

(1986) 08 PAT CK 0007

In the Patna High Court

Case No : Criminal Writ Jurisdiction Case No. 137 of 1984

Ex-Major Ganesh Prasad Sinha

APPELLANT

Vs

Union of India and 3 Others

RESPONDENT

Date of Decision : 22-08-1986

Acts Referred:

Army Act, 1950 — Section 125, 126, 127, 152, 169

Criminal Procedure Code, 1973 (CrPC) — Section 1, 125, 167, 428, 480

Penal Code, 1860 (IPC) — Section 193, 228

Citation : (1986) PLJR 1059

Hon'ble Judges : P.S. Mishra, J

Bench : Single Bench

Advocate : Ashok Kumar Keshri and Rakesh Ranjan Prasad, for the Appellant;
K.K. Prasad, S.C.C.G., for the Respondent

Final Decision : Allowed

Judgement

P.S. Mishra, J.—An Ex-Major in the Indian Army has moved this Court for an appropriate writ to quash the order dated 30.1.1984 issued by the second respondent (Annexure I) and the order dated 9.1.1984 by the 4th respondent (Annexure-2). The petitioner was found guilty in a General Court Martial held at Jalandhar Cantonment and convicted on 29.10.1982 for acts prejudicial to good order and military discipline etc. On the said conviction, the General Court Martial ordered for the petitioner's dismissal from the military service, vide order dated 8.3.1983. There was a review suo motu and on 11.6.1983 the punishment was enhanced by the following: -

- (1) The petitioner to be cashiered, and
- (2) To suffer rigorous imprisonment for one year.

The enhancement was confirmed by the Chief of the Army Staff on 27.10.1983. Accordingly, the sentence was promulgated on 8.11.1983 and the petitioner was handed over to the Civil Police, Jalandhar and lodged in the custody of the

Superintendent, Central Jail, Jalandhar with the order that the sentence would take effect from 8.3.1983. It appears that before the promulgation of the sentence, the petitioner had been taken in custody by the army with his arrest on 21.10.1982 and at no time he was released until, according to him, he served out his sentence and released on 16.11.1983. According to the petitioner, he was so released pursuant to remission of 11 days for blood donation and benefits of trial period of 130 days vide order of the 4th respondent dated 15.11.1983. The second respondent, however, addressed a communication to the Superintendent of Police, Muzaffarpur dated 30.1.1984 stating therein that the petitioner was required to undergo unexpired portion of his sentence in view of the Warrant of commitment issued by the 4th respondent on 9.1.1984. The communication of the second respondent has made a reference of the order of the 4th respondent dated 9.1.1984 which was issued cancelling the warrant of commitment dated 8.11.1983. Apprehending arrest, the petitioner has moved this Court.

2. There is no substantial controversy as to the conviction and sentence awarded to the petitioner by the competent authority. The main controversy, however, is whether the release of the petitioner on 8.1.1984 by the second respondent from his custody was invalid as the petitioner was yet to serve out the sentence of imprisonment imposed upon him. In the counter-affidavit on behalf of the respondents 1 to 4, it is said that since the sentence was to commence from 8th March, 1983 as per Army Rules, 1968, the petitioner should have been released from the said prison on 8th March, 1984; erroneously, the Superintendent of the said jail prematurely released him from the prison on 16th November, 1983. He did so presuming that the provisions of section 428 of the Code of Criminal Procedure of 1973 were applicable to the petitioner; but the provisions of Code of Criminal Procedure 1973 are not applicable to the trials conducted by a Court Martial under the Army Act and the Army Rules made thereunder, since the Army Act is a special law as defined in the Indian Penal Code and section 5 of the Code of Criminal Procedure vitiates the application of such provision to the trials under the military law. According to the respondents, this bona fide mistake was detected by the Superintendent of Central Jail, Jalandhar and accordingly, the communication (Annexure-1) has been issued.

3. Learned Counsel for the petitioner has attacked the communication to re-arrest the petitioner to undergo further imprisonment after his release from custody mainly on two grounds:-

(1) There is no error in releasing the petitioner from custody who has served out his sentence of one year rigorous imprisonment, and (2) the respondents by taking unilateral decision to revoke remissions granted to the petitioner in the sentence have violated the principles of natural justice.

4. Before I deal with the contentions, I may refer to the provision in section 5 of the Code of Criminal Procedure. It says:

Nothing contained in this Code shall, in the absence of a specific provision to the

contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force.

What has been envisaged by this provision in the Code is to allow any special jurisdiction or power conferred or any special form of procedure prescribed by a special law to take control of the proceedings and exclude the operation of the Criminal Procedure Code. But merely because there is a special law, the operation of the Criminal Procedure Code is not excluded unless the special law expressly or impliedly provides in that behalf, in which case the special law applies, otherwise the Code applies. Section 5 of the Code is a re-enactment of a portion of sub-section 2 of section 1 of the Code of Criminal Procedure 1898. Since, section 5 is in the nature of a saving clause, it can only save what is acquired or already provided. It cannot debar legislature from creating or conferring new rights by a special enactment. At the same time, in order that one provision can be said to be a specific provision to the contrary, it must completely cover the field of operation of the other and must lay down a contrary rule for the entire field so as altogether to nullify the other. These principles can alone guide to test whether period of detention undergone by the accused during the investigation, enquiry or trial before conviction may be allowed to be set off against the term of imprisonment on conviction as provided u/s 428 of the Cr. P.C. In the instant case, the petitioner has been convicted by the General Court Martial and sentenced to imprisonment in accordance with the provisions in the Army Act.

5. Chapter 10 of the Army Act contains provisions as to the powers of the Court Martial. Section 125 thereof says;--

When a Criminal Court and a Court Martial have each jurisdiction in respect of an offence it shall be in the discretion of the officer commanding the army, army corps, detention or independent brigade in which the accused persons is serving or such other officer as may be prescribed to decide before which Court the proceedings shall be instituted, and if that officer decides that they should be instituted before a Court Martial, to direct that the accused person shall be detained in military custody.

It has given a discretion to the officer commanding or such other officer as may be prescribed to decide whether the case would be tried by a military court or a court otherwise competent to try the offender. This jurisdiction, although exclusive does not appear to affect the jurisdiction of the ordinary Criminal Court. Sections 126 and 127 of the Army Act provide that a Criminal Court having jurisdiction, may by written notice require the officer, referred to in section 125, at his option either to deliver the offender over to the nearest Magistrate for being proceeded against according to law, or to postpone proceedings pending reference to the Central Government and on such notice the officer concerned to either deliver the offender over to the magistrate in compliance of the requisition or forthwith refer the question to the Central Government whose order upon such

reference is final; and even after conviction or acquittal by a Court Martial for trial of the offender by a Criminal Court for the same offence or on the same facts, of course, with the previous sanction of the Central Government. Sub-section 2 of section 127, however, says;

"If a person sentenced by a Court-martial under this act or punished under any of the sections 80, 83, 84 or 85 is afterwards tried and convicted by a Criminal Court for the same offence, or on the same facts, that Court shall in awarding punishment, have regard to the punishment he may already have undergone for the said offence."

Chapter 11 of the Army Act which contains provisions as to procedure of Court martial, says in section 152;--

Any trial by a Court martial under the provisions of this Act shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code and the Court martial shall be deemed to be a Court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898.

The other relevant provisions are in Chapter 13 of the Army Act. Section 167 provides for reckoning commencement of sentence of imprisonment and says:

Whenever any person is sentenced by a Court martial to transportation or imprisonment, the term of his sentence shall whether it has been revised or not be reckoned to commence on the day on which the original proceedings were signed by the Presiding Officer or in the case of a summary Court martial by the Court.

6. The controversy herein, however, is based on the interpretation given to the provisions in sections 169, 171, 172, 173 and 176 of the Army Act. Before, however, I advert to these provisions and test whether the reckoning date of commencement of sentence will vary in a case where sentence is directed to be undergone in a civil prison or not, I may state that there are provisions in Chapter 14 of the Army Act which deal with the pardons, remissions and suspension of sentence but they do not appear to have any effect on what I am called upon to decide.

7. The respondents have apparently pleaded that there was some error in the warrant which was later corrected and the second respondent realised his mistake in treating, after granting remissions etc., the petitioner to have undergone the sentence, of imprisonment and recalled his order. He accordingly directed for petitioner's arrest to undergo imprisonment for the period remaining unserved in the civil prison.

8. Section 171 of the Army Act says;--

Whenever in the opinion of an officer commanding an army, army corps, detachment or independent brigade any sentence or portion of a sentence of imprisonment cannot for special reasons conveniently be carried out in a military

prison or any military custody in accordance with the provisions of section 169, such officer may direct that such sentence or portion of sentence shall be carried out by confinement in any civil prison or other fixed place.

The petitioner who was arrested on 21.10.1982 and admittedly punished to undergo imprisonment by an order made on 8.3.1983 was directed to undergo imprisonment in a civil prison. The order in Annexure "1" recites that under the warrant of commitment issued by the 4th respondent dated 9.1.1984 the petitioner was sentenced to undergo one year rigorous imprisonment; he was released by giving the benefit of 130 days undergone during investigation, enquiry and trial; the release was unauthorised and the petitioner was still required to undergo imprisonment to complete the sentence awarded to him. True, the petitioner was sent to civil prison on 8.11.1983 after confirmation of the punishment awarded and revision thereof but he was kept in confinement with effect from his arrest on 21.10.1982. In accordance with the provision in section 428 of the Code of Criminal Procedure, 1973, the petitioner is entitled to set off against the term of imprisonment imposed on him, the period of detention undergone, by him during the investigation, enquiry or trial, if the said provision is applicable. In the instant case, the investigation, enquiry or trial of the case against the petitioner was conducted by the competent authority under the Army Act and the General Court Martial. The procedure in that behalf prescribed in the Army Act, therefore, has been applied. There was no provision similar to one in section 428 of the Code of Criminal Procedure, 1973 in the Code of Criminal Procedure, 1898. The Army Act has spelt out some characters of a Criminal Court in a Court Martial by providing in section 152 of the Army Act that any trial by a Court Martial under the provisions of the Act shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code and the Court Martial shall be deemed to be a Court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898. Since the Act has referred to the Code of Criminal Procedure, 1898 and the provisions contained therein one can legitimately suggest that for treating a Court Martial, a court subject to the Code of Criminal Procedure, one has always to refer to the Code of 1898 and not to the Code of 1973. On this basis, it can be suggested that in the matter of imposition of sentence by a Court Martial set off as provided u/s 428 of the Code shall not be granted to the convict sentenced to undergo imprisonment by a Court Martial. Before this argument is sustained, however, it will be necessary to hold that a conviction by a Court Martial will be one governed by a special law which has prescribed a special procedure for commuting the sentence and has made no provision for set off. In other words, it has to be held that the trial and conviction by a Court Martial is saved by section 5 of the Code of Criminal Procedure, 1973.

9. In the case of F.R. Jesuratnam 1976 Cr. L.J. 65 before a Division Bench in the Delhi High Court, the petitioner who was a Squadron Leader in the Air Force and was tried by a General Court Martial after his arrest under the Air Force Act, 1950 and sentenced to rigorous imprisonment had raised a similar question. The

Court has observed;--

So far as section 428 of the Code is concerned it has been held in *Boucher Pierre Andre Vs. Superintendent, Central Jail, Tihar, New Delhi* and *Another*, that the said section is absolute in its term and that it provides for set off of the pre-conviction detention of an accused person against the term of imprisonment imposed on him on conviction, whatever be the term of imprisonment imposed and whatever be the factors taken into account by the court while imposing the term of imprisonment. The Legislature having introduced no such exception, the court cannot read it into the section, by a process of judicial construction that no set off or such pre-conviction detention would be permitted if the same had been already taken into account by the court while imposing the term of imprisonment on conviction.

But the Court having said that the Army Act is a special law and a conviction and sentence to undergo imprisonment by the Court Martial shall not attract section 428 of the Code, it has said:-

The most formidable difficulty in the way of the petitioner, as we see it is that the petitioner, on whom the burden lies heavily, has not been able to show how now giving him the benefit of pre-trial detention set off is discriminatory merely because civilians are now getting such a benefit u/s 428 of the Code. The petitioner cannot say in such a contest, that all that he is asking for is that the jail authorities must commute the period of imprisonment imposed by the Court Martial u/s 428; obviously the Code does not apply to him by reason of section 5 thereof. The Act is seen to be more lenient in some respects to persons subject to it even as in some areas they may be more disadvantageously placed. When this is so-and this was not and could not be denied- we fail to see how the petitioner could seek to compare himself with civilians in any area where he complains of being more disadvantageously placed. In no view of the matter does the argument of discrimination seem to have any force.

10. A Division Bench of the Madras High Court in the case of *P.P. Chandrasekaran v. Government of India and others* (1977 Criminal Law Journal 677) has said that the Navy Act is a special law as contemplated by section 5 of the Criminal Procedure Code; it prescribes an elaborate procedure for conducting a trial and for execution of sentences; and the accused who is sentenced to imprisonment by the Court Martial under the Navy Act is not entitled to claim the benefit of section 428 of the Code.

11. It appears to me, however, that the Supreme Court in the case of *B.P. Andra* (supra) has said with no ambiguity that the conviction and sentence by the Court are not in any way effected by granting set off and that they remain the same even after the set off is allowed. The thrust of the judgment of the Supreme Court although apparently confined to the question whether a person convicted after the coming into force of the new Code of Criminal Procedure would alone claim the benefit of section 428 also embraces cases where a person had been

convicted before but his sentence was still running at the day when the new Code came into force is also that section 428 is absolute in its terms. The object of the enactment of section 428 of the Code was to release the anguish of prolonged detention of undertrials and to avoid over-crowding in jails. The Army Act like the Navy Act or the Air Force Act may be a special law and special provisions are made for the trial by the Court Martial, still how the sentence would be carried out and in doing so, set off would be granted or not is not covered by the special provisions thereof.

12. I find support to my view in a judgment of the Kerala High Court in the case of *Subramanian v. Officer Commanding Armoured Static Workshop* 1979 C L J 617, which has chosen to record its disagreement with the Delhi view. In the words of P. Narayana Pillai, J. in the said judgment:-

The object of the enactment of section 428 of the Code was to relieve the anguish of prolonged detention of undertrials and to avoid overcrowding in jails. Sentence is the pith and substance of the whole criminal process. When that and the conviction remain intact and untouched inspire of the grant of set off, the grant of set off, cannot be considered as in any manner affecting the provisions of the Army Act." I entirely agree with the above and also record my disagreement with the decision in *F.R. Jeauratnam v. Chief of Air Staff* (supra).

13. The Supreme Court in the case of *Lt. Colonel Prithi Pal Singh Bedi v. Union of India & others*- 1982 SC 1413 has considered the constitutional validity of some of the provisions as to enquiry and trial by a Court Martial. Although, it has not found any infirmity in the law as such, yet it has lost no opportunity to remind that persons subject to the Army Act and Rules are also citizens of India and governed by the liberty oriented Constitution and made several recommendations for removing anomalies in the trials by the Court Martials and the ordinary Criminal Courts.

14. In a judgment previous to it in the case of *Suraj Bhan Vs. Om Prakash and Another*, also some words have been used by the Supreme Court which say the following:

"Indeed section 428 does not contemplate any challenge to a conviction or a sentence. It confers a benefit on a conviction reducing his liability to undergo imprisonment out of the sentence imposed for the period which he had already served as undertrial prisoner."

15. My attention, however, has been drawn to a judgment by a Division Bench of the Madras High Court in the case of *T.S. Ramani v. Superintendent of Prisons, Central Jail, Madras* 1984 C L J 892. The Madras High Court has chosen to dissent from Kerala view and adopted the reasoning in the Delhi Courts-" judgment. It has gone further to say that the same person if tried by Court Martial and sentenced to undergo imprisonment shall not be entitled to the benefit of section 428 Cr. P.C. but on his trial by the ordinary Criminal Court, if so ordered by the competent authority, he shall be entitled to the benefit thereof. I

have already indicated my preference and noticed the legal position. The Madras Court has not taken notice of the fact that conviction or sentence imposed by the Court Martial has got nothing to do with the set off, which set off is granted by section 428 of the Code of Criminal Procedure irrespective of the conviction and sentence on whatever considerations.

16. The next question is also of some importance. The petitioner who was entrusted to the custody of the second respondent was released from custody and it appears his re-arrest has been designed at the initiative of the fourth respondent. No provision of law has been brought to my notice under which they can take initiative and direct for the arrest of the petitioner to undergo sentence once, according to the petitioner rightly and according to the respondents wrongly set off has been granted. The common law principle of natural justice, apart from giving to the petitioner opportunity of being heard will also require disclosure of the authority of law under which he is sought to be detained. Is he a fugitive of law? The answer is "not". Even if he is a fugitive of law, his detention can be authorised only by a competent authority. Judicial review of administrative action is a rule which is answered on facts which show the authority of law and the procedures prescribed in this behalf. It is obvious that no such opportunity has been afforded to the petitioner. There is thus, a violation of natural justice in so far as the petitioner's right to know the legal authority and opportunity of being heard is concerned. In the result, this application is allowed. Let, a writ in the nature of certiorari be issued quashing the orders contained in Annexures 1 and 2 and consequentially, a writ in the nature of mandamus be issued directing the respondents for not taking the petitioner in custody pursuant to the orders contained in Annexures 1 and 2. There shall be no order, as to costs.