Sections 46(a), 65, 45 of the Air Force Act, 1950; the Investigation Officer was summoned twice to appear before the Officer for recording summary of evidence prior to convening General Court Martial, but she did not present herself for giving summary of evidence; however, based on the other substantive evidence, the General Court Martial was convened; thereafter, the Investigation Officer was summoned thrice to appear before the General Court Martial through the competent Magistrate; but, the Investigation Officer did not appear; therefore, the present petition is not maintainable under Section 482 of Cr. P.C.

17. It is further submitted that Section 124 of Air Force Act has been correctly invoked and the orders of the Courts in handing over the accused to the Air Force authorities is fair and proper; the General Court Martial has already been convened and the trial is pending; in fact, through the impugned order, the Court has permitted the petitioner to continue the investigation; the respondent was also willing to give active cooperation not only upto the point of arrest, but also during the judicial custody, pending decision of the Additional Mahila Court.

18. On 28.09.2021, when the custody of the accused was *subjudice*, the police had recorded statements of six Air Force personnels inside the premises of AFAC; the police ought to have proceeded with the investigation and concluded the same within 60 days from the date of FIR in accordance with Section 173 Cr. P.C. and ought to have filed the charge sheet; but the petitioner did not approach the Air Force

authorities for conducting investigation; they disregarded their legal obligations; the petitioner cannot invoke Section 482 Cr. P.C. for the present situation.

19. It is further submitted that the decision of the Hon'ble Supreme Court held in the case of *S.K. Jha Commodore v. State of Kerala* is not applicable to the facts of this case; because in the present case the accused and the victim are the subjects of Air Force Act; in the *S.K. Jha's case*, the accused alone is subject of Navy Act; in the present case, the offence was first reported to Air Force authorities on the very same day; the competent authority has exercised power under Section 124 of the Air Force Act and decided to retain the accused under Air Force jurisdiction/custody and proceeded against him in accordance with the Air Force Act; in *S.K. Jha's case*, the competent Naval authority had not ordered any Court of Inquiry and the FIR was first registered; further, the Naval Law does not have provisions similar to Section 124 of Air Force Act and no similar act was done by the Naval authorities; the commanding Officer of the accused gave pre-matured notice under the said Adjustment of Jurisdiction Rules for trial of the accused under Navy Act before framing charges by the Magistrate and hence the same was rejected; in the instant case the request was made by the Air Force authorities soon after the arrest was made by the police. The facts of the instant case are similar to the case of *Som datt Datta*, which is the authoritative case law on the Doctrine of concurrent jurisdiction.

20. In *Army Headquarters v. CBI*, the competent authority had not invoked the provisions of Section 125 of the Army Act (similar to Section 124 of Air Force Act); in *Balbir Singh v. State of Punjab*, reported in (1995) 1 SCC 90 (a case of an accused person subject to Air Force Act); the competent authority has not invoked Section 124 of Air Force Act, but handed over the custody of the accused to civil authorities for trial by ordinary Criminal Court and hence, in that case, the contention of the accused of his right to be tried only by the Court Martial was disallowed; in the case of *State of Sikkim v. Jasbir Singh*, the competent Army authority had invoked Section 125(AA) and decided not to take over the case and allowed the case to be tried by the Criminal Court after the revision order of the High Court of Sikkim. The principles of concurrent jurisdiction have been settled in the case of *Som Datt Datta v. Union of India*, by a five judges Constitution Bench; the relevant provisions governing this subject would be Section 124 of Air Force Act.

Discussion:

21. The accused involved in Crime No. 9 of 2021 and the victim are flight lieutenants in the Indian Air Force. At the time of occurrence, both of them along with the other officers were undergoing seven

weeks Professional Knowledge Course from 16.08.2021 at AFAC, Coimbatore. They participated in a party at the officers' mess in AFAC in the evening of 09.09.2021. Thereafter the victim went to her room and slept there. The occurrence is said to have occurred at the room of the victim on the same night and for which she had already given a complaint to her Officers and that resulted in forming a Court of Inquiry and it had started its inquiry.

22. Having not satisfied with the manner in which the matter was handled, the victim had given a police complaint on 20.09.2021 and the FIR got to be registered on the same day in Crime No. 9 of 2021 of All Women Police Station Central, Coimbatore. All Women Police Station Central, Coimbatore took charge of the case and started to investigate and the accused was arrested. At the time when the accused was produced before the learned Magistrate, the Air Force Authorities placed a request for seeking the custody of the accused and the same is ordered by the learned Judicial Magistrate, Additional Mahila Court dated 30.09.2021. The police challenged the same by preferring a revision before the Sessions Court and the learned Sessions Judge passed an order and by which the order of the learned magistrate was modified and investigation was permitted to be done by both the petitioner and the respondent in accordance with the Air Force Act and the Code of Criminal Procedure respectively. However that part of the order of the Magistrate which handed over the custody of the accused to the Air Force authorities remained unaltered. Further, the petitioners were directed to prepare two sets of material papers for placing one set before the Court Martial for trial under the Air Force Act, 1950 and another set before the regular Court. Having got aggrieved over the said order, the State has preferred this Criminal Original Petition.

23. In usual course the issue involved in this case could be resolved through application and interpretation of the law on the subject without making much elaboration. However, the petitioner has expressed anguish by alleging that the victim of a sexual offence involved in this case was further victimised due to the insensitivity and apathy shown by the authorities and that compelled her to lodge a police complaint. Perusal of the detailed complaint of the victim to the police would justify their anguish. Though the respondent has filed a detailed counter, the tenor of the counter is as though it is an onset for a power wrangle. That contains some disparaging statements about the performance of the State police by taking excuses from certain isolated incidents. Such misunderstanding or bickering will defeat the noble object of the legislative arrangement of concurrent jurisdiction. When such visible misunderstanding between the two responsible forces is brought to this court, the court is obliged to assume a little higher responsibility by making a little more elaboration.

24. Before focusing on the concept of concurrent jurisdiction in the military law a quick understanding about the scheme of the Act which led to the conferment of concurrent powers on the Criminal Courts and the Court Martial is essential. The Air Force Act is largely modelled on the Army Act. Chapter-VI of the Air Force Act (hereinafter referred to as the Act) classifies certain military offences under sections 34 to 70. The said offences are relative to persons who commit the same and those persons should be the subjects of the Act. Section 2 of the Act defines the persons subject to the Act.

25. For the sake of clarity, Section 2 of the Act is shown as under:

"Section.2. Persons Subject to the Act:

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 (62 of 1952);

(d) persons not otherwise subject to 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."

26. So, any person who falls within the ambit of the above definition is the subject under the Act and if he commits any of the offence prescribed under Sections 34 to 70, he shall be tried before the Court Martial. Apart from those offences listed under Sections 34 to 70, the Court Martial has also got jurisdiction to try the civil offences also, if the offender happens to be a person subject of this act and so charged under Section 71 of the Act. This is irrespective of the fact whether the offence is committed within India or at any place beyond India, but subject to the exceptions under Section 72. The provision under section 71 not only empowers the Court Martial to try those offences and it also prescribes the nature and the limit of the punishment that can be imposed on the offender. Section 71 of Act reads as under:—

"71. Civil offences.—

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"*

27. While the offences under Sections 34 to 70 are directly considered as offences under the Act, the civil offences are also construed as offences against the Act under Section 71, if the offender happens to be the subject of the Air Force Act. For the sake of completion it is worthwhile to look into the definition for civil offence under Section 4(xii), before proceeding to appreciate the exceptions contemplated under Section 72 of the Act.

"Section 4(xii) - "civil offence" means an offence which is triable by a criminal court."

28. Now coming to the exceptions provided under Section 72 of the Act which are not considered as Offences under the Air Force Act, it can be seen that those are the grave and heinous offences like murder, culpable homicide not amounting to murder and rape. However, there are exceptional circumstances and under said circumstances, the Court Martial can still assume jurisdiction to try those heinous offences as well. For the sake of clarity Section 72 of Act is extracted below:—

"72. Civil offences not triable by court-martial.—

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."*

29. The offender should always be the subject of this Act even under section 72. But the distinction under section 72 is made on the basis of the type of the offences, type of the victims and the situation during which the offence was committed.

- (i) *Type of offences - as stated already the type of the offences are murder, culpable homicide not amounting to murder and rape.*

(ii) Type of victims - whether the victim is the subject of the Act or any other person.

(iii) Type of the situations : - The following situations are also relevant for the Court Martial to assume jurisdiction to try those exempted grave offences also. If the offender subject to the act commits the offence,

(a) while he is in active service;

(b) at any place outside India;

(c) at a frontier post specified by the Government by notification.

30. If the victim is a person falling under this Act and if the offender had committed the offence while he was in active service and if the place of occurrence is any place outside India or at a frontier post specified by the Government by notification, the Court Martial can still assume jurisdiction to try these offences also similar to those offences triable under Section 71 of the Act.

31. The term "*active service*" is defined under Section 4(i) as under:

"(i) active service, as applied to a person subject to this Act, means the time during which such person,

(a) is attached to, 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."

32. The civil offences by their very nature are triable by the regular Criminal Courts. However, the jurisdiction to try the civil offences has also been conferred on the Court Martial in view of the circumstances and exigencies that are specially known to the Armed forces. In *Ram Sarup v. Union of India*, AIR 1965 SC 247, the Hon'ble Supreme Court has held that there could be variety of circumstances which may influence the justification as to whether the offender be tried by a Court Martial or by the Criminal Court, and therefore, it becomes inevitable that the discretion to make such a choice be left to the Military Officers. Military Officer is to be guided by considerations of the exigencies of the service, maintenance of discipline in the Army, speedier trial, the nature of the offence and the persons against whom the offence is committed.

33. With the above avowed object in mind, the legislature in its wisdom thought it fit to have provisions for concurrent jurisdiction under military laws by conferring the powers on Court Martial to try civil offences along with military offences. Hence the object of such special

arrangement cannot be wrongly construed that if an offender of heinous crime like rape, if happens to be a subject of this Act, he should be treated like a privileged person and his authorities should act like his guardians by leaving the interest of the victim at lurch. On the other hand, the offender being a part of a disciplined force is expected to act in a more disciplined manner than an ordinary citizen and any deviance on his part is liable to be handled so seriously and fastly. Though the system of Court Martial appears to be an in-house mechanism, such proceedings before the Court Martial are not mere disciplinary proceedings but they are akin to criminal proceedings before a regular Criminal Court and hence the Court Martial has been conferred with the power of a Sessions Judge.

34. Sections 124 and 125 of the Air Force Act speak about the concurrent jurisdiction. While Section 124 refers about the discretion that can be exercised by the Chief of the Army staff or any other competent Authority in this regard in the matters which have concurrent jurisdiction. Before adverting into the nitty-gritties of Sections 124 and 125, it is worthwhile to extract those provisions below:

"Section 124. Choice between criminal court and court-martial. —

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 of 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 detained in Air force custody."

35. As per Section 124 of the Act in matters falling under the concurrent jurisdiction, if the Competent Authority opts to exercise his power to try the offence before the Court Martial by getting the proceedings instituted before him, he can direct the accused to be handed over to the Air Force custody. Priority is given to the Competent Authority of the Act to exercise option and not to the Criminal Court. The justification for giving such a priority to the Authorities has been approved by the Supreme Court in *Balbir Singh v. State of Punjab* reported in (1995) 1 SCC 90 and the relevant observation in this regard is extracted as below:

*" 17. ******

There appears to be sound logic to give the first option to the Authorities under the Act to decide whether the accused should be tried by the court martial or the criminal court. The defence of the country being of paramount importance, the Air Force Authorities

would know best as to whether the accused should be tried by the court-martial or by the ordinary criminal court because the trial by the ordinary criminal court would necessarily involve a member of the force being taken away for trial by the ordinary criminal court and not being available to the Authorities and the like considerations. However, in the event the criminal court is of the opinion, for reasons to be recorded, that instead of giving option to the Authorities under the Act, the said court should proceed with the trial of the accused, without being moved by the competent authority under the Act and the Authorities under the Act decide to the contrary, the conflict of jurisdiction shall be resolved by the Central Government under Section 125(2) of the Act and the decision as to the forum of trial by the Central Government in that eventuality shall be final."

36. Section 125 speaks about the option exercisable by a Criminal Court and it is given as below:

"Section 125. Power of criminal court to require delivery of offender.—

(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."

37. As per Section 125 of the Act, if a Criminal Court having jurisdiction thinks it fit that the proceedings should be instituted before it, the court shall give a written notice to the competent authority referred under Section 124 of the Act to deliver the offender to the nearest Magistrate for proceeding against the offender in accordance with law or to postpone the proceedings till the decision on the reference made to the Central Government is given. Section 125(2) says about the duty on the part of the competent authority of the Act either to deliver the accused as requested by the Court or to refer the matter to the decision of the Central Government. However, delivering the offender to the nearest Magistrate is at the option of the Commanding Officer. So, it is again the authorities under the Act have been given with the right of priority to deal with any subject of Air Force.

38. At the risk of repetition it is reiterated that when the Criminal Court deems it fit to deal the matter by itself by assuming its own jurisdiction that cannot be done automatically as it is done in all other cases, but only after putting the Commanding Officer on notice and after getting his consent. If the Commanding Officer has not chosen to give his consent to the notice given by the Magistrate, he cannot disregard the notice of the Criminal Court, but he has to refer the issue to the Central Government and stop the proceeding until its decision and the decision of the Central Government shall be final.

39. Section 475 Cr. P.C. speaks about the situation where the persons subject to Military, Naval or Air Force law or such other law is brought before the Magistrate and charged with an offence. As per Section 475(1), the Magistrate "*shall in proper cases*" deliver him together with a statement of the offence to the Appropriate Authority. Sub-section (2), says about the duty of the Magistrate to apprehend an accused within his jurisdiction, at the request of the appropriate authority. In this regard it is relevant to refer Section 105 of the Air Force Act, which also speaks about the assistance to be rendered by the Police in apprehending and delivering the accused to Air Force custody, upon receipt of a written request from the commanding officer.

40. In view of sub section (3) of Section 475 Cr. P.C., the High Court in appropriate cases, can pass orders to hand over any accused detained in any jail within the State to be produced before the Court Martial. The Rules as required under Section 475 Cr. P.C. have also been framed and kept in place as '*the Criminal Court and Court Martial (Adjustment of Jurisdiction Rules), 1978*'. For a better understanding, Section 475 Cr. P.C. is extracted below:

"Section 475. Delivery to commanding officers of persons liable to be tried by Court-martial.

(1) *The Central Government may make rules consistent with this Code and the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957), and the Air Force Act, 1950 (45 of 1950), and any other law, relating to the Armed Forces of the Union, for the time being in force, as to cases in which persons subject to Military, Naval or Air Force law, or such other law, shall be tried by a Court to which this Code applies or by a Court-martial; and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit 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 a Court-martial.
Explanation.- In this section-

- (a) *"unit" includes a regiment, corps, ship, detachment, group, battalion or company,*
 - (b) *"Court-martial" includes any tribunal with the powers similar to those of a Court-martial constituted under the relevant law applicable to the Armed Forces of the Union.*
- (2) *Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any unit or 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.*
- (3) *A High Court may, if it thinks fit, direct that a prisoner detained in any jail situate within the State be brought before a Court-martial for trial or to be examined touching any matter pending before the Court-martial."*

41. In the instance case, on a complaint given by the victim, the Court of Inquiry has been constituted and it has started its enquiry. However, the victim had given another complaint to the police and on which, a case has been registered and the accused was secured from the Air force premises after giving notice to the authorities concerned and he was brought before the Magistrate. On a request made to the learned Magistrate to hand over the accused to Air Force custody, an order has been passed to hand over the custody to them. When it was challenged by the petitioner by preferring a revision, the Revisional Court confirmed the order to handing over custody, but with some additional directions.

42. It was the argument of the petitioner, State prosecution that the stage to hand over the custody would arise only at the time of institution of the proceedings and the language of Section 475 Cr. P.C. and Sections 124 and 125 would confirm the same. The words employed in Section 475 Cr. P.C. is '*when any person is brought before the Magistrate and Charged with an offence*'. In Sections 124 and 125 Air Force Act, it is mentioned as '*the proceedings shall be instituted*'. In this regard it is relevant to make a mention about the judgment of the Supreme Court in *Army Head Quarters v. CBI*, (2012) 6 SCC 228 and in which, it is held that the stage of making option to try is after filing the charge sheet. The relevant paragraph is brought down here:

"91. Thus, the law on the issue is clear that under Section 125 of the Army Act, the stage of making option to try an accused by a court-martial and not by the criminal court is after filing of the chargesheet and before taking cognizance or framing of the charges."

43. The full bench of the Hon'ble Supreme Court has held in *R.R. Chari v. Uttar Pradesh* reported in 1951 SCC 250 : 1951 SCC OnLine SC 22 that commencement of proceedings is different from initiation of proceedings and taking cognizance is a condition precedent for initiating the proceedings. In *Balbir Singh v. State of Punjab*, (1995) 1 SCC 90, the Hon'ble Supreme Court had an occasion to deal with the argument that if the compliance of the provisions 124 and 125 of Air Force Act is not in order that will vitiate the proceedings before the Magistrate. A reference was made to the Full Bench judgment of the High Court of Punjab in *Ajit Singh v. State of Punjab*, wherein it is held as under:

"18. In our opinion, on a construction of the various provisions referred to above the criminal courts are not deprived of their inherent jurisdiction to take cognizance of civil offences under the Code. Before the Full Bench of the Punjab & Haryana High Court in Ajit Singh v. State of Punjab² it was argued on behalf of the appellant therein, who was in "active service" of the Air Force, that on account of the non-compliance with the provisions of Section 125 of the Act and Section 549 CrPC (corresponding to Section 475 of the Code), the committal of the appellant and his trial held in pursuance thereof must be held to be without jurisdiction. The Full Bench repelled the argument and opined:

"No room is left for doubt about the legal position being that 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 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 court-martial and an arrangement for the proper exercise of such jurisdiction including, when necessary a way of resolving a conflict of jurisdiction." and went on to 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."

19.

20. We are also unable to agree with Mr. Poti, in the facts and circumstances of this case, that there was any non-compliance with the provisions of Sections 124 and 125 of the Air Force Act read with Section 475 CrPC.

21. The object of giving a notice as envisaged by the Act and the 1952 Rules to the Authorities under the Act is to make them fully

aware of the pendency of a criminal case against a member of the force and to afford them an opportunity to exercise their discretion of having the member of the force tried either by the court-martial or to allow the ordinary criminal court to proceed with the trial. Though the provisions of the Act and the Code referred to above are mandatory in character insofar as they require that the Authorities under the Act shall be given the first option to decide whether to try the accused by court-martial or allow his trial by the ordinary criminal court, no particular form of notice has been prescribed either under the Act, the Rules or the Code. Whether or not the Authorities have been made fully aware and put on notice by the criminal court to enable them to exercise their option, would depend upon the facts and circumstances of each case. It is the substance and not the form of notice which is relevant and important. All that the law envisages is that the Authorities under the Act must be made fully aware of the nature of offence, status of the victim and the pendency of the criminal case against a member of the force on "active service", so that the Authorities under the Act may exercise their option whether or not to try the accused by a court-martial. Where full and complete 'information' is provided to the Authorities, the requirement of law would stand complied with, irrespective of the fact whether the information was given by way of a notice or otherwise.

44. The arguments of the petitioner revolves around a single point that a right provision has been invoked at a wrong stage. The counter argument of the respondent is that the stage to exercise option itself arise only if the charge sheet has been filed before the Criminal Court and even before that the Court of Inquiry has been formed and it had taken up the investigation.

45. Similar such argument is seen to have surfaced before the Constitutional bench of the Supreme Court in *Som Datt Datta v. Union of India* (AIR 1969 SC 414). Certain similarities between the case in hand and *Som Datt Datta* is that both the offender and the victim are persons subject to the Act and the offence committed was murder which ordinarily prohibits a trial before a Court Martial except during some special circumstances and part of the investigation was carried out by the police, even though a Court of Inquiry was formed by the appropriate authority. It was argued on behalf of the petitioner of the said case, who was convicted by the Court Martial and whose conviction was confirmed by the confirming authority that the concerned authority did not give any notice to the Criminal Court about his intention to try the case before the Court Martial and hence the Criminal Court alone has got the jurisdiction to try the case and further that the order of the confirming authority has not given any reasons for confirmation. But

the Supreme Court has held that the Rules framed by the Central Government under Section 549 of the Criminal Procedure Code (*corresponding to Section 475 of the new Code*) shall apply to a case where the proceedings against the offender have already been instituted in an ordinary Criminal Court having jurisdiction to try the matter and not at a stage where such proceedings have not been instituted.

46. In this regard the relevant part of the judgment is extracted below : *Som Datt Datta v. Union of India* (AIR 1969 SC 414);

"5. In the present case, we are unable to accept the contention of the petitioner that merely because Maj. Agarwal had directed that the first information report should be lodged with the police through Second Lt. Jesudian, it means that the competent authority under Section 125 of the Army Act had exercised its discretion and decided that the proceedings should be instituted before the Criminal Court. The reason is that Maj. Agarwal was not the competent authority under Section 125 of the Army Act to exercise the choice under that section. The competent authority was the Central Officer Commanding, Madras, Mysore and Kerala Area and that authority had decided on September 2, 1965 that the matter should be tried by a Court Martial and not by the Criminal Court. On the same date, the General Officer Commanding, Madras, Mysore & Kerala Area had ordered the constitution of the Court Martial under Chapter VI of the Army Rules to investigate into the case of the petitioner and the other accused persons. There was admittedly no direction by the Commander of that area to hand over the proceedings to the Criminal Court. It is true that Maj. Agarwal had directed a report to be lodged with the Police at 4.00 a.m. on September 2, 1965. It is also true that Sri Bashyam, Inspector of Police had inspected the place of occurrence, seized certain exhibits and held inquest of the dead body of Spr. Bishwanath Singh. Sri Bashyam has admitted that he stopped investigations on the same date as directed by the military authorities. Merely because Sri Bashyam conducted the inquest of the dead-body of Spr. Bishwanath Singh or because he seized certain exhibits and sent them to the State Forensic Science Laboratory, Madras for chemical examination, it cannot be reasonably argued that there was a decision of the competent military authority under Section 125 of the Army Act for handing over the inquiry to the Criminal Court. On the other hand, the action of the General Officer Commanding in constituting the court of enquiry on September 2, 1965 indicates that there was a decision taken under Section 125 of the Army Act that the proceedings should be instituted before the Court Martial.

7. *It was argued on behalf of the petitioner that there was*

no notice given by the Commanding Officer to the Magistrate under Rule 5 that the petitioner should be tried by a Court Martial and hence the criminal court alone had jurisdiction under Rule 3 to conduct proceedings against the petitioner for the offences charged. In our opinion, the argument on behalf of the petitioner is misconceived. The Rules framed by the Central Government under Section 549 of the Criminal Procedure Code apply to a case where the proceedings against the petitioner have already been instituted in an ordinary Criminal Court having jurisdiction to try the matter and not at a stage where such proceedings have not been instituted. It is clear from the affidavits filed in the present case that the petitioner was not brought before the Magistrate and charged with the offences for which he was liable to be tried by the Court Martial within the meaning of Rule 3 and so the situation contemplated by Rule 5 has not arisen and the requirements of that Rule are therefore not attracted. It was pointed out by Mr. Dutta that after the first information report was lodged at Pallavaran police station a copy thereof should have been sent to the Magistrate. But that does not mean that the petitioner "was brought before the Magistrate and charged with the offences" within the meaning of Rule 3. It is manifest that Rule 3 only applies to a case where the police had completed investigation and the accused is brought before the Magistrate after submission of a charge sheet. The provisions of this Rule cannot be invoked in a case where the police had merely started investigation against a person subject to Military, Naval or Air Force law. With regard to the holding of the inquest of the dead-body of Spr. Bishwanath Singh it was pointed out by the Attorney-General that Regulation 527 of the Defence Services Regulations has itself provided that in cases of unnatural death that is death due to suicide, violence or under suspicious circumstances information should be given under Section 174 of the Criminal Procedure Code to the civil authorities, and the conduct of Maj. Agarwal in sending information to the police was merely in accordance with the provisions of this particular regulation. For these reasons we hold that counsel for the petitioner is unable to make good his argument on this aspect of the case.

9. Finally it was contended on behalf of the petitioner that the order of the Chief of the Army Staff confirming the proceedings of the Court Martial under Section 164 of the Army Act was illegal since no reason has been given in support of the order by the Chief of the Army Staff. It was also pointed out that the Central Government has also not given any reasons while dismissing the appeal of the petitioner under Section 165 of the Army Act and that the order of

the Central Government must therefore be held to be illegal and ultra vires and quashed by the grant of a writ in the nature of certiorari. In this context it is necessary to reproduce Sections 164 and 165 of the Army Act which are to the following effect:

“164. (1) Any person subject to this Act who considers himself aggrieved by any order passed by any Court Martial may present a petition to the officer or authority empowered to confirm any finding or sentence of such Court Martial, and the confirming authority may take such steps as may be considered necessary to satisfy itself as to the correctness, legality or propriety of the order passed or as to the regularity of any proceeding to which the order relates.

(2) Any person subject to this Act who considers himself aggrieved by a finding or sentence of any Court Martial which has been confirmed, may present a petition to the Central Government, the Chief of the Army Staff or any prescribed officer superior in command to the one who confirmed such finding or sentence, and the Central Government, the Chief of the Army Staff or other officer, as the case may be, may pass such order thereon as it or he thinks fit.

165. The Central Government, the Chief of the Army Staff or any prescribed officer may annul the proceedings of any Court Martial on the ground that they are illegal or unjust.” In contrast to these sections, Section 162 of the Army Act expressly provides that the Chief of the Army Staff “for reasons based on the merits of the case” set aside the proceedings or reduce the sentence to any other sentence which the court might have passed. Section 162 reads as follows: “The proceedings of every summary Court Martial shall without delay be forwarded to the officer commanding the division or brigade within which the trial was held, or to the prescribed officer; and such officer, or the Chief of the Army Staff, or any officer empowered in this behalf by the Chief of the Army Staff, may, for reasons based on the merits of the case, but not any merely technical grounds, set aside the proceedings or reduce the sentence to any other sentence which the court might have passed.”

It is necessary in this context to refer to Rules 61 and 62 of the Army Rules which prescribe the standard form of recording the opinion of the Court Martial on each charge and of announcement of that finding. These Rules omit all mention of the evidence or the reasoning by which the finding is reached by the Court Martial. Rules 61 and 62 are to the following effect:

“61. Consideration of finding.— (1) The court shall deliberate on its finding in closed court in the presence of the Judge-

Advocates. (2) The opinion of each member of the court as to the finding shall be given by word of mouth on each charge separately.

63. Form, record and announcement of finding. — (1) The finding on every charge upon which the accused is arraigned shall be recorded and, except as provided in these Rules, shall be recorded simply as a finding of 'guilty' or of 'not

(10) The finding on each charge shall be announced forthwith in open court as subject to confirmation."

In the present case it is manifest that there is no express obligation imposed by Section 164 or by Section 165 of the Army Act on the confirming authority or upon the Central Government to give reasons in support of its decision to confirm the proceedings of the Court Martial. Mr. Dutta has been unable to point out any other section of the Act or any of the Rule made therein from which necessary implication can be drawn that such a duty is cast upon the Central Government or upon the confirming authority. Apart from any requirement imposed by the statute or statutory rule either expressly or by necessary implication, we are unable to accept the contention of Mr. Dutta that there is any general principle or any rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision."

47. In fact, in *Som Dutt Datta* case, it is the police who had first registered the case on 2nd September 1995 and started their investigation and the Court of Inquiry was formed on 3rd September 1995. Subsequent to the formation of Court of Inquiry the police had stopped their investigation. *guilty*'. However, it is submitted by the learned Government Advocate for the petitioner that the Supreme Court has held in *S.K. Jha Commodore v. State of Kerala*, (2011) 15 SCC 492 that the commanding officer cannot exercise his option before the charge sheet is filed and it has been later followed by the High Court of Orissa in *Adm Commandant v. State of Odisha*, 2020 SCC OnLine Ori 873.

48. For the sake of clarity the essential portion of those judgments are given as under:

S.k Jha Commodore v. State of Kerala (2011) 15 SCC 492

"1. Heard the learned counsel for the parties in extenso.

2. It is clear to us that the judgment of the High Court is in conformity with the judgment of the Constitution Bench of this Court in Som Dutt Datta v. Union of India. The Constitution Bench while construing Rule 3 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952 read with Section 549 of the Cr. P.C., 1898 (now Section 475 Cr. P.C.,

1973) held that the option as to whether the accused be tried before the criminal court or by a Court Martial could be exercised only after the police had completed the investigation and submitted the charge-sheet and that the provisions of the Rule could not be invoked in a case where the police had merely started an investigation against a personnel subject to Military, Naval or Air Force law.

3. The facts of the present case indicate that three naval officers were arrested on 10-1-2008 for offences punishable under Sections 143, 147, 148, 452, 307, 326 and 427 read with Section 149 IPC and some other penal laws. They were produced before the Magistrate on the 11-1-2008 who remanded them to judicial custody. An application was filed on 14-1-2008 by the Commanding Officer of the Naval Unit to which they belonged for handing over the accused for trial under the Navy Act, 1957. This application was rejected by the Magistrate holding that the stage of consideration of the application would arise only on the completion of the police investigation which was still at a preliminary stage and that the request of the Commanding Officer was premature. The order of the Magistrate was challenged before the High Court of Kerala in revision. This too has been dismissed on similar grounds.
4. We see from the facts that the observations of the Constitution Bench in *Som Datt Datta* case apply fully to the facts herein. The stage at which the option can be exercised by the Commanding Officer (as to whether the accused should be tried before a Court Martial or a criminal court) cannot be examined at this stage as the investigation has not been completed and a charge-sheet has yet to be submitted.
5. The appeal is accordingly dismissed."

Adm Commandant v. State of Odisha 2020 SCC OnLine Ori 873

"11. In the case of *Chandra Mohan Shukla*, which was rendered on 17th July, 2007, it is observed by the Guahati High Court, as follows:—

"70. What crystallizes from the above discussion is that even when an investigation by police into an offence alleged to have been committed by a person subject to the Army Act is in progress, there is no impediment, on the part of the competent military authority, to either investigate the case in terms of Chapter V of the Army Rules or in holding Court-martial if the accused is not in the custody of the Criminal Court or in the custody of the police on the orders of the Criminal Court. The decision in *Som Datt Datta*, 1969 Cri LJ 663 (*supra*) is a case of

this nature, where the Army Officer was put to trial even when the investigation by police was pending. If, however, the accused is arrested during investigation and brought before a Magistrate, Rule 4 gets, attracted and a notice to the competent military authority to exercise their option to try the accused has to be given."

12. But every confusion has been cleared by the Hon'ble Supreme Court in the case of S.K. Jha Commodore (supra). It is a short judgment of the Hon'ble Supreme Court, which is produced below in entire.

13. In the factual aspects of the present case at hand, the same is found squarely covered by the decision of the Hon'ble Supreme Court in the case of S.K. Jha (supra). Here is a case, the F.I.R. was lodged on 7.10.2020, opposite party No. 3 (accused) was arrested and produced on the next day before the learned S.D.J.M., Bhubaneswar and then on the same day the Military custody of the accused (opposite party No. 3) was sought for by the Army authority and it was allowed. It is thus clear that, the custody of the accused was handed over to the Army authority pending investigation and before submission of the police report under Section 173(2) of the Cr. P.C. What is contended on behalf of the petitioner as well as opposite party No. 3 that, the custody of opposite party No. 3 pending investigation is in terms of provision under Section 104 of the Army Act and not under Sections 125 and 126 or under the provisions of the Criminal Procedure Code is not seen with substance. It is for the reason that the provisions of Section 104 has to be read in coherence with the provisions of 125 of the Army Act, Section 475 of the Code and the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978.

The provisions under Section 104 cannot stand alone to decide the custody of the accused in respect of the civil offences committed against a civilian or non-subject of Army Act. Moreover, the decision rendered by the Hon'ble Supreme Court in the case of S.K. Jha leaves no scope or any confusion with regard to custody of opposite party No. 3 in the present context.

14. It is thus clear that, the custody of opposite party No. 3 cannot be examined at this stage pending investigation and the stage to exercise the option by the petitioner for custody of opposite party No. 3 has not reached yet awaiting submission of police report u/s. 173(2) of the Cr. P.C. Accordingly, I do not see any merit in the present Criminal Misc. Case to interfere with the order of the learned Sessions Judge."

49. But in both the cases, the victims are civilians and not subjects of the Act and further the investigation appeared to have been initiated

and allowed to be made by the police. Further, the judgment of *S.K. Jha Commadore* has been rendered by the Full Bench of the Supreme Court and it has been followed by the Single bench of the Orissa High Court in *Adm Commandant v. State of Odisha* But the dictum in *Som datt Datta* has been laid down by a constitutional bench of the Supreme Court and hence that alone can rule the position of law involved in the subject. In the case in hand, the Court of Inquiry has been constituted at the very beginning and that would indicate the intention of the Appropriate Authority to assume jurisdiction before the Court Martial in terms of Section 124 of the Act.

50. No doubt the offence of rape falls within the exceptional offences under Section 72 and over which the Court Martial cannot ordinarily exercise jurisdiction. The exceptional offences are murder, culpable homicide not amounting to murder and rape. But denial of jurisdiction to Court Martial is only if the person against whom the offence committed is not a subject of Military, Naval or Air Force law. The words 'against a person not subject to Military, Naval or Air Force law' and 'such a person' under Section 72 would only mean that the person should be the person not defined under Section 2 of the Act (extracted supra). However, if any of those offences is committed against a person who is also subject of the Military, Navy and Air Force, the Court Martial cannot be excluded from exercising his option to assume jurisdiction. Even when the victim is not a subject of the Act, under certain circumstances and as specified under Section 72, the Court Martial can exercise jurisdiction. In the instant case the victim is also a subject of Air Force law and hence it cannot be said that the Court Martial cannot exercise option to assume jurisdiction over the offence involved in this case.

51. Having said that, it should also be emphasised that the proposition of law laid down in *Sam datt Datta*, cannot be superficially understood as a mere 'No' to exercise option to assume jurisdiction until the investigation is completed and the charge sheet is filed before the Magistrate. It should be comprehensively understood that if the Court of Inquiry has undertaken the investigation, it is indicative of assumption of jurisdiction by the Court Martial and in such case, there is no necessity to continue or complete the investigation by the police and hence the necessity to lay the charge sheet by police before the Criminal Court and the consequential need to invoke Section 475 Cr. P.C. read with the corresponding Court Martial (Adjustment of Jurisdiction) Rules, will not arise.

52. Any piecemeal or truncated understanding of the above legal position will only cause confusion and confrontation between the two mighty forces. Even though the learned Magistrate at the first level had rightly understood the legal position and passed orders to hand over

the custody of the accused, he omitted to add that the further investigation of the police should not be continued, unless it is so desired by the Appropriate Authority under the Act.

53. The Revisional Court further confounded the situation by directing the police to continue the investigation and prepare two copies of evidence and lay one before the regular Court and another before the Court Martial. In fact that order of the Revisional Court ought to have been challenged by the respondent, if he did not desire the police to continue the investigation. By keeping silence and not raising any red flag, the respondent allowed the police also to continue the investigation. Simultaneous investigation was carried out by the Court of Inquiry also and the report has been laid before the Court Martial and thereafter the accused was tried by the Court Martial. The adjustment of concurrent jurisdiction as contemplated under the Act and the relevant rules framed in this regard are towards an understanding between two forces in the larger interest and not for a race between two different forces to win any trophy.

54. In the instant case, the necessity to register a case by the police arose due to the complaint filed by the victim. Having not satisfied with the way in which the things were handled by Air Force authorities subsequent to her reporting and having faced humiliation and threat to withdraw the complaint, the victim had approached the police.

55. The country had waken up to a progressive world order of gender equality with the promulgation of the Constitution of India. The march gained momentum with the successive victim centric enactments made to combat violence against women and children, especially the sexual violence against them and this has spread more awareness among the populace. The definition of rape has been very much updated and the Ministry of Home affairs has also released the Standard Operating Procedure for Investigation and Prosecution of the offence of Rape in their official website. (<https://www.mha.gov.in>). Victim jurisprudence have evolved to the extent of recognizing the victim's right to participation in the proceedings from bail to trial and much attention is given to restorative justice by awarding compensation under Victim Compensation Scheme. In this era of awareness and sensitivity, it is difficult to comprehend that a victim of a sexual offence in the Armed Forces was not comfortable enough to take up her grievance and she was looked down and pressured for having got the courage to report. If the women of the armed forces should not have courage to fight such violence, who else can have?

56. If an appropriate authority under the Act continues to handle the offences like rape against the persons subject to the Act by opting to assume jurisdiction under the Court Martial, even when the situations and events surrounding the victim are not hunky-dory, the victim will

be vulnerable to secondary victimisation. Even if the accused is convicted at the end of the trial that cannot be called as a complete justice and there is a possibility for such victimisation to continue even after the conviction of the accused.

57. The remedy available to all aggrieved Officers under Section 27 of the Act by making complaints against their superiors to the Central Government or a remedy of re-trial at the discretion of the Central Government under Section 126, cannot be an immediate answer to the most demanding post reporting situations of the victims of sexual offences. This hard-core reality can only be remedied through legislative measures by properly addressing the gap in such special legislation and by ensuring the compliance of mandates of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 in the Armed Forces and by spreading awareness.

58. It is not out of place to mention that Section 357(c) of Cr. P.C., would mandate that all hospitals, public or private, whether run by the Central Government or the State Government and the local bodies or any other person should immediately provide medical treatment for free of cost to the victim of the offence of rape and the matter should be immediately informed to the police and any deviation of the mandates of Section 357(c) would amount to criminal offence under Section 166-B of IPC.

59. To conclude in the background of the above discussions, I feel the following guidelines can be given to the Criminal Courts for dealing with the matters of handing over custody of the subjects of Armed Forces.

- (i) *Whenever the requests for custody is made by a competent authority of any Armed Force, the magistrate should follow the dictum laid down in Som datt Datta v. Union of India in letter and spirit by having a comprehensive understanding that if the Court of Inquiry has undertaken the investigation in the matter, it is indicative of assumption of jurisdiction by the Court Martial under Section 124 of the Act.*
- (ii) *Once an option under Section 124 is exercised there is no necessity to continue or complete the investigation by the police and hence the necessity to lay the charge sheet by police before the Criminal Court and the consequential need to invoke Section 475 Cr. P.C. read with the corresponding Court Martial (Adjustment of Jurisdiction) Rules, will not arise. Hence an order should be passed that the police shall not continue the investigation unless it is expressly desired by the Competent Authority of the Military, Naval, Air Force, as the case may be.*
- (iii) *Once the Investigation is undertaken by the appropriate*

Authority, it is that authority or team of authorities who had investigated the offence have to appear before the Court Martial during trial to depose evidence and not the police. Hence if any summons is ordered by the Court Martial through the Magistrate for the appearance of the Police, before serving the same, the magistrate shall clarify whether it was due to the investigation carried out by the Police.

- (iv) There need not be any doubt that if the police has undertaken the investigation, the charge sheet has to be laid only before the Magistrate under Section 190 Cr. P.C. and not before the Court Martial, even though the Magistrate is obliged to follow sec. 125 of the Act. However, such reports will be directly instituted before the Court Martial if the investigation is done by the Court of Inquiry and if the report is filed by the Appropriate Authority.*
- (v) So far as the power of the Criminal Court to exercise the option to assume jurisdiction to try the offence, it can be exercised only after the charge sheet is filed and in accordance with Section 125 of the Act.*
- (vi) While exercising such an option under sec. 125, the magistrate shall put the Appropriate Authority on notice and postpone the trial until his decision or the decision of the Central Government at his instance is obtained and informed to the Court.*
- (vii) If the request is made by the Appropriate Authority after the charge sheet is filed in accordance with Section 125, due procedure contemplated under Section 475 Cr. P.C. and the Court Martial (Adjustment of Jurisdiction) Rules, 1978 shall be followed.*
- (viii) When a subject of the Act is arrested and brought before the learned Magistrate after he was arrested under Section 105 of the Act, the accused should be handed over to the custody of the Military, Navy or Air force as the case may be, if request for custody is made. If no such request is made by the Appropriate Authority for custody, the magistrate shall remand the accused u/s 167 Cr. P.C. on intimation to the Appropriate Authority, if the offence involved is a civil offence and it is well grounded and over which the Criminal Courts have jurisdiction. If the offence involved is not a civil offence but a military offence or combined with any military offence and over which the Criminal Courts have no jurisdiction, the accused shall be handed over to the custody of the Military, Navy, Air Force, as the case may be, even if there is no written request.*

60. With the above guidelines, this Criminal Original Petition is disposed. And the Central Government is directed to ensure the proper existence of Internal Complaints Committee in the Armed Forces in accordance with the mandates of the Sexual Harassment of Women at

Workplace (Prevention, Prohibition and Redressal) Act, 2013 and to sensitise the armed personnel by imparting gender sensitive awareness training to achieve its objectives. Consequently, connected miscellaneous petition is closed.

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