

(1984) 01 MAD CK 0027

In the Madras High Court

Case No : Writ Petition No. 10953 of 1983

T.S. Ramani

APPELLANT

Vs

The Superintendent of Prisons, Central Jail, Madras and
Others

RESPONDENT

Date of Decision : 31-01-1984

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 33
Criminal Procedure Code, 1973 (CrPC) — Section 345(1), 346, 4, 4(2), 428
Evidence Act, 1872 — Section 3
Penal Code, 1860 (IPC) — Section 193, 228

Citation : (1984) 01 MAD CK 0027

Hon'ble Judges : S. Ratnavel Pandian, J;K.M. Natarajan, J

Bench : Division Bench

**Advocate : U.N.R. Rao, for K. Thamizhmani and P. Ramadas, for the Appellant;
Public Prosecutor and Jothi, Addl. Central Government Standing Counsel, for the
Respondent**

Judgement

Ratnavel Pandian, J.—This writ petition under Article 226 of the Constitution of India is directed by one Mrs. T. S. Ramani, praying for the

issuance of a writ of habeas corpus setting at liberty forthwith her husband M. N. Manoharan, ex-Naik/Clerk, an Army personnel, who has been

incarcerated in the Central Prison, Madras, in pursuance of the conviction by the District Court-Martial, Avadi, u/s 64(e) of the Army Act, 1950

(hereinafter referred to as the Army Act) for receipt of illegal gratification, and the sentence of rigorous imprisonment for six months in addition to

the punishment of reduction in rank and dismissal from service, inflicted on him.

2. Though various allegations have been made in the affidavit which are refuted in the counter-affidavit, for the limited purpose of disposing of this

writ petition, we feel that it would suffice to state that the said Manoharan was

arrested and taken to military custody by his Commanding Officer

before the commencement of his trial on 16-4-1983 u/s 101 of the Army Act read with Paragraph 392 of the Regulations for the Army, 1962, and

kept under detention till 18-9-1983, on which date he was convicted and sentenced as aforementioned.

3. The only submission made by Mr. U. N. R. Rao, learned counsel for the writ petitioner, is that the detenu Manoharan is, by virtue of Section

428, Cr.P.C., entitled to have the pre-conviction detention suffered by him set off against the term of imprisonment imposed on him and that his

liability to undergo imprisonment for his conviction should be restricted only to the remainder and in that case, he is to be set at liberty forthwith.

According to him, notwithstanding the fact that the Army Act is a special enactment regulating the manner or place of investigating, inquiring into

and trying the offences, as prescribed under the provisions of the Act as well as under the Rules made thereunder, inasmuch as there is no specific

provision in the Army Act either expressly or impliedly excluding the application of the benevolent provisions of Section 428, Cr.P.C., to the

persons convicted and sentenced under the said Act, the pre-conviction detention suffered by the detenu in this case should be given a set-off. In

support of this proposition, learned counsel would place reliance on Sections 4(2) and 5 of the Cr.P.C.

4. Mr. N. Jothi, learned Additional Central Government Standing Counsel, in attempting to meet the arguments of Mr. Rao, submitted that the

Army Act is a special law and as the Act and the Rules made thereunder lay down a complete and comprehensive procedure with regard to the

trial of the offenders, award of sentences and the execution thereof. Section 428 Cr.P.C., has no application to a person sentenced by a Court-

Martial. Secondly, he states that the Court-Martial has in fact, before passing the sentence, taken into consideration the pre-conviction detention

undergone by the detenu, and therefore, the grievance expressed by the petitioner is misconceived.

5. Before launching on a discussion about the contentions raised by the respective counsel, we shall give a brief note of the provisions coming

under the various chapters of the Army Act, dealing with the functions, classification of offences, punishments, procedure to be adopted with

regard to trial, execution of sentences etc.

6. The present Army Act, 1950 (Act 46 of 1950) was enacted in supersession of the Indian Army Act of 1911 (Act 8 of 1911) and was brought

into force in July, 1950. Thus, the Act was enacted after the Constitution came into force on 26-1-1950. The Army Rules of 1954, made by the

Central Government by virtue of the powers conferred by Section 191 of the Army Act, were made in supersession of the Indian Army Act Rules

made under the Indian Army Act of 1911 and of the Army Act Rules of 1950, and they came into force from the date of the publication viz., from

27-11-1954. Therefore, we are concerned at present only with the present Army Act of 1950 and the Rules of 1954.

7. If one goes through each and every provision of this Act, he could see that this Act is based on grounds of maintenance of strict discipline in the

Army. The military officers, while implementing the various provisions of the Act, are to be guided by considerations of exigencies of the service,

maintenance of discipline in the Army, speedier trial, nature of the offence, the person against whom the offences are committed, etc. There are in

total 196 sections grouped under sixteen chapters. So far as this writ petition is concerned, we would like to touch upon some of the provisions of

Sections 34 to 70 coming under Chapter VI under the caption ""Offences"", Sections 71 to 89 coming under Chapter VII dealing with punishments.

Sections 90 to 100 coming under Chapter VIII dealing with penal deductions, Sections 101 to 107 coming under Chapter IX dealing with arrest

and proceedings before trial, Sections 108 to 127 coming under Chapter X dealing with Courts-Martial, Sections 128 to 152 under Chapter XI

dealing with procedure of Courts-Martial, Sections 153 to 165 coming under Chapter XII dealing with confirmation and revision, Sections 166 to

178 coming under Chapter XIII dealing with execution of sentences, and Sections 179 to 190 coming under Chapter XIV dealing with pardons,

remissions and suspensions, so as to see whether or not the Army Act is a self-contained Code by itself providing separate provisions for trial of

cases against offenders under the Army Act from the stage of levelling a charge till the execution of sentences.

8. Section 3(xvii) of the Army Act defines the word ""offence"" as follows :

In this Act, unless the context otherwise requires, (xvii) "offence" means

any act or omission punishable under this Act and includes a civil offence as hereinbefore defined.

Section 3(ii) defines the "civil offence" as meaning "'an offence which is triable by a criminal Court'". The term "'criminal Court'" is defined in Section

3(viii) as meaning a Court of ordinary criminal justice in any part of India. Sections 34 to 68 define various kinds of offences against the Act triable

by a Court-Martial and also indicate the punishments for the said offences. Section 69 reads 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 as provided under

the said section (Section 69). Section 70 deals with civil offences not triable by a Court-Martial and provides thus :

A person subject to this Act who commits an offence of murder against a person not subject to Military, Naval or Air Force Law, or of culpable

homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence

against this Act and shall not be tried by a Court-Martial unless he commits any of the said offences :-

(a) while on active service, or

(b) at any place outside India, or

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

Shortly stated, under Chapter VI three categories of offences are enumerated, viz.,

(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) offence 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. (Offences coming under this third category of cases, subject to a few exceptions, are not triable by a Court-Martial but

are triable only by ordinary criminal Courts). The legal position, therefore, is that when an offence is for the first time created by the Army Act,

such as those created by Sections 34 to 68, it would be exclusively triable by a Court-Martial. But, where a civil offence is also an offence under

the Army Act, or deemed to be an offence under the Act both an ordinary criminal Court and a Court-Martial would have jurisdiction to try the

person committing the offence. Such a situation is visualised and provision is made for resolving the conflict under sections 125 and 126 of the Act.

Section 125 presupposes that in respect of offences both a Criminal Court and the Court-Martial have such concurrent jurisdiction. Such a

situation can arise in the case of an act or omission punishable both under the Army Act and under any law in force in India. It may also arise in the

case of an offence deemed to be an offence under the Army Act. Under the scheme of the two sections (Sections 125 and 126), in the first

instance, it is left to the discretion of the officer mentioned in Section 125 to decide before which Court the proceedings shall be instituted, and, if

the officer decides that they should be instituted before a Court-Martial, the accused person is to be detained in military custody, but if a criminal

Court is of opinion that the said offence shall be tried before itself, it may issue the requisite notice u/s 126 either to deliver over the offender to the

nearest Magistrate or to postpone the proceedings pending a reference to the Central Government. On receipt of the said requisition, the officer

shall either deliver over the offender to the said Court or refer the question to the proper Court for the determination of the Central Government

whose order shall be final. These two sections of the Army Act provide a satisfactory machinery to resolve the conflict of jurisdiction, having

regard to the exigencies of the situation in any particular case. See *Som Datt Datta Vs. Union of India (UOI) and Others*, .

9. Section 475(1) of the new Code of Criminal Procedure corresponding to Section 549(1) of the old Code deals with delivery to commanding

officers of persons liable to be tried by a Court Martial. According to this section, the Central Government may make rules consistent with the

Code of Criminal Procedure and the Army Act of 1950, the Navy Act of 1957, the Air Force Act of 1950 and any other law relating to the

Armed Forces of the Union, for the time being in force, as to cases in which persons subject to Military, Naval or Air Force law or such other law,

shall be tried by a Court to which this Code applies or by a Court-Martial, and when any person is brought before a Magistrate and charged with

an offence for which he is liable to be tried either by, a Court to which this Code applies or by a Court-Martial, such Magistrate shall have regard

to such rules, and shall in proper cases deliver him together with a statement of the offence of which he is accused, to the commanding officer of

the unit to which he belongs, or to the commanding officer of the nearest military, naval or air force station, as the case may be, for the purpose of

being tried by a Court-Martial. An explanation is appended to the new section explaining the term ""unit"" and ""Court-Martial"". The explanation to

this subsection reads as follows :

Explanation. In this section :-

(a) "unit" includes a regiment, corps, ship, detachment, group, battalion or company.

(b) "Court-Martial" includes any tribunal with the powers similar to those of a Court-Martial constituted under the relevant law applicable to the

Armed Forces of the Union.

According to this provision of the Criminal Procedure Code and the Rules framed thereunder, the final choice about the forum of the trial of a

person accused of a civil offence rests with the Central Government, whenever there be difference of opinion between a Criminal Court and the

military authorities about the forum where an accused be tried for the particular offence committed by him. The position under sections 125 and

126 of the Army Act is quite analogous to the one u/s 475(1) of the Code.

10. The procedure to be followed by a Court-Martial is quite elaborate and generally follows the pattern of the procedure under the Code of

Criminal Procedure. There are, however, material difference too. All the members of the Court-Martial are military officers who are not expected

to be trained Judges as the presiding officers of the Criminal Court are No judgment is recorded except a finding and the sentence passed thereon.

No appeal is provided against the order of the Court-Martial. However, as per the provisions under Chapter XII of the Act, the sentences passed

by the Court-Martial have to be confirmed as contemplated thereunder. Section 164 provides a remedy for an aggrieved person against the order,

finding or sentence of a Court-Martial, by presenting a petition to the officer or

authority empowered to confirm the finding or sentence of such

Court-Martial, and again presenting a petition, if aggrieved by such confirmed finding or sentence, to the Central Government, the Chief of Army

Staff or any prescribed officer superior in command to the one who confirms such finding or sentence. The authorities to whom the convicted

person can represent against a finding or sentence passed against him by the Court-Martial are also non-judicial authorities. See *Ram Sarup Vs.*

The Union of India (UOI) and Another, . Reference, in this connection, can be had to the relevant rules touching on this aspect. Chapter V of the

Army Rules consists of Rules 22 to 176, all coming under the caption ""Investigation of Charges and Trial by Court-Martial"". This chapter is

divided into seven sections, under the following sub-headings, viz., (1) Investigation of Charges and Remand for Trial, (2) General and District

Courts-Martial, whereunder the procedure of the trial, the findings and sentences etc., are dealt with, (3) Summary Court-Martial, (4) General

Provisions with regard to Witnesses and Evidence, (5) Summary General Courts-Martial, (6) Execution of Sentences and (7) Field Punishments.

Thus, it is clear that the Army Act is a self-contained Code by itself, providing for the machineries and the procedure to be followed for the trial of

any army personnel for the various offences except the offences specifically excluded in the Act from the stage of indictment, arrest, etc., up to the

stage of the execution of sentences and also with regard to the period of limitation for trial. The army Rules made thereunder are comprehensive

enough containing provisions for the effective implementation of the Act.

11. Now, coming to the present case on hand, it is submitted by Mr. U. N. R. Rao by taking the aid of Sections 4 and 5 of the Criminal Procedure

Code, 1973, that as there is no specific provision in the Army Act contrary to Section 428, of the Code affecting the special law, this benevolent

provision under S. 428 could be invoked in favour of an army personnel also sentenced by a Court-Martial under the Army Act.

12. Now, let us examine this contention with reference to the intendment of Sections 4 and 5 of the Criminal Procedure Code. They read as

follows :

4. Trial of offences under the Indian Penal Code and other laws :- (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. Saving :- 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.

Sections 4 and 5 of the Criminal Procedure Code, 1973, correspond to Sections 5 and 1(2) of the old Code.

13. The law of procedure is not different for the trial of cases under the Penal Code and those under other statutes, according to Section 4,

Cr.P.C., except that in the case of offences under other statutes, the procedure laid down, by the Code is subject to any enactment for the time

being in force for regulating the manner or place of investigation, inquiry or trial. The existence of a special law or local law by itself cannot be

taken to exclude the operation of the Code of Criminal Procedure, unless such law prescribes a special procedure for the trial of an offence,

thereby excluding, impliedly or expressly, the operation of the Code of Criminal Procedure in respect of such trial. In other words, if such special

law or local law prescribes a special procedure for the trial of offences under that Act, the procedure laid down in the Criminal Procedure Code

would be excluded in respect of such trials. As per Section 4(2), all offences under a law other than the Indian Penal Code shall be tried according

to the provisions contained in the Criminal Procedure Code, 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. Section 5 provides that in the absence at any specific provision to the

contrary nothing in the Criminal Procedure Code shall 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. In other words, this section provides that nothing in the Code shall affect any special law in the absence of any specific provision to the contrary. Thus, this provision is an application of the maxim ""generalalia specialibus non derogant"". For the complete exclusion of the application of the Code of Criminal Procedure, the law regarding the procedure to be followed in cases falling under the special Act must be found in the enactment itself conferring jurisdiction to try the cases, as contemplated in Section 4(2). A conjoint reading of Sections 4(2) and 5 of the Code would have the following effect :-

(1) All offences, whether under the Penal Code or under any other law, have to be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Code.

(2) This rule is subject to the qualification that in respect of offences under other laws, that is to say, under laws other than the Indian Penal Code, if there be an enactment regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences, such an enactment will prevail over the Code.

(3) The provisions of a special or local law will prevail over the provisions contained in the Code of Criminal Procedure unless there is a specific provision to the contrary.

14. The Army Act is a special law within the definition of Section 41 of the 1984 Indian Penal Code. The kind of punishment that has been

imposed on the writ petitioner is specifically provided by Section 64(e) of the Army Act. As we have already found, the Army Act is a self-

contained Code, prescribing the mode of investigation, trial, sentence, execution etc., that is to say, the law regarding the procedure to be followed

in such an inquiry is found in the Army Act itself which confers jurisdiction on "the Court-Martial in respect of the offences to be tried by the

Court-Martial. Therefore, the provisions of the Criminal Procedure Code cannot be made applicable to the trial of cases by the Court-Martial,

except to the extent to which the Army Act makes it applicable to them, that is, to a very limited extent. Section 152 of the Act reads 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 345(1) and 346, Cr.P.C. Similar to S.

152 of this Act we have got Section 151 of the Air Force Act. Analogous to the first part of Section 152 of the Army Act, there are certain

provisions in some other enactments such as Section 108(4) of the Customs Act, S. 40(4) of the Foreign Exchange Regulation Act, S. 63(4) of the

Gold (Control) Act, etc.

15. Mr. U. N. R. Rao, taking advantage of the expression used in Section 152 of the Army Act, viz., that the trial by a Court-Martial under the

said Act shall be deemed to be a Judicial proceeding and the Court-Martial shall be deemed to be a Court within the meaning of Sections 345(1)

and 346, Cr.P.C. submits that the provisions of the Code of Criminal Procedure, inclusive of Section 428, in the absence of any specific exclusion

thereof in the Army Act, could be applied to a trial by the Court Martial. We are unable to accept this submission. Merely because Section 152 of

the Army Act states that the trial by the Court-Martial shall be deemed to be a judicial proceeding and that the Court-Martial shall be deemed to

be a Court, the provisions of the Criminal Procedure Code inclusive of Section 428 thereof cannot be applied to" trials by a Court-Martial, for the

reasons to be mentioned hereunder. We have already found that the Army Act, a special enactment, is a complete Code by itself prescribing a

special procedure to be adopted in a trial by a Court-Martial, thereby excluding the application of the provisions of the Criminal Procedure Code.

The expression ""judicial proceeding"" (as defined in Section 2(h) of the Code) includes any proceeding, in the course of which evidence is or may

be legally taken on oath and the expression ""Court"" as defined in Section 3 of the Evidence Act includes all Judges and Magistrates and all persons

except arbitrators legally authorized to take evidence, unless a contrary intention appears from the context. S. 345(1) deals with the procedure in

certain cases of contempt committed in the presence of the Court. Section 131 of the Army Act and Rule 140 of the Army Rules speak about the

administration of oath to witnesses. Therefore, the provisions of Section 152 is only introduced for the limited purpose of punishing a perjurer. u/s

193, I.P.C., or a person who intentionally offers any insult or causes any interruption to a public servant sitting in a judicial proceeding (under

Section 228, I.P.C.).

16. Now, let us examine the submissions of Mr. Rao that Section 428 can be invoked in favour of the accused in this case in view of Section 4(2),

Cr.P.C. since the application of this provision is not specifically excluded. Touching on this argument, there are certain judicial pronouncements of various High Courts which we shall immediately refer to.

17. In F.R. Jesuratnam Vs. Chief of Air Staff and Others, , a contention was raised by the counsel for the petitioner therein, viz., by Mr. Rao

himself, that the benefit of having the pre-conviction detention set off against the sentence of imprisonment awarded, which is availed of by a

convicted civilian u/s 428, Cr.P.C., should be made applicable to an army personnel, viz., a Squadron Leader in the Air Force in that case also;

otherwise, it would amount to discrimination which is unconstitutional. It was held by the Bench to which the matter was referred by a learned

single Judge (who later sat along with the other Judge on the Bench which decided this question), thus :

..... Obviously the Code does not apply to him (petitioner therein) by reason of S. 5 thereof.

It is worth recalling that the petitioner does not say that any provision in the Act (Air Force Act) is to be struck down. All that is being stated is that

the benefit conferred on civilians u/s 428 of the Code should be made available to the petitioner. This may be possible only if Section 5 of the

Code is struck down. It seems it would not be possible to strike down Section 5, because that provision is purely innocuous as it stands, it only

provides for a special law, not being affected by the Code.

18. In P.P. Chandrasekharan Vs. The Government of India and Others, , before a Division Bench of this Court consisting of Kailasam, J. (as he

then was) and Paul, J., an argument was advanced that the writ-petitioner therein, viz., Chandrasekharan, an ex-officer of the Navy, who had been

convicted and sentenced by a Court-Martial, was entitled to have a set-off of his pre-conviction suffered under naval custody by virtue of the

provisions of Section 428, Cr.P.C. The Bench rejected that contention and dismissed the petition, observing thus :

There is no such provision in the Navy Act. Section 5 of Criminal Procedure Code says that the Code is not applicable where any special form of

procedure is prescribed by any special or local law. The naval law is a special law

wherein an elaborate procedure is prescribed for conducting a trial and for execution of sentences Therefore, it is clear that the sentence will have to be reckoned as commencing on the date on which the sentence was awarded. The Navy Act being a special enactment the application of Criminal Procedure Code has been excluded; the operation of Section 151 of the Navy Act is only applicable." A similar question arose in *Subramonian Vs. Officer Commanding, Armoured Static Workshop*, , in which the learned single Judge of the Kerala High Court, disagreeing with the decision in *F.R. Jesuratnam Vs. Chief of Air Staff and Others*, , held that the provisions of Section 428 of the Code could be applied to sentences for offences under the Penal Code passed by a Court-Martial under the provisions of the Army Act as well. According to the learned Judge, "the grant of set-off cannot be considered as in any manner affecting the provisions of the Army Act". Drawing inspiration from the above judgment, Mr. Rao would state that Section 428 can be applied in favour of an army personnel tried either for the offence under the Penal Code or for the offence under the Army Act. With great respect, we are unable to agree with the view expressed by the single Judge of the Kerala High Court in *Subramonian Vs. Officer Commanding, Armoured Static Workshop*, . On the other hand, we are in full agreement with the Bench decisions of the Delhi High Court and of this Court, referred to above, and hold that Section 428, Cr.P.C., cannot be availed of by a person tried, convicted and sentenced by a Court-Martial under the Army Act, which is a self-contained Code, in respect of the trial, punishment, execution of sentences etc.

19. If one has to accept the argument of the learned counsel, then it would completely defeat the very object of the Army Act in the sense that an army personnel sentenced under the special Act can claim the various rights available to a civilian accused under the various provisions of the Criminal Procedure Code, such as Sections 235(2) and 248(2) contemplating that the accused shall be heard on the question of sentence before the sentence is passed, and also that he can claim the benefit of Sections 360 and 361, etc., The result of all this would be quite detrimental to the very object of the Army Act which is mainly based on the grounds of maintenance of discipline in the Army and other measures. The position

would, of course, be different in the case of army personnel tried by ordinary criminal Courts for civil offences as provided under the Act, in which

case such accused persons would be entitled to the benefit of Section 428, Cr.P.C.

20. Mr. Rao would criticize the plea taken in paragraph 6 of the counter wherein it is stated that Note 4 to Rule 53 of the Indian Army Act

reading.

The Court will also consider the length of time during which the accused has been in confinement, awaiting trial upon the present charge or

charges"" had been taken into consideration by the convicting authority, along with various other factors in deciding the quantum of punishment to

be awarded to the petitioner in this case. According to Mr. Rao, as the Indian Army Act Rules, 1911, have been superseded by the present Army

Rules, 1954, there could never be a consideration of Note 4 of the previous Rules, especially when such a note is not found in the corresponding

Rule 64 of the present Rules, leave alone the legal sanctity to be attached to such a note. Mr. Jothi produced a copy of a printed form (statement

as to character and particulars of service of accused), which document contains a record of the various factors taken into consideration before

passing the sentence against a convicted person by the Court-Martial, wherein there is a column relating to the period of the confinement suffered

by him. According to Mr. Rao, simply because the said form or sheet contains such a column, it cannot be said that the column has got a legal

sanctity behind it. Under Chapter VII of the Act, various punishments ranging from stoppage of pay and allowances up to death have been

provided and the Court-Martial is empowered to inflict any one of the sentences taking into consideration the nature of the offences committed and

the punishments provided therefor. In this connection, it would be relevant to note that Sec. 144 of the Army Act requires the Court-Martial to

take evidence of previous conviction and general character of the persons convicted. Sub-rule (1) of Rule 64, under the heading ""Procedure on

Conviction"", reads :

If the finding on any charge is "guilty", then for the guidance of the Court, in determining its sentences, and of the confirming authority in

considering the sentences, the Court, before deliberating on its sentence, shall, whenever possible, take evidence of and record the general

character, age, service, rank, and any recognized acts of gallantry or distinguished conduct of the accused, any previous convictions of the accused

either by Court-Martial or a criminal Court, any previous punishments awarded to him by an officer exercising authority under sections 80, 83, 84

or 85 as the case may be, the length of time he has been in arrest or in confinement on any previous sentence, and any military decoration or

military reward, of which he may be in possession or to which he is entitled"".

On a mere reading of the above Rule it is clear that the Court-Martial, while awarding the sentence on an army personnel on his conviction, is

statutorily obliged to take into consideration the various factors mentioned in the said Rule. It follows that when there is a specific provision with

regard to the factors to be taken into consideration while awarding the sentence, the person convicted by a Court-Martial cannot claim the benefit

of Section 428, Cr.P.C., stating that the Army Act has not specifically excluded the application of Section 428, Cr.P.C., to persons convicted and

sentenced by the Court-Martial. Further, it cannot be said that the Rules do not give any guideline to the Court-Martial in the matter of infliction of

the quantum of punishment.

21. Mr. Rao next contended that the non-application of Section 428, which is a salutary provision introduced in the new Code, in the case of a

person tried under the Army Act, is clearly violative of Arts. 14 and 21 of the Constitution of India.

22. Mr. Jothi, stoutly refuting the contention of Mr. U. N. R. Rao, as misconceived, would draw the attention of this Court to Article 33 of the

Constitution of India and various decisions of the Supreme Court touching on this aspect. Article 33 of the Constitution, coming under Part III

(Fundamental Rights), reads as follows :

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

Forces or the Forces charged with the maintenance of public order, be restricted or abrogated so as to ensure the proper discharge of their duties

and the maintenance of discipline among them.

The Supreme Court, in *Ram Sarup Vs. The Union of India (UOI)* and Another, wherein the provisions of Section 125 of the Army Act were

challenged as discriminatory and contravening the provisions of Article 14 of the

Constitution and thus void, has explained the scope of the abovesaid Article as follows :-

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. We are, however, of opinion that the provisions of S. 125 of the Act are not discriminatory and do not infringe the provision of Art. 14 of the Constitution.

23. The Supreme Court in *Lt.-Col. Prithi Pal Singh Bedi and Others Vs. Union of India (UOI) and Others*, , which arose under the provisions of the Army Act, observed thus :-

Article 33 confers power on the Parliament to determine to what extent any of the rights conferred by Part III shall, in their application to the members of the Armed Forces, be restricted or abrogated so as to ensure the proper discharge of duties and maintenance of discipline amongst them. Article 33 does not obligate that Parliament must specifically adumbrate each fundamental right enshrined in Part III and to specify in the law enacted in the exercise of the power conferred by Article 33 the degree of restriction or total abrogation of each right. That would be reading into Article 33 a requirement which it does not enjoin. In fact, after the Constitution came into force, the power to legislate in respect of any item must be "referable to an entry in the relevant list. Entry 2 in List I : Naval, Military and Air Force and any other Armed Force of the Union, would enable Parliament to enact the Army Act and armed with this power the Act was enacted in July. 1950. It has to be enacted by the Parliament subject to the requirements of Part III of the Constitution read with Article 33 which itself forms part of Part III. Therefore, every provision of the Army Act enacted by Parliament, if in conflict with the fundamental rights conferred by Part III, shall have to be read subject to Art. 33 as being enacted with a view to either restricting or abrogating other fundamental rights to the extent of inconsistency or repugnancy between Part III of the Constitution and the Army Act Therefore it is not possible to accept the submission that the law prescribing procedure for trial of offences

by Court-Martial must satisfy the requirement of Article 21, because to the extent a procedure is prescribed by law and if it stands in derogation of

Article 21, to that extent Article 21 in its application to the Armed Forces is modified by enactment of the procedure in the Army Act itself." See

also Raja Birakishore Vs. The State of Orissa, and S. P. Mittal v. Union of India : [1983]1SCR729 .

24. Mr. Jothi cited a decision rendered by a Division Bench of the Jammu and Kashmir High Court in Mulkh Raj v. Union of India 1982 Cri LJ

1794, wherein it has been ruled :

That apart, Section 164 (of the Army Act), assuming that it takes away any fundamental right of the accused, is still beyond the pale of challenge

in view of Article 33 of the Constitution which says that the Parliament may by making a law restrict or even abrogate the fundamental rights

conferred by the Constitution in their application to the members of the Armed Forces." A similar contention raised by Mr. Rao himself in F.R.

Jesuratnam Vs. Chief of Air Staff and Others, cited above has been repelled by a Bench of the Delhi High Court, A Bench of this High Court

consisting of K. B. N. Singh, C.J. and Padmanabhan, J., in M. K. Krishnamurthi v. Commander, Karnataka Sub-Area, Bangalore judgment of

this Court in Writ Appeal No. 673/83 dated 14-9-1982) has turned down a contention raised before it that the procedure prescribed for the

Court-Martial under the Army Act is itself violative of natural justice. It would not be out of place to mention here that the petitioner herein is not

challenging the constitutional validity of any of the provisions of the Army Act. Hence, when the contention of Mr. Rao is tested in the light of the

principles of law enunciated by the decision of the Supreme Court and the other decisions referred to above, we are of the view that the non-

application of Section 428, Cr.P.C., to a convicted army personnel cannot be said to be violative of Arts. 14 or 21 of the Constitution.

25. In view of the foregoing discussions, we hold that the claim of the petitioner that he is entitled to the benefit of Section 428, Cr.P.C., cannot be

accepted and there is no merit in the writ petition.

26. Accordingly, the writ petition will stand dismissed.

27. After the pronouncement of this judgment, Mr. U. N. R. Rao, the learned Counsel for the petitioner requests this Court to grant leave for

preferring an appeal before the Supreme Court Leave refused.

28. Petition dismissed