
(1985) 12 GUJ CK 0017
In the Gujarat High Court

Som Bahadur Gurung and Another

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 13-12-1985

Acts Referred:

Air Force Act, 1950 — Section 164

Criminal Procedure Code, 1973 (CrPC) — Section 4, 4(2), 428, 428, 5

Navy Act, 1957 — Section 151

Citation : (1986) 2 GLR 1352

Hon'ble Judges : R.C. Mankad, J; R.A. Mehta, J

Bench : Division Bench

Judgement

R.A. Mehta, J.—These petitions by the convicts of Court Martial seek a direction for giving them the benefit of setting off the period undergone by them in military custody during the pendency of their trial before the Court Martial and reliance is placed on Section 428 Cri. P.C. which reads as under:

428. Where an accused person has, on conviction, been sentenced to imprisonment for a term, not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him.

2. On behalf of the respondents, it is contended that the provisions of Criminal Procedure Code are not applicable to the military offences and convicts of Court Martial. They are exclusively governed by the Army Act which is a self-contained code providing for investigation, inquiry, trial and matters, relating to military offences, trial of military personnel and sentence and remission. Reliance is placed on Sections 4 and 5 of Cri. P.C. which read as under:

4. (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the

provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

5. 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.

3. The Army Act, 1950, is an Act to consolidate and amend the law relating to the Government of regular Army. In the Statement of Objects and Reasons, it is stated as under:

The main objects of the revision of the Army Act are:

(a) to make it self-sufficient by incorporating the relevant provisions from certain other related enactments:

(b) to adopt the existing provisions to suit the new constitutional set up and prevent day requirements; and

(c) on the one hand, to bridge the gap between the Army and Civil laws as far as possible in the matter of punishments for offences and on the other, to eliminate the disparity between the corresponding provisions of the law governing the Army and the Air force.

4. The Army Act provides in the Chapters VI to XIV (Section 34 to 190) to the following effect:

Chapter VI - Offences.

VII - Punishments.

VIII - Penal Deductions.

IX - Arrest and proceedings before trial.

X - Court-martial.

XI - Procedure of courts-martial.

XII - Confirmation and Revision.

XIII - Execution of Sentences.

XIV - Pardons, Remissions and Suspensions.

These sections from Section 34 to 190 is a sort of a Criminal Procedure Code, for the Army personnel. Ch. XIII deals with execution of sentence (Section 166 provides for form of sentence of death, Section 167 provides for commencement

of sentence of transportation or imprisonment, Sections 168 and 169 provide for execution of sentence of transportation and imprisonment, Section 174 provides for execution of sentence of fine. There are restrictions on corporal punishment. Ch. XIV (Sections 179 to 190) Deal with Pardons, Remissions and Suspensions.

5. As compared to that, there are corresponding and comparable provisions in the Criminal Procedure Code, 1973 regarding investigation, inquiry, trial and other general provisions and Chapter 32 deals with execution, suspension, remissions and commencement of sentences, the same subjects which are dealt by Chapters 13 and 14 of the Army Act. Chapter 32 of Cri. P.C. provides for:

A. Death Sentence.

B. Imprisonment.

C. Levy of fine.

D. General provisions regarding execution (including Section 428 regarding set off).

E. Suspension, Remissions and Computations of sentence.

6. In the light of these corresponding provisions in both statutes it would be necessary to see what is the effect of Sections 4 and 5 of the Criminal Procedure Code. Section 4(2) quoted above shows that all offences under any other law (in the present case the offences are under Sections 37 and 40 of the Army Act and they are military offences) shall be investigated, inquired into, tried and otherwise dealt with subject to the special enactment regulating the manner or place of investigation, inquiring into, trying or otherwise dealing with such offences. Therefore, the question whether the subject of execution of sentence and set off for the period already undergone during trial is a subject which has been dealt with by this special law, namely, the Army Act.

7. The argument of the learned Counsel for the petitioner is that there is no provision in the Army Act regarding set off and the subject of set off is not at all dealt with by the Army Act and, therefore, Section 428 of the Criminal Procedure Code which deals with set off would be applicable. It would not be correct to say that set off is an independent subject. Even in the Criminal Procedure Code it has been dealt with under Chapter 32 as execution of sentence. Same subject of execution of sentence is also dealt with by the Army Act under Chapter XIII. If the Army Act and the provisions dealing with execution of sentence do not include the provisions of set off, it cannot be incorporated by reference to the Criminal Procedure Code. Having regard to the comprehensiveness and self contained nature of the Army Act and its preamble that it was an Act to consolidate and amend the law and the Statement of Objects and Reasons that the Army Act was intended to make it self-sufficient by incorporating the relevant provisions from certain other related enactments, it is not possible to agree with the learned Counsel for the petitioners that the general provisions of the Cri. P.C. in Section 428 regarding set off would be attracted in the present case, more

particularly in view of the subject of execution of sentence having been specifically dealt with under the Army Act. If the provision of set off is not included in the Army Act, it cannot be introduced by reference to Section 4 of the Cri. P.C. because Sub-section (2) of Section 4 clearly excludes extension of Cri. P.C. to the subjects covered by Special enactments. Section 5 of the Cri. P.C. also provides that nothing contained in the Cri. P.C. 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. Further having regard to the fact that Armed forces have a special status in our constitutional and judicial system where even the constitutional jurisdiction of the High Court and Supreme Court is excluded by virtue of the provisions of Articles 33 and 227 of the Constitution, and having regard to the self-contained nature of the Army Act, it is not possible to hold that the provisions of Section 428 regarding set off would be applicable in the case of convicts of court martial for military offences.

8. The learned Counsel for the respondents have relied upon the judgment of the Delhi High Court in the case of F.R. Jesuratnam Vs. Chief of Air Staff and Others, . It was a case under the Air Force Act, 1950 and there also a claim was made for set off u/s 428 for the period of pre-trial detention. The Division Bench of the Delhi High Court held that the Air Force Act, 1950, is a special law to which Cri. P.C. (1974) does not apply by virtue of Section 5 of the Code, and where a person is convicted under the Air Force Act and sentenced to imprisonment, the period of pre-detention cannot be set off against the term of imprisonment. It was further held that non-extension of the benefit of Section 428 of the Code to sentences under the Air Force Act is not discriminatory and is not violative of Articles 14, 21 and 33 of the Constitution. Section 164 of the Air Force Act provided, that the 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. The corresponding section of Army Act is Section 167 which reads as follows:

167. Whenever any person is sentenced by a court-martial under this Act 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.

The Division Bench of Delhi High Court also observed that 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 of such pre-conviction detention would be permitted the same having been already taken into account by the court while imposing the term of imprisonment on conviction.

9. Similar view is also taken by the Madras High Court in the case of P.P. Chandrasekhran Vs. The Government of India and Others, . In that case, before

the Division Bench of the Madras High Court, the Act. in question was the Navy Act and the convict at court martial under the Navy Act had claimed benefit of Section 428 for getting set off of the period of pre-trial detention. Kailasam J. (as he then was, speaking for the Division Bench) held that the Navy Act is a Special law as contemplated by Section 5 of Cri. P.C. and it prescribes an elaborate procedure for conducting a trial and for execution of sentences. Section 151 of the Navy Act (which corresponds to Section 167 of the Arm Act) is to the same effect that every term of imprisonment or detention awarded shall be reckoned as commencing on the day on which the sentence was awarded and the Criminal Procedure Code not being applicable, the accused cannot claim the benefit of Section 428.

10. We respectfully agree with the aforesaid two decisions of the Division Benches of Delhi and Madras High Courts.

11. A contrary view has been taken by a learned single Judge of Kerala High Court in the case of Subramonian Vs. Officer Commanding, Armoured Static Workshop, . The judgment of the Delhi High Court in the case of F.R. Jesuratnam (supra) was cited. However, the learned single Judge of Kerala High Court disagreed with the same. It was observed that in respect of trial of offences under the Penal Code committed by persons governed by the Army and Air Force Acts, both the Court Martial and the Criminal Court have concurrent jurisdiction, and the object of the enactment of Section 428 of the Code was to relieve the anguish of prolonged detention of under-trials and to avoid overcrowding in jails and sentence is the pith and substance of the whole criminal process. It was further observed that when that and the conviction remain intact and untouched inspite 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. With respect to the learned Judge of Kerala High Court, we are unable to agree with the same. Subject of execution of sentence having been specifically dealt with under the Army Act, the provisions of Cri. P.C. relating to execution of sentence and set off cannot apply. It is not by the provision of Section 428 only that sentencing justice is done. This provision for statutory set off is only one of the modes and another mode is that while awarding sentence at the time of conviction, the authority or Court would take into account the sentence already undergone during the pendency of the trial. In fact when provision of Section 428 was not there before 1973, the Courts ordinarily took that circumstance into account and did the justice by taking into account the pre-trial detention.

12. It is not possible to agree with the learned Counsel for the petitioner that each and every provision is required to be seen separately. A provision for set off is contained in the Cri. P.C. and no such provision is to be found in the Army Act. That would not mean that Army Act has not dealt with the subject of sentence and execution of sentence. A subject to be dealt with has to be looked broadly and to be seen whether it has been dealt with or not. The Army Act has not dealt with many matters which were dealt with under the Cri. P.C. as for example,

anticipatory bail. It would be absurd to suggest that the provision of anticipatory bail would be applicable to courts martial merely because there is no corresponding provision in the Army Act. In the light of the above discussion we hold that Army Act is a self contained code and in view of Section 4(2) and Section 5 of the Cri. P.C. Section 428 of Cri. P.C. regarding set off does not apply to the offences tried and sentences awarded under the Army Act.

13. No other contention has been advanced at the time of hearing. Learned counsel Mr. K.J. Shethna was requested to assist the Court as amicus curiae and we acknowledge his valuable assistance rendered at the hearing of this matter.

In the result both these petitions fail and are dismissed. Rule discharged.