
(1981) 06 DEL CK 0001

In the Delhi High Court

Case No : Criminal Writ Petition No. 83 of 1980

R.S. Ghalwat

APPELLANT

Vs

The Union of India and others

RESPONDENT

Date of Decision : 04-06-1981

Acts Referred:

Citation : (1981) 06 DEL CK 0001

Hon'ble Judges : Rajinder Sachar, J; R.N. Aggarwal, J

Bench : Division Bench

Judgement

Sachar, J.—The petitioner was a Major in the Army and was tried by General Court Martial in the month of August 1977. This petition challenges the finding and conviction by General Court Martial as confirmed by respondent No. 2 by which the petitioner has been held guilty of three charges for offence u/s 3(1)(c) of the Official Secrets Act and sentenced to R.I. for 14 years.

2. The petitioner was an officer in the rank of Major in the Army and was undoubtedly subject to the provisions of the Act vide Section 2 of the Army Act, 1950 (to be called the Act), Chapter VI of the Act, deals with the offences punishable under the Act and provides that whosoever commits any of the offences mentioned therein shall on conviction by court martial be liable to suffer such or less punishments as are mentioned therein. Shortly stated under this Chapter there are three categories of offences namely (1) offences committed by a person subject to the Act triable by a court-martial in respect whereof specific punishments have been assigned; (2) civil offences committed by the said person at any place in or beyond India but deemed to be offences committed under the Act and if charged u/s 69 of the Act triable by a court-martial and, (3) offences of murder and culpable homicide not amounting to murder or rape committed by a person subject to the Act against a person not subject to the military law. Subject to a few exceptions, they are not triable by court martial but are triable only by ordinary courts.

3. Section 69 of the Act lays down that subject to the provisions of Section 70

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.

4. The scheme of the Act, Therefore, is self-evident. It applies to offences committed by army personnel described in Section 2 of the Act; it creates new offences with specified punishments, imposes higher punishments to pre-existing offences and enables civil offences by a fiction to be treated as offences under the Act, (vide Major E.G. Barsay Vs. The State of Bombay,). The expression "if charged therewith under this Section" occurring in Section 69 of the Act means "if accused of an offence which is an Army Act offence because of the legal fiction created by Section 69" (vide Major Gopinathan Vs. The State of Madhya Pradesh and Another,). Civil offence is defined in Section 3(ii) of the Act to mean an offence which is triable by a criminal court and sub-clause (viii) defines the criminal court to mean a court of ordinary criminal justice in any part of India. Section 13(1) of the official Secrets Act says that no court other than that of a Magistrate of the first class specially empowered in this behalf by the appropriate Government which is inferior to that of a District or Presidency Magistrate shall try any offence under this Act. Admittedly Magistrate of the first class is one of the classes of criminal courts mentioned in Section 6 of the Criminal P.C. 1973. Thus as the offence under the Official Secrets Act is triable by the Magistrate of the first class it would be a civil offence as defined in the Act and Section 69 would be applicable. Mr. Garg however, contends that as Section 13 does not empower every Magistrate of the first class to try an offence under the Official Secrets Act but only a Magistrate specially empowered by the appropriate government the said court cannot be treated to be a court of ordinary criminal justice but it is a special court, and Section 69 of the Act would not apply. The argument is without substance. The court of Magistrate of the first class is one of the classes of criminal courts as defined in the Criminal P.C. When the Criminal Court, is defined in the Act to mean a court of ordinary criminal justice in any part of India, it would inevitably cover the various classes of criminal courts mentioned in Section 6 of the Criminal P.C. The mere fact that the Magistrate of first class has to be empowered to try an offence under the Official Secrets Act does not mean that such a court ceases to be a court of ordinary criminal justice. Conferring of special powers does not take it out of the purview of being a court of ordinary criminal justice within the meaning of the Act.

5. It is true that an offence under the Official Secrets Act as such is not incorporated separately under the Act, The manner in which this could be treated to be an offence under the Army Act is by invocation of Section 69 of the Act which creates a legal fiction by which any person who commits any civil offence shall be deemed to be guilty of an offence against the Army Act. And as an offence under the Official Secrets Act is to be deemed to be a civil offence, by virtue of Section 69 of the Act, such an offence is punishable under the Act. The petitioner cannot, Therefore, maintain that offence under the Official Secrets Act

is not punishable under the Act.

6. Section 13(3) of the Official Secrets Act provides that no court shall take cognizance of any offence under this Act unless upon complaint made by order of, or under authority from the appropriate government or some officer empowered by the appropriate Government in this behalf. It is a common case that no complaint as above under the Official Secrets Act was made to start proceedings under Court Martial. Mr. Garg contends that in the absence of sanction u/s 13(3) the General Court Martial was not competent to proceed with the trial. We cannot agree. The fallacy in the argument of Mr. Garg is that he reads the procedural aspect of complaint in Section 13(3) as part of substantive offence under the Official Secrets Act. Now the fact is that substantive offence under the Official Secrets Act is defined in Sections 3 and 4 of the said Act. The purview of Section 13(3) relates to the procedural aspect of prosecution of an offence. But Mr. Garg seeks to urge that making of complaint as required by Section 13(3) is itself a part of substantive offence and in the absence no offence under the Official Secrets Act would have been committed. In this he seeks to rely on AIR 1927 Sind 10 : 27 Cri LJ 1105 Fakir Mohamed v. Emperor, wherein after saying correctly that if no prior sanction is given the trial will be bad, it went on to make the unacceptable comment that Section 195 in reality lays down that the offences therein referred to or rather the facts Constituting those offences shall not be deemed to be any offences at all except on the complaint to the persons or the courts therein specified. In our view these observations are too widely stated and cannot be accepted as laying down correct law. These observations omit to notice that there is an essential distinction between an offence and the prosecution for an offence. The former forms part of the substantive law and the latter of procedural law. An offence is an aggregate of acts or omissions punishable by law while prosecution signifies the procedure for obtaining an adjudication of courts in respect of such acts or omission. Sanction or prior approval of an authority is made a condition precedent to prosecute in regard to specified offences. Prosecution without the requisite sanction makes the entire proceedings ab initio void. It is intended to be a safeguard against frivolous prosecutions and also to give an opportunity to the authority concerned to decide in the circumstances of a particular case whether prosecution is necessary. Sanction to prosecute for an offence is not, Therefore, an ingredient of the offence, but it really pertains to procedure. *Kapur Chand Pokhraj Vs. The State of Bombay*, . The observation that no offence can be brought into existence unless there were a complaint under S. 195 has not been found to be laying down correct law in *M.L. Sethi Vs. R.P. Kapur and Another*, wherein it was observed that "we are unable to agree with the view expressed by the learned Additional Judicial Commissioner that Section 195 Cr.P.C. really lays down that the offences therein referred to shall not be deemed to be any offences at all, except on the complaint of the persons or the Courts therein specified. An offence is constituted as soon as it is found that the acts which constitute that offence have been committed by the person accused of the offence. It remains

an offence whether it is triable by a court or not. If a law prescribes punishment for that offence, the fact that the trial of that offence can only be taken up by courts after certain specified conditions are fulfilled does not make that offence any the less an offence. The limitation laid down by Section 195, Cr.P.C. is, in fact, a limitation only on the power of courts to take cognizance of, and try, offences and does not in any way have the effect of converting an act, which was an offence, into an innocent act. We cannot, Therefore, subscribe to the view expressed in that case."

7. In this connection reference may also be made to (1956) 3 All ER 429. R. V. Jennings. In that case the soldier was proceeded under Court Martial for an offence under the Road Traffic Act, 1930. Objection was taken to the effect that court martial had not warned him of the intended prosecution within 14 days as required by the Act. This plea was overruled and it was held that Section 21 of the Road Traffic Act was a procedural one and the Court martial was entitled to convict in spite of the fact that the procedure for which Section 21 provided was not carried out. On the same analogy the court martial here was entitled to convict the petitioner if it held against him on merits notwithstanding that no complaint was filed as required by Section 13(3) of the Official Secrets Act as the latter provision only related to the procedural aspect.

8. It will be seen that Section 69 of the Act creates a legal fiction by which any civil offence shall be deemed to be an offence against the Army Act. That means that substantive offence under the Official Secrets Act which is defined in Sections 3 and 4 of the said Act is by legal fiction to be treated to be an offence under the Army Act. Once that is so thereafter the procedure for prosecuting that has to be followed is the one under the Army Act. The requirement of Section 13(3) of the Official Secrets Act namely the condition precedent for taking cognizance of an offence except upon complaint from specified officer applies only when the cognizance of an offence is to be taken in proceedings under the Official Secrets Act. The mere fact that by legal fiction the offence under the Official Secrets Act is offence under the Army Act does not automatically incorporate Section 13(3) of Official Secrets Act, relating to the procedural law, into the Army Act. The argument of Mr. Garg, of alleged non-compliance of S. 13(3) of the Official Secrets Act before commencing proceedings under the Court Martial law, must Therefore, be rejected.

9. The next contention is that the petitioner was not allowed to engage a lawyer of his choice. Elaborate arguments were addressed to persuade us to hold that assistance of lawyers is an element of fairness of procedure mandatorily required by Art. 21 of the Constitution. It is true that as procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, Therefore, have to go through the trial without legal assistance cannot possibly be regarded as reasonable, fair and just, vide Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna, . Having a lawyer's service is the other ingredient of fair procedure to a prisoner who has to

seek his liberation, vide *Madhav Hayawadanrao Hoskot Vs. State of Maharashtra*, .

10. The principles are not and indeed cannot be now disputed. The scope and ambit of Article 21 of the Constitution has now been too firmly established to even require emphasis. But the hurdle in Mr. Garg's way is that these arguments proceed on a non existing foundation. In the counter affidavit it is specifically stated that there is nothing in the proceeding to indicate that the petitioner ever desired to engage a counsel. There is no challenge to this factual aspect. Mr. Garg however, seeks to argue that we must hold that as the matter was a serious one and issued raised so complex that it must be assumed that the petitioner must have asked for the assistance of a lawyer. We find this argument unacceptable. The petitioner was a senior officer in the army. He was not an indigent under-trial. He knew his rights under the law. If he felt the necessity of lawyer there was nothing which prevented him from so asking. May be the petitioner was satisfied with the assistance of a legally qualified defending officer which undoubtedly was available to him. As a matter of fact before the start of trial the petitioner was specifically asked by the court whether he wanted to apply for adjournment on the ground that rules relating to procedure had been violated and he had been prejudiced or that he had no sufficient opportunity for preparing his defense and he had answered in the negative. We do not understand the law to be that even in the case of the person like the petitioner who had full opportunity to ask for the assistance of counsel but does not ask for one, the proceedings should be held to be vitiated simply because the counsel was not associated with the trial. The cases referred to by Mr. Garg are obviously distinguishable because in those cases the parties were poor and did not know their rights and it was in that context that the Supreme Court held that without legal aid, advice and service the proceedings would be vitiate. It may be noted that such an argument namely of back of assistance by a counsel was raised in *Ram Sarup Vs. The Union of India (UOI) and Another*, . The Court there held that from record it was not shown that the petitioner had requested the military authorities for permission to allow him to be represented by a counsel of his choice and this negatives any suggestion of violation of any fundamental rights of the petitioner to be represented by a practicing lawyer. It is relevant to mention that in the connected case, the petitioner was represented by Col. Bains, a retired Army Officer who was a practicing lawyer. It is not suggested that any special effort had to be made by the writ petitioner to have the services of Col. Bains made available to him. This instance will show that the complaint of the petitioner in this case that he had wanted to engage the practicing lawyer but was denied does not appear to be correct. In the connected case the allegations were as serious as in the present case. If the Army authorities permitted in that case to engage the lawyer we have no reason to doubt that if the permission had been asked for, it would have been given in the same manner. There is thus nothing on the record to show that such a request to engage a lawyer was made. The contention of alleged violation of Articles 21 and 22 of the Constitution,

Therefore, must be repelled.

11. The next argument of Mr. Garg was that the provision of Court Martial by which a person can be convicted for an offence by the Army authorities without having been tried by the ordinary criminal court was destructive of the whole concept of separation of judiciary and the executive, and that the trial by the court martial was trial by the executive which in the scheme of constitutional separation of powers was not permissible. Mr. Garg did not of course take the matter to the extent of saying that the trial by court martial was destructive of basic structure of the Constitution because he was aware of Article 33 of the Constitution which provides that Parliament may by law determine to what extent any of the rights conferred by this part shall in their application to the members of the Armed Force or the Forces charged with the maintenance of public order be restricted or abrogated. He however, did make a serious contention that notwithstanding Article 33, the right to trial by ordinary criminal courts was still preserved to members of Armed Forces, notwithstanding the provisions of Army Act. The argument thus worded really comes to that that the trial by court martial is violative of the safeguards provided by Art. 21 of the Constitution. The argument was that independence of judiciary postulated the trial by a set of people who are judicially trained and the court martial which was evidently manned by Officer who had no such judicial training was in breach of that fundamental rights in Part III of the Constitution. The argument was that if any of the articles of Part III of the Constitution were to be modified in their application to Armed Forces special provision with regard to that must be so enacted, and as there was no specific law modifying the provisions of Arts. 14 and 21 the Armed Forces continue to enjoy the protection of Part III of the Constitution, even in the matter of trials by ordinary criminal courts. This argument though tempting and provocative and one which may normally have led us into a survey of the whole concept of relationship of civilian power and its supremacy over military power, does not have to be elaborately discussed by us for the simple reason that this point is no longer rest integra. We have on this point a firm decision of Supreme Court which had taken a view contrary to the contention urged by Mr. Garg. In that connection reference may be made to *Ram Sarup Vs. The Union of India (UOI) and Another*, . In that case it had been sought to be argued that only Section 21 of the Army Act which empowered the Central Government to modify certain fundamental rights in their application to persons subject to the Act was the only limitation on fundamental rights and Parliament check up (sic) not to modify any other article. The court negated this contention and held otherwise by observing :

"We agree that each and every provision of the Act is a law made by Parliament and that if any such provision tends to affect the fundamental right under Part III of the Constitution that provision does not on that account, become void, as it must be taken that Parliament has thereby in the exercise of its power under Art. 33 of the Constitution made the requisite modification to affect the respective fundamental right."

This preempts any argument based on the premise that trial by court martial was inherently void. Mr. Garg had however, sought to urge that in that case the Supreme Court had not so laid down as a matter of law but had gone on to examine the matter on merits. It is true that the court had examined the procedure followed by court martial. But it is important to note that notwithstanding the finding that the prosecution by criminal courts would be more beneficial to the accused than trial by court martial, the court nevertheless held that the discretion u/s 125 of the Army Act gave sufficient material and guidance for exercise of discretion to decide whether the trial should be by ordinary criminal court or by court martial. The important point to note it that the trial by court martial in a case which resulted in finding of the army officer being held guilty and sentenced to death was not held to violate any of the fundamental rights guaranteed in Part III of the Constitution. The only distinction which Mr. Garg could point out was that the arguments were raised on Art. 14 and no argument was raised with regard to violation of Article 21. But as we read this judgment it has clearly held that the mere fact of trial by court martial of army person who is subject to the provisions of Army Act is not vocative of any of the provisions enshrined in Part III of the Constitution. If that be so Art. 21 is also covered by the ratio of the judgment. It would not be open to this court to say that because Art. 21 was not specifically mentioned, Therefore, the decision given by the Supreme Court would not be binding. The argument, attractive or otherwise raised by Mr. Garg has, Therefore, to be rejected on the short ground that this court cannot re-examine the matter in view of the law laid down by the Supreme Court.

12. We may in this connection note that the law with regard to members of the Armed Forces being subject to trial by court martial is not a peculiar feature of our country. The apprehension expressed by Mr. Garg as to why the members of armed forces should be singled out for trial by court martial and why this law should not be held to be vocative of due process of law enshrined in Article 21 of the Constitution, has not been accepted in any of the countries which though very conscious of the rights of the primacy of civilian power over military power and the dangers inherent in giving too great a power to the military authorities have nevertheless accepted that in the interest of national security and military discipline the power of the military tribunals to try persons who are governed by the Army Act has to be left to the army authorities and the courts and tribunals constituted under the Act. Thus Article 1. Section 8, Clause (14) of American Constitution empowers the Congress of United States of America "to make rules for the Government and regulation of the land and naval forces." It has been held that this makes an exception to the normal method of trial in civilian courts as provided by the Constitution and permits the Congress to authorities military trial of members of the armed services without all the safeguards given to an accused by Article 3 of the Bill of Rights. Vide (1879) 100 US 538 Ex Parte Alvin R. Reed. In that case it was observed that.

"the constitutionality of the acts of Congress touching Army and Navy courts

martial in this country, if there could ever have been a doubt about it it no longer an open question in this court."

13. The American Supreme Court has consistently been trying to exclude the applicability and jurisdiction of the court martial to person who are not covered by the Army and Naval Acts. The court has recognised that the established principle of every free people is that the law shall alone govern and to it the military must always yield. Vide (1945) 327 US 304 : 90 LEd 688 *Duncan v. Kahanamoku*, though in that case the right to jury trial and the other constitutional rights of an accused individual were considered too fundamental to be sacrificed merely through a reasonable fear of military assault. There must be some overpowering factor that makes a recognition of those rights incompatible with the public safety before we should consent to their temporary suspension.

14. Another very interesting and illuminating discussion on the History of the court martial is to be found in (1955) 353 US 1 : 1 L Ed 1148. *Reid v. Covert*, in that case the trial by court martial of the wives of two army officers was quashed on the ground that though the soldiers may be subject to the court martial tribunals, their wives could not be denied their fundamental right of trial by Jury in a court of law and forced to trial before court martial. But it is important to note that notwithstanding the decision by the majority of the Supreme Court, in refusing to extend the power of court martial over wives. (minority upholding the rights of the court martial of try the wives of the soldiers on the ground of necessity) it nevertheless upheld the right of the court martial to try soldiers notwithstanding that the procedure was not as favorable as that of the ordinary courts. Thus the court upheld the power of the legislature to authorise military trial of members of the armed services. The foot-note 42 of the history of the development of court martial would show that in the Mutiny Acts first passed in 1688 the English Parliament made a departure from common law and granted the army authorities in times of peace to try soldiers initially for mutiny and desertion in times of civil insurrection. Initially it was done for a period of 4 months and later on extended for a period from year to year. In 1863 the Congress in U.S.A. authorised the trial of soldiers in war times for civil crime such as murder, arson by court martial. Notwithstanding the repugnance to allow military trial it was nevertheless recognised that the trial by court martial of persons belonging to land and Naval Forces was constitutional and permissible. Thus trial by court martial is constitutionally permissible for persons who can be regarded as falling within the authority given to Congress under Article I to regulate the land and Naval forces, and who, Therefore, are not protected by the specific provisions of Article 3, 5th and 6th amendments.

15. Section 2 of Article 3 provides that trial of all crimes shall be by jury. The 5th amendment provides that no person shall be held to answer for a capital or otherwise infamous crime unless for a presentment or indictment by a Grand Jury except in cases arising in the Land and Naval forces or in the militia. And 6th amendment provides that in all criminal prosecutions the accused shall enjoy the

rights for a speedy and public trial by an impartial jury of the State and the District wherein the crime shall have been committed. (see page 1158 Head Note 5) Notwithstanding the constitutional protection of a right to trial by a jury the court held that if ideas can be expressed in words, and language has any meaning, this right one of the most valuable in a free country is preserved to everyone accused of crime who is not attached to the army, or navy, or militia in actual service. The court recognised that the court martial are typically ad hoc bodies appointed by a military officer from among his sub-ordinates. In essence, these tribunals are simply executive tribunals whose members are in the executive chain of command. Conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, the members of a court martial in the nature of things, do not and cannot have the independence of jurors drawn from the general public or of civilian judges. In spite of such serious reservations the court was nevertheless compelled to recognise the necessity and the compulsion to have trials by court martial because it observed that

"in summary, it still remains true that military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts. In part this is attributable to the inherent differences in values and attitudes that separate the military establishment from civilian society. In the military, by necessity, emphasis must be placed on the security and order of the group rather than on the value and integrity of the individual."

But in the end the court held the trial by court martial to be constitutionally permissible for members of the armed forces. Thus we need not be unduly apprehensive of any onslaught on the fundamental rights if trial by court martial are held valid. In view of Article 33 of the Constitution and Ram Saroop's case (1965 (1) Cri LJ 236 (supra) the argument that trial by court martial suffers from any constitutional infirmity as urged by Mr. Garg is a non-starter and without any merit and is repelled.

16. Effort was then made to go through the record of court martial (and we did go into it) and persuade us to hold that the finding of court martial was vitiated because of various alleged illegalities in the matter of confession, admissibility of evidence and other irregularities. Now if the writ petition was to be treated as a Habeas Corpus petition the only jurisdiction the court has would be to see whether the return shows that the detenu is held lawfully. Once it is shown, as in the present case that court martial, properly convened and constituted has passed an order in pursuance of which the petitioner is being held no relief would be possible as this court cannot go into the question of sufficiency of evidence, and the conviction by competent court would be a sufficient answer to the petition u/s 491, Criminal P.C. vide AIR 1946 Lah 103 : 47 Cri LJ 1022, Kartar Singh v. Emperor. The court is entitled to go into the regularity of steps taken by the court martial in the course of trial or by the confirming authority in the

finding and the sentence which do not go to their jurisdiction and confirming. Interference is possible only where the irregularity or illegality affects the jurisdiction of the court martial or the confirming authority. (See *S. Sundarajan Vs. Union of India and Others*, .

"The court had jurisdiction over the person and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings cannot be collaterally impeached for any mere error or irregularity, if there were such, committed within the sphere of its authority. Its judgments, when approved as required, rest on the same basis and are surrounded by the same considerations which give conclusiveness to the judgment of other legal tribunals, including as well as the lowest as the highest, under like circumstances. The exercise of discretion, within authorized limits, cannot be assigned for error and made the subject of review by an appellate court."

"If error was committed in the rightful exercise of authority, we cannot correct it. A writ of habeas corpus cannot be made to perform the functions of a writ of error." See (*Alvin Reed*) (1879) 100 US 538 (*supra*).

17. We, however, do not propose to dispose of this matter on this short point and heard the matter on the footing that the writ petitioner was also asking a writ of certiorari, against the finding of a statutory tribunal, i.e. General Court Martial constituted under the Act. But even then the jurisdiction of this court is limited to only finding out whether there is error of jurisdiction or it is a case of total lack of evidence. We do not sit as a court of appeal. If there was legal evidence available on which a finding could be given, the sufficiency or otherwise is for the authority to decide and this court cannot substitute its opinion for that of Court martial.

18. Special considerations apply where procedural errors have been committed by authorities administering military discipline. The courts have always shown a marked aversion from seeming to interfere with the proceedings of military authorities except where the civil rights of an individual have been infringed; and their reluctance to define the meaning of "civil rights" has been equally conspicuous. See (*Judicial Review of Administrative Action* by de Smith P. 146).

19. Thus where the court martial acts within jurisdiction, habeas corpus would not issue to interfere with its decision on the ground of mere insufficiency of evidence or irregularity of procedure except where there has been no hearing at all or the rules of natural justice have not been followed. In the Canadian case of *Ex parte order*, it was recognized that, where a court martial has acted within its jurisdiction neither the merits of the conviction nor the propriety of the sentence could be reviewed by the Supreme Court upon an application for either certiorari or habeas corpus. (See *Military Law in India* by Sharma P. 202, Notes 68 and 69).

20. "Where a quasi judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion, whether it is wrong in law or in fact A tribunal may lack jurisdiction if it is improperly constituted, or

if it fails to observe certain essential preliminaries to the inquiry. But it does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question that it is empowered or required (i.e. had jurisdiction) to determine."

See *Smt. Ujjam Bai Vs. State of Uttar Pradesh*, . A writ of certiorari under Art. 226 of the Constitution can be issued for the purpose of examining the record and proceedings of a court-martial if the complaint is that the court-martial was not duly constituted, that it had no jurisdiction over the person or over the subject matter of the charge or that there is an error of law apparent on the face of the record or that the principles of natural justice were violated so as to result in miscarriage of justice. Where a court martial has acted within its jurisdiction neither the merits of the conviction nor the propriety of the sentence can be reviewed by this court, upon an application for certiorari. The courts-martial are in fact a specialised form of administrative courts and the scope of review traditionally afforded by the civil courts over their judgments has been very limited. This is evident from the fact that Article 136 of the Constitution expressly excluded the power of judicial review in respect of any judgment, determination sentence order passed or made by any court or tribunal constituted by or under any law relating to the armed forces though the jurisdiction of the Supreme Court and High Courts under Article 32 and Article 226 of the Constitution respectively to issue writs to any person or authority has been preserved. See (2nd (1976) 2 Del 691, *Ram Murti Wadhwa v. Union of India*. It is true that general power to issue writs of Habeas Corpus and certiorari given to this court under Article 226 does not make the finding of the court-martial totally immune from scrutiny by this court. But as said by (1952) 346 US 137 : 97 L Ed 1508, *Burns v. Wilson* "the statute which vests federal courts with jurisdiction over applications for habeas corpus from persons confined by the Military Courts is the same statute which vests them with jurisdiction over the applications of persons confined by the civil court. But in military habeas corpus the inquiry, the scope of matters open for review, has always been more narrow than in civil cases. Thus the law which governs a civil in the exercise of its jurisdiction over military habeas corpus applications cannot simply be assimilated to the law which governs the exercise of that power in other instances. It is suit generis; it must be so, because of the peculiar relationship between the civil and military law. Military law, like State law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. We have held before that this does not displace the civil courts' jurisdiction over an application of habeas corpus from the military prisoner. But these provisions do mean that when a military decision had dealt fully and fairly with an allegation raised in the application it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence. Realizing the limited nature of scope for interference by this Court when hearing a petition under Art. 226 of the Constitution counsel attacked the confession as having been obtained by coercion and undue influence and thus totally inadmissible. It is common case

that the contents of confession seriously implicate the petitioner and unless the confession could be excluded from consideration, the court martial's finding based as it is on amongst other (sic) the confession would be one which a reasonable person could legitimately have arrived at. In this context the counsel urged that as allegation has been made that the confession was made under duress it is incumbent on us to hold an independent enquiry to find out the truth of this statement. This unusual contention is put forth on the basis that this court as a protector of fundamental rights must examine and taken evidence, as like a trial court, the moment such an allegation has been made. Reference is made to Art. 20(3) of the Constitution that no man should be compelled to be a witness against himself and it is said that if there is an involuntary confession it means the petitioner's fundamental rights have been violated. We fell the argument proceeds on so many facile assumptions. Before this court can hold that the petitioner's rights under Article 20 have been violated, it must first be proved that the petitioner was compelled and coerced to make a confession. It is self evident that the confession under duress has totally to be ruled out.

Various authorities were referred to by Mr. Garg like 12 Law Years Edition page 908, and Sarkar on Evidence page 238 to the effect that it is sufficient for such exclusion if it appears to the court that the confession of the accused is not voluntary and that it is not necessary to prove this beyond doubt. It is true that Evidence Act postulates that the sine qua non of any confession is the voluntariness of it and if that is missing the truth of the contents of confession are inadmissible. See *Madhav Hayawadanrao Hoskot Vs. State of Maharashtra*, . As a proposition of law it is unexceptionable. It is also true that if the accused takes the plea that the confession was not voluntary that point must be examined by the court and finding recorded : See (1940) 2 All ER 599 and (1941) 3 All ER 318. But whether a confession is voluntary or not is a question of fact and must be proved before the tribunal holding a trial which alone must be satisfied that no duress was effected to obtain the confession. We find from the record that this objection as to the voluntary nature of the confession was raised before the court martial which however, overruled it. It is not, Therefore, as if the plea of forced confession was raised but was not examined by the court trying the petitioner. What, however, Mr. Garg urges and what we find unacceptable is that simply because this plea has now been again raised before us that we should without any prima facie proof of there being any duress exercised on the petitioner hold an independent enquiry and decide on merits ourselves. Mr. Garg obviously conscious of the limitation on our enquiry on merits under Art. 226 of the Constitution has chosen to dress his argument in the garb of fundamental right by invoking Article 20(3) of not being compelled to be a witness against oneself. In our view contention based on Article 20(3) is misconceived. This is because if the confession is voluntary then no question of the petitioner being compelled to be a witness against himself or of any violation of Article 20(3) arises. If on the other hand the confession is involuntary one then virtue of Section 24 of the Evidence Act which is applicable to the proceedings before the

court martial the same is inadmissible and it is not necessary to invoke Article 20(3) for the purpose of ruling out that confession which has been obtained under duress. In reality the limited and short point for determination is whether the finding of the court martial rejecting the plea of the petitioner that the confession was taken under duress can be said to be such that no person properly instructed in law could have come to that conclusion. If the finding is on the material placed before the court martial and it has arrived at a conclusion that a reasonable person could have come to namely that the confession is voluntary one, this court cannot under Article 226 seek to reappraise that finding of fact on the supposed plea of violation of fundamental rights under Article 20(3) or under Article 21 of the Constitution. Fairness of procedure under Article 21 can only mean that if the confession is involuntary, the same is inadmissible. This what is provided by S. 24 of the Evidence Act. But there is no presumption that the confession was coerced.

21. Had the court-martial refused to examine the grievances of the petitioners as to the coerced confession, the alleged brutal conditions in which they were supposedly kept, by which their will was overpowered to give confession, it might have been open to argument that this court should as a guardian of the fundamental rights and as a guarantor of fairness of trial of the petitioners, conduct a de novo enquiry itself. But that is not the position here (the grievance was made before the court martial which took full evidence, examined the arguments and then overruled the contention). It is not, Therefore, as if the grievance that a confession has been relied upon by the court-martial, without even trying to find out whether it was voluntary one or not can be alleged in this case. In Burns case the petitioners had made grievance of denial of due process of law, in that they had been subjected to illegal confinement and that they had been denied counsel of their choice and that available evidence had been suppressed. The court found that all these allegations have been denied in the return and record had been produced before the court to show that a fair trial had been given. Rejecting the contention of the petitioners the court observed that, "these records make it plain that the military courts have heard petitioners out on every significant allegation which they now urge. Accordingly, it is not the duty of the civil simply to repeat that process to re-examine and re-weigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus. It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims. We think they have. The petitioners have failed to show that this military review was legally inadequate to resolve the claims which they have urged upon the civil courts. They simply demand an opportunity to make a new record, to prove de novo in the District Court precisely the case which they failed to prove in the military courts. We think, under the circumstances, that due regard for the limitations on a civil court's power to grant such relief precludes such action. The scope of power of review of (decisions of) Military Court being limited was further highlighted in that very case by Justice Minton in

his concurring judgment, wherein he said : I do not agree that the federal civil courts sit to protect the constitutional rights of military defendants, except to the limited extent indicated below. Their rights are committed by the constitution and by Congress acting in pursuance thereof to the protection of the Military Courts, with review in some instances by the President. Nor do we sit to review errors of law committed by Military Courts. This grant to set up military courts is as distinct as the grant to set up civil courts. Congress has acted to implement both grants. Each hierarchy of courts is distinct from the other. We have no supervisory power over the administration of military justice such as we have over civil justice in the federal courts. Due Process of law for military personnel is what congress has provided for them in the military hierarchy in courts established according to law. If the court is thus established, its action is not reviewable here. Such military court's jurisdiction is exclusive but for the exceptions contained in the statute, and the civil courts are not mentioned in the exceptions. If error is made by the military courts, to which Congress has committed the protection of the rights of military personnel, that error must be corrected in the military hierarchy of courts provided by Congress. We have but one function, namely, to see that the military court has jurisdiction, not whether it has committed error in the exercise of that jurisdiction. The effort of Mr. Garg to broaden the enquiry by invoking Articles 20 and 21 is futile because circumstances and facts lay no such foundation for the alleged violation of these articles in the present case. The grievance that fundamental rights of the petitioner have been violated is misconceived and is repelled.

22. In the present case the petitioner was arrested on 8-4-1977. His confession was recorded on 24-4-1977. Earlier he had been interrogated by one Captain Sudhir. The summary of evidence was recorded from 7-5-1977 to 11-6-1977. The petitioner never objected that his confession was obtained under torture. The court martial started proceeding from 25-7-1977. The charges against the petitioner related to his having passed on sensitive documents to an agent of a foreign country which would be prejudicial to the interest of safety of the State and thus contrary to Section 3(1)(c) of the Official Secrets Act. Evidence was led of GNR Servan Dass who admitted that he had been serving as an agent of a foreign country and also deposed how he took the accused across the border where he had a talk with the army officer of the foreign country. He also claimed that some money was paid to him as well as to the petitioner. He also gave details as to how even subsequently when he was arrested he was told by the petitioner not to worry and he would look after his interest. Another witness examined before the court martial was GNR Aya Singh. This witness has deposed that he had gone to Pakistan and one Major Khan had given him a chit which contained something about an armoured division and he had given that chit to the accused when he met him when he returned from Pakistan. Captain Sudhir was the officer who had investigated the matter and has deposed that after some interrogation the accused made a confession in bits and starts on 19th and 20th of April 1977 and that he gave time to the accused to think over the matter and

on 24-4-1977 the accused made a confessional statement which he (accused) wrote in his presence in his own hand. He i.e. the petitioner signed each page of his confessional statement and Capt. Sudhir attested the statement of the accused. When this witness was going to produce a confessional statement the defending counsel raised the objection on behalf of the accused. The objection amongst other was that the confession is inadmissible inasmuch as Capt. Sudhir should also be considered to be a police officer within the meaning of the Evidence Act and also that it was involuntary confession, and the same is, Therefore, inadmissible. The record shows that there were full-fledged arguments before the court martial and the Judge Advocate referred to Romesh Chandra Mehta Vs. State of West Bengal, . in which the court had held that confession made to a Customs Officer is not a confession made to a member of a Police Force. Reference was also made to Badku Joti Savant Vs. State of Mysore, , and after hearing the parties the court-martial overruled this objection. Thereafter the defending officer raised a further objection u/s 24 of the Evidence Act on the ground that the confession of the accused was involuntary and requested permission of the court to allow him to cross examine Capt. Sudhir with regard to the circumstances under which the accused made a confessional statement. There was then a detailed cross-examination of Capt. Sudhir as to the circumstances in which the confession was made. Capt. Sudhir denied that he had slapped the accused or used criminal force or in any manner subdued the petitioner in making the confessional statement. The defending officer objected to the confession being taken into account on various grounds amongst others that the petitioner was made to give confession by putting pressure on him and by inducing him that he will be rewarded if he confesses. This was denied by the prosecution. Detailed arguments from the prosecution and the defending officer were heard. The Judge Advocate pointed out that the accused was interrogated between 11th 20th April, 1977 with an interval of 12th, 13th and 17th of April, 1977. The evidence also revealed that accused started making his confessional statement on 19th/20th of April, 1977 in bits and pieces and he was given time to think over and recollect and the accused finally made a confessional statement on 24-4-1977. It was pointed out that the accused had never complained to any one that he had been subjected to torture and that the accused was a fairly senior officer and had put in 13 years of services and that a person of rank and service of the accused would normally have objected if he had been put under torture and agony. The court thereafter took time to consider the matter and then overruled this objection. It will thus be clear that full-fledged arguments were raised before the court-martial as to the admissibility or otherwise of confession on various grounds including the one that it was made made coercion and pressure. It is thereafter that the court martial overruled this objection. We cannot, Therefore, say that this objection of voluntary nature of confession was not examined by the court-martial. It is a different matter that it found that confession was not obtained under coercion. This decision on merits about the confession has necessarily to be of the court martial which was trying the accused. We cannot reassess the evidence and seek to substitute our own finding

on this matter. The court martial thus had various pieces of evidence before it on which it could have come to a conclusion of fact. It having done so this court cannot reopen the matter. This plea is, Therefore, repelled.

23. We may note that one of the objections made in the petition was that no copies of the proceedings were made available to the petitioner. It appears that the petitioner had asked to be supplied with copies before the General Court Martial. He was told by the army authorities by its communication of 3-4-1980 that as per Army Rule 147 every person can be supplied on demand a copy of the proceedings but that Rule 147(A) prohibits giving copies of proceedings in certain cases if the Central Government certifies that it is against the interest of security of State to supply the copies and that the Central Government has to take a decision but that nevertheless if he was desirous of submitting the petition, he or his legal advisor could inspect the proceeding subject to the condition specified in clauses (b)(i) & (ii) of Army Rule 147(A). Arguments were sought to be raised before us as to the virus of Rules 147(A) on the ground that discretion vested in the authorities is uncanalised. A reference to the Rule clearly shows that though the supply of copies is prohibited the said power can only be exercised if the Central Government is satisfied and certifies that it is against the interest of security of State to supply the copies of proceedings. Even then the person is allowed to inspect the proceeding provided he gives an undertaking that he shall not make copies of the proceedings and that the information obtained will not be used by him for the purpose other than for submitting a petition in accordance with the Act or in an action in a court. It will be clear that the limitation for the exercise of power is because of the security of State. In this connection we may refer to an analogous Rule 112(A) of the Air Force Act which was held to be intra virus in *S.P.N. Sharma Vs. The Union of India*, wherein it was said that this rule has been inserted for the interest of security of State and for friendly relations with the foreign States, and the court observed, "that this rule is not arbitrary so as to expose it to the challenge of violation of the essential rules of natural justice, is clear from the proviso which, in fairness to all concerned, lays down that the person demanding copies is to be permitted inspection of the proceedings if he wants to submit a petition in accordance with the Act or to institute any action in a Court of law in relation to finding or sentence." It is not the petitioner's case that he asked for inspection and the same was refused. As a matter of fact it would appear that the petitioner had all the materials before him because from the detailed representation that he has filed against the finding and sentence of the court-martial a copy of which has been filed along with the supplementary affidavit dated 13-5-1981 shows that the petitioner was not in any way prejudiced by making a representation because he has given details, after referring to various facets of evidence and other relevant matter. That the confidential nature of information may sometime be withheld even from the person concerned was recognised in a court of appeal case reported in (1977) 3 All ER 452, *R. v. Secretary of State for the Home Dept., ex parte, Hosenball*, wherein Lord Denning said, "that the information

supplied to the Home Secretary by the Security Service is, and must be, highly confidential. The public interest in the security of the realm is so great that the sources of the information must not be disclosed, nor should the nature of the information itself be disclosed, if there is any risk that it would lead to the sources being discovered. The reason is because in this very secretive field, our enemies might try to eliminate the source of information. So the sources must not be disclosed. Not even to the House of Commons. Nor to any tribunal or court of inquiry or body of advisers, statutory, or non statutory, save to the extent that the Home Secretary thinks safe. Great as is the public interest in the freedom of the individual and the doing of justice to him, nevertheless in the last resort to must take second place to the security of the country itself." That case related to the information relating to a person who was to be deported out of the country. The requirements of Rule 147(A) are nowhere near that rigorous because no information is withheld from the petitioner. All that is required is that the normal rights of a person to obtain full copies of the proceedings are not given to him after the confirmation of the finding of the court-martial. It is important to note that the copies of all these documents and evidence were with the petitioner when the court martial proceedings were going on. This rule only deals with obtaining copies after the findings of the court martial have been confirmed which means that at the stage of making representation against the finding of the court martial the petitioner was in no way prejudiced because copies and documents were available with him. We may in this connection also note that during the hearing Mr. Garg the counsel for Major Ghalwat had made a request that the petitioner (who was in custody in Rohtak Jail) may be summoned to the court and we had acceded to that request. We had also permitted Mr. Garg to have full consultation with the petitioner, Major Ghalwat in the Court, Mr. Garg was also permitted by us to go through the record and he had made his arguments after referring to the record in detail. The petitioner, Major Ghalwat was permitted by us to attend the court during hearings for a number of days and was constantly able to instruct his counsel on any points. In the other connected writ petition no such request was made by the counsel, Col. Bains to call the petitioner, Col. Rana and, Therefore, no occasion arose for permitting him to be present in the court. Presumably Col. Bains did not feel the necessity because he was the defense counsel before the court-martial and he was fully aware of what had happened there and, Therefore, did not possibly require the presence of his client to instruct him during arguments.

24. We may mention that the petitioner had filed a supplementary affidavit dated 17-8-1981, which was nothing more than a repetition of his version that his confession was under coercion. He had already given all the details before the court martial. As there were mere repetitions, we did not deem it necessary to direct the respondents to file additional counter affidavit : though Mr. Sabharwal had offered to do so if we thought necessary. We did not so require and that is why no further counter affidavit has been filed by Union of India. We have made this clear because during arguments. Mr. Garg had sought to suggest that as this

supplementary affidavit has not been replied to its contents should be accepted as correct. In view of what we have said above this contention is without any substance. We have already rejected the argument that we should do novo hold an enquiry about the voluntary nature of the confession.

25. Before we conclude we may refer to some aspects of Army Act. This Act is modelled on the British Act, but has retained its pristine aloofness ever since it was enacted (apart from few not so significant changes). Though almost everyone accepts the need of having court martial trials of persons governed by the Army Act, large number of even sympathetic persons feel that some more liberality and safeguards be provided so as to give greater assurance to armed personnel that objective considerations have been given to their cases, especially when punishments given can have very serious consequences. In this connection it may be worthwhile for the government to consider whether a right of appeal before another forum may not be made available apart from the present right given to the convicted person to make a representation to the Chief of Staff or the Central Government. In England from where our Army Act has been copied a committee was appointed, headed by Justice Lewis, which recommended a right of appeal and now a Court martial's (Appeals) Act 1951 has been passed provided a right of appeal where the conviction involves a sentence of death or if a court of appeal thinks that the finding of court martial is unreasonable or cannot be supported on evidence or involves a wrong decision on a question of law or on any ground there is a miscarriage of Justice. And the matter can even be taken to the House of Lords at the instance of the accused or prosecutor where the Court Martial Appeal court has granted leave to appeal to the House of Lords or the House of Lords itself has given leave to appeal. No such right can be exercised in India in view of Article 136(2) of the Constitution of India which specially excepts the determination made by a court or a tribunal constituted under any law relating to the armed forces. Similarly in U.S.A. under the uniform Code of Military Justice, 1950 a court of military appeal has been established which reviews all cases where the sentence is of death or where in a case reviewed by a Board of Review Judge Advocate General orders to the court of military appeals for review or where Appeal Court has granted a review. The Appeal Court of course cannot review the question of fact but only take action with respect to matters of law. Some further reforms have been brought about and incorporated in Military Justice Act, 1968, which brings many of the provisions of civilian criminal justice in military justice. There is a demand in our country also that considering the large number of court martial which take place and large number of people involved it would be in fitness of things if a second look at some of the features of Army Act was given by the concerned authorities. Though the soldier has to perform and maintain a high degree of discipline and though strictest standards may be permissible in the case of military men, yet it may add to the greater satisfaction and a greater sense of confidence in the fairness of procedure to the members of the armed forces if there was at least one review of those serious cases in which punishments have been given by the

court martial. We need not say more and leave it for the authorities to consider this aspect.

26. As a result we see no merits in the petition and the same is, Therefore, dismissed.

27. Petition dismissed.