Major E.G. Barsay Vs The State

Court: Bombay High Court

Date of Decision: July 27, 1957

Acts Referred: Army Act, 1950 â€" Section 101, 102, 108, 125, 126
Explosive Substances Act, 1908 â€" Section 3, 4(a)
General Clauses Act, 1897 â€" Section 3(32)
Penal Code, 1860 (IPC) â€" Section 107, 109, 114, 120A, 120B

Citation: (1958) 60 BOMLR 159

Hon'ble Judges: Gokhale, J; Datar, J

Bench: Division Bench

Judgement

Gokhale, J.
[His Lordship after stating the facts of the case, proceeded] : Before I consider the evidence against the accused and the

arguments addressed to us at great length on behalf of the accused on the evidence, I think it would be convenient to dispose of first some of the

law points which have been argued on behalf of the accused. I may mention that ordinarily we would have expected counsel to address us on law

points at. the very outset. But Mr. Purshottam informed us that he would address us on the law points after he dealt with the merits of the case

against the accused on the basis of the evidence on the record. The first, law point raised by Mr. Purshottam is in connection with the charge. I

may mention that in the first instance Mr. Purshottam and Mr. Harnam Singh, who appeared on behalf of accused No. 2, took exception only to

the second and the third heads of the charge. It was Mr. Bhasme, who was appointed on behalf of accused Nos. 5 and 6, who challenged the

legality of the entire charge in respect of his clients, and his arguments were thereafter supported by Mr. Purshottam.

2. The main grievance is that so far as the first head of the charge is concerned, it refers to three kinds of illegal acts, the first two of which would

fall u/s 5(1)(c) and Section 5(1)(d) of the Prevention of Corruption Act. u/s 5(1)(c) of the said Act, a public servant is said to commit the offence

of criminal misconduct in the discharge of his duty if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any

property entrusted to him or under his control as a public servant or allows any other person so to do; and u/s 5(1)(d) of the Act a public servant

would also commit the offence of criminal misconduct in the discharge of his duty if he, by corrupt or illegal means or by otherwise abusing his

position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage. The argument is that the first two

sub-heads of the first charge definitely fall within the definition of Section 5(1)(c) and (d) of the Prevention of Corruption Act; and it is urged that as

admittedly accused Nos. 4, 5 and 6 are not public servants, it cannot be said that they could be charged with having agreed to commit these acts.

It is no doubt conceded that the first head of the change is that all the six accused were parties to a criminal conspiracy for the doing of certain

illegal acts. But it is contended that since accused Nos. 4, 5 and 6 were not public servants, they could not commit the offence of criminal

misconduct under the Prevention of Corruption Act, and therefore their joinder in this trial is illegal. It is also urged that though the third sub-head

of the first charge could be framed against accused Nos. 4, 5 and 6, accused Nos. 1, 2 and 3 could not be charged for the offence of committing

theft in respect of property which was admittedly under their control as public servants. It is also submitted that not only could accused Nos. 1, 2

and 3 on the one hand and accused Nos. 4, 5 and 6 on the other be not jointly tried, but that the Special Judge under the Criminal Law

Amendment Act, 1952, was not competent to try such a charge.

3. It is necessary to examine the provisions of the Criminal Law Amendment Act, 1952, in considering this argument. u/s 6(1) of the said Act, the

State Government may, by notification in the Official Gazette, appoint as many Special Judges as may be necessary for such area or areas as may

be specified In the notification to try offences which are specified in Clauses (a) and (b) of that section. Under Clause (a) offences punishable u/s

161, Section 165 or Section 165A of the Indian Penal Code or Sub-section (2) of Section 5 of the Prevention of Corruption Act, 1047, are

included; and under Clause (b) are included any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in

Clause (a). At one stage Mr. Purshottam appeared to submit that u/s 6 it would be public servants alone who could be tried by a Court of a

Special Judge. But that contention would not be correct because Sections 162 and 165A of the Indian Penal Code would obviously include in

their ambit persons who would not be public servants. Similarly the reference in Clause (b) of Section 6 to any conspiracy to commit or any

attempt to commit or any abetment of any of the offences specified in Clause (a) would necessarily involve trial of persons who are not public

servants. In our opinion, therefore, the Court of the Special Judge would be competent to try offences committed even by persons who are not

public servants, provided they fall within Clauses (a) and (b) of Section 6(1) of the Criminal Law Amendment Act, 1952.

4. In the first head of the charge all the accused are said to be parties to a criminal conspiracy who had agreed to do certain illegal acts. The

essence of a criminal conspiracy is that two or more persons should agree to do, or cause to be done, an illegal act or an act which is not illegal by

illegal means, and such an agreement is designated a criminal conspiracy. In this ease it is the case of the prosecution that all the accused had

agreed that certain illegal acts which are specified in the first charge be committed. The definition of criminal conspiracy u/s 120-A of the Indian

Penal Code postulates an agreement to do an illegal act or acts, and it is not necessary that every one of the persons aggreing to do these acts

should be capable in law of committing an offence in respect of that act. Under the Explanation to Section 120-A it is immaterial whether the illegal

act is the ultimate object of such agreement, or is merely incidental to that object. The essence of the offence of conspiracy is the bare engagement

and association to break the law, whether any act be done in pursuance thereof by the conspirators or not. O''Connell and Ors. v. The Queen

(1844) 6 Cl. & P. 155. u/s 43 of the Indian Penal Code an act would be illegal, among other things, if it is an offence or if it is prohibited by law. It

is not necessary that the agreement of conspiracy should be confined to the commission of only a single act; it may comprise the commission of a

number of acts. If that be the true position in respect of a criminal conspiracy, we fail to see how the charge framed against all the accused under

the first head of the charge would be illegal in any manner if all the accused are charged with being parties to a criminal conspiracy having agreed to

do certain illegal acts. The mere fact that accused Nos. 4, 5 and 6 being not public servants would not be guilty of offences u/s 5(1)(c) and Section

5(1)(d) of the Prevention of Corruption Act would not introduce any infirmity in the charge. Similarly, it may be that accused Nos. 1 to 3 could not

technically be guilty of committing theft in respect of property which was under their control as public servants. But that by itself in our opinion

would not introduce any infirmity in the charge.

5. As regards the competence of the Special Judge to entertain such a charge, we do not find any difficulty either. u/s 6(1)(b) of the Criminal Law

Amendment Act, 1952, the Special Judge is competent to try the offence of conspiracy, to commit any of the offences specified in Clause (a) of

that section, and there is no dispute that the first two sub-heads in the first charge against the accused fall within the ambit of Section 5 of the

Prevention of Corruption Act, 1947. It is true that the third sub-head of the first charge would not fall within the ambit of the provisions of Section

6(1)(a) and (b) of the said Act. But once it is held that the Special Judge is competent to try the offence of criminal conspiracy in respect of illegal

acts falling within Section 5(1)(c) and Section 5(1)(d) of the Prevention of Corruption Act there would be no difficulty in holding that lie would be

also competent to try, along with that charge, a charge in respect of any other offence that is not specified in Section 6, but which may be levelled

against the accused as a part of the conspiracy. In this connection the provisions of Section 7(3) of the Criminal Law Amendment Act may be

referred to. Under that sub-section it is provided that when trying any case, a Special Judge may also try any offence other than an offence

specified in Section 5 with which the accused may, under the Code of Criminal Procedure, 1898, be charged at the same trial.

6. Then turning to the second and third heads of the charges against the accused, in our opinion, the contention that accused Nos. 4, 5 and 6 could

not be charged with having committed an offence u/s 5(1)(c) and Section 5(1)(d) of the Prevention of Corruption Act is well founded. As we have

already seen, Section 5(1)(c) and (d) contemplate criminal misconduct on the part of public servants and admittedly accused Nos. 4, 5 and 6 are

not public servants. u/s 5(2) of the Prevention of Corruption Act it is a public servant alone who is punishable for the offence of criminal

misconduct in the discharge of his duty. In our opinion, therefore, it was an error in law to have charged accused Nos. 4, 5 and 6 with having

committed the offence u/s 5(1)(c) and Section 5(1)(d) punishable u/s 5(2) of the Prevention of Corruption Act read with Section 34 of the Indian

Penal Code. The punishing section being Section 5(2) alone, the addition of Section 34, Indian Penal Code, would not make accused Nos. 4, 5

and 6 liable u/s 5(1)(c) and Section 5(1)(d) of the Prevention of Corruption Act. As these offences are said to have been committed in pursuance

of the criminal conspiracy mentioned in the first head of the charge, in our opinion, it would have been proper if a charge u/s 5(1)(c) and (d) read

with Section 109 of the Indian Penal Code had been framed against accused Nos. 4, 5 and 6. According to the prosecution, the part that was

played by accused Nos. 4, 5 and 6 as members of the conspiracy was mainly at the receiving end near Talegaon Dabhade Road and they were to

arrange for the transport of the goods, and, in our opinion, it would have been proper under the circumstances of this case if a charge of abetment

had been framed against accused NOS. 4, 5 and 6. u/s 107 of the Indian Penal Code, a person abets the doing of a thing, who, inter alia, engages

with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that

conspiracy and in order to the doing1 of that thing. Under the Explanation to Section 109 of the Code, any act or offence is said to be committed

in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy, or with the aid which

constitutes the abetment. As in this case the prosecution case is that accused Nos. 4, 5 and 6 joined accused Nos. 1 to 3 conspiring to do certain

illegal acts, in our opinion, it would have been proper to frame a charge against accused Nos. 4, 5 and 6 u/s 109 of the Indian Penal Code for

having abetted the commission of the offence of criminal misconduct u/s 5(1)(c) and (d) of the Prevention of Corruption Act by accused Nos. 1 to

3 and confine the charge of criminal misconduct against accused Nos. 1 to 3 alone. While we, therefore, accept the argument on behalf of the

accused regarding the second, and the third heads of charges, we propose to alter the charge to one u/s 109 of the Indian Penal Code read with

Section 5(1)(c) and (d) of the Prevention of Corruption Act in ease we find that any of the accused Nos. 4, 5 and 6 are guilty of abetment of the

offence of criminal misconduct by any or all of the other accused, which must necessarily imply that the offence of criminal misconduct has been

committed in consequence of the abetment.

7. Mr. Bhasme, however, contended that the Court could not alter the charge against accused Nos. 4, 5 and 6 to one u/s 109, Indian Penal Code,

read with Section 5(1)(c) and (d) of the Prevention of Corruption Act, when they were charged only with the offence u/s 5(1)(c) and (d)

punishable u/s 5(2) of that Act read with Section 34 of the Indian Penal Code along with accused Nos. 1, 2 and 3. In support of his argument, he

relied on Emperor Vs. Raghya Nagya, in which Macleod C.J., following the decision of this Court in Reg. v. Chand Nur and Pirbhai Adamji

(1874) 11 B.H.C.R. 240, held that when a person is charged with having committed an offence, he cannot be convicted of abetment of the said

offence. The learned Chief Justice quoted in this connection the observations of their Lordships in the earlier Bombay case that (p. 325):

It was not open to a Court to find a man guilty of the abetment of an offence on a charge of the offence itself. When a man is accused of murder,

he may not be conscious that he will have to meet an imputation of collateral circumstances constituting abetment of it, which may be quite distinct

from the circumstances constituting the murder itself.

But these two cases are distinguishable from the present case inasmuch as here accused Nos. 4, 5 and 6, along with accused Nos. 1, 2 and 3, are

not only charged with the offence of criminal conspiracy to do certain illegal acts including offences u/s 5(1)(c) and (d) of the Prevention of

Corruption Act, but they are also charged with having committed these offences in pursuance of the conspiracy, read with Section 34 of the Indian

Penal Code. In our opinion, therefore, it would not be illegal to alter the charge against accused Nos. 4 to 6 to one of abetment of the offence of

criminal misconduct, as we are satisfied that no prejudice is likely to be caused to any of the accused by our doing so. The ruling in Emperor Vs.

Ranchhod Sursang, , where it was held that the Court can convict accused persons of offences u/s 307 read with Section 34 or 114, although they

are charged only with offences under Sections 148, 149 and 307 of the Indian Penal Code, would seem to support the view we are taking. In

Begu Vs. Emperor, it was held that in view of the provisions of Sections 236 and 237 of the Criminal Procedure Code, a man may be convicted of

an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. See also

Symo Maha Patro, In re. ILR(1932) Mad. 903, Hira v. King-Emperor ILR(1946) Pat.562, Debiprasad Kalowar v. Emperor ILR(1932) Cal.

1192, and Provincial Government, Central Provinces and Berar v. Gomaji [1944] Nag. 589.

8. As regards the last head of the charge, the main criticism is that obviously all the accused could not be charged with having committed the

offence u/s 381 of the Indian Penal Code. Mr. Amin, Special Counsel appearing on behalf of the State, urged that the proper charge would have

been u/s 379 of the Indian Penal Code. But that again would be difficult to sustain so far as accused Nos. 1 to 3 are concerned. The charge u/s

411 of the Indian Penal Code would also appear to be improper so far as accused Nos. 1 to 3 are concerned. But. so far as accused Nos. 4, 5

and 6 are concerned, the charge u/s 411 read with Section 34, Indian Penal Code, would be quite proper and there is no dispute about that either.

9. As regards the contention that all these charges could not be tried together, in our opinion, it is clearly misconceived. The charge is one of

conspiracy against all the accused and they are also charged with having committed substantive offences in pursuance of the said conspiracy. u/s

239(d) of the Code of Criminal Procedure, persons accused of different offences committed in the course of the same transaction may be charged

and tried together. In our opinion, therefore, there is no substance in the argument that the charge suffers from the defect of misjoinder.

10. In support of his argument that the charge is illegal Mr. Purshottam relied mi the case of Emperor Vs. Keshavlal Tribhuvandas Panchal, . In

that case the accused was alleged to have manufactured in his iron foundry some cast iron containers'' and screw caps, which were used by other

persons for making bombs. One of suck bombs was thrown at a police chowkey and exploded causing injury to a police constable, The other two

bombs were aimed at other police chowkies on different dates but failed to explode. On these facts the accused was tried at one trial for three

offences u/s 6 read with Sections 3 and 4(a) of the Explosive Substances Act, 1908, and was also charged in the alternative with an offence u/s

4(b) of the Act. The trial having proceeded on these charges, an application was made on behalf of the prosecution for dropping the first charge as

it contravened the provisions of Section 234(1) of the Criminal Procedure Code. That having been done and the accused having been convicted, it

was held that the dropping of the first charge was not warranted inasmuch as the trial having proceeded on an improper charge framed in

contravention of the mandatory provisions of the Criminal Procedure Code, could not be rendered legal, by a subsequent amendment of the

charge at a late stage. In our opinion this ease has no application to the facts of the present case. In this case, as we have already seen, the accused

have been charged with the offence of criminal conspiracy and there is no defect in that charge. It is true that accused Nos. 1 to 3 alone should,

have been charged with the offences u/s 5(1)(c) and (d) punishable u/s 5(2) of the Prevention of Corruption Act, and the proper charge against

accused Nos. 4, 5 and 6 would have been u/s 5(1)(c) and (d) of the Prevention of Corruption Act read with Section 109 of the Indian Penal

Code; and though the charge against accused Nos. 1 to 3 u/s 381 or Section 411 of the Indian Penal Code would appear to be misconceived and

they would not be liable to be convicted under those sections, we do not think that there is any infirmity in the charge on that account so as to

vitiate the trial of the accused.

11. Even assuming, however, that the charge contains errors and irregularities in some respects, we are not prepared to hold that it has caused any

prejudice or injustice to the accused. u/s 537 of the Code of Criminal Procedure, no finding, sentence or order passed by a Court of competent

jurisdiction shall be reversed or altered because of any error, omission or irregularity in the charge including any misjoinder of charges, unless such

error, omission or irregularity has occasioned a failure of justice, and the Explanation to that section provides that in determining whether any error,

omission or irregularity has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been

raised at an earlier stage in the proceedings. In the present case, it is obvious that no objection whatever was taken to the charge in the Court

below. As I have already indicated, the point was not even raised in the first instance and it was only when Mr. Bhasme argued the point on behalf

of accused Nos. 5 and 6 as regards the legality of the entire charge that Mr. Purshottam supported him on behalf of his client. In the first instance,

the objection was only taken as regards the second and third, heads of the first charge. In our opinion the charge as framed which was explained to

the accused has not caused any prejudice or injustice and would not warrant the setting aside of the conviction or ordering a re-trial on that

ground.

12. Mr. Amin on behalf of the State relied on a ruling of the Supreme Court, H.N. Rishbud and Inder Singh Vs. The State of Delhi, , in support of

his argument that there would be nothing wrong in a joint trial, before the Special Judge, of public servants and persons who are not public

servants, provided the offences fell within the ambit of the provisions of the Criminal Law Amendment Act, 1952. In the above case it appears that

there were three appeals before their Lordships of the Supreme Court and in one appeal, namely, Appeal. No. 95 of 1954, only three of the

accused were public servants. The charges against all the accused were u/s 120-B and Section 420 of the Indian Penal Code and Section 7 of the

Essential Supplies (Temporary Powers) Act, 1946, while in. respect of such of the accused as were public servants they were also charged u/s

5(2) of the Prevention of Corruption Act, 1947. That appeal was undoubtedly dismissed, but the main point that has been considered by the

Supreme Court in that case was as to the legality of the investigation, and the question of joinder of charges was not raised at that stage. It seems

that the matter had been taken before their Lordships of the Supreme Court at the stage of quashing the proceedings. This ruling, therefore, would

not be of any material assistance in the decision of that, question.

13. In Willie (William) Slaney v. The State of Madhya Pradesh [1945] 2 S.C.R. 1140, it has been observed that like all procedural laws the Code

of Criminal Procedure is designed to subserve the ends of justice and not to frustrate them by mere technicalities. The Code regards some of the

provisions as vital and others not, and a breach of the latter is a curable irregularity unless the accused is prejudiced thereby. It places errors in the

charge or even a total absence of a charge in the curable class. The object of the charge is to give the accused notice of the matter he is charged

with and does not touch jurisdiction. If the necessary information is conveyed on the basis of the charge and there is no prejudice, the trial would

not be invalid. In the case before the Supreme Court a separate charge in the alternative was not formally reduced to writing. In the present case

undoubtedly there are some errors in the charge as framed; but, in our opinion, especially in view of the fact that no objection was raised at the

stage of trial as regards the legality of the charge and as no prejudice seems to have been caused to the accused, we see no reason why we should

interfere in appeal on the ground that there are some irregularities and errors in the charge.

14. The second point as regards the legality of the trial is raised under the provisions of the Army Act, 1950, by Mr. Purshottam on behalf of

accused No. 1. That again is a point which has been raised for the first time in appeal challenging the jurisdiction of the Special Judge to entertain a

charge against accused No. 1. No doubt notice in respect of this point was served on the learned Special Counsel for the State, but this point was

argued after a full-dressed argument on the merits. Mr. Amin, the learned Special Counsel on behalf of the State, contended that even though this

was a law point, we should not allow it to be raised at the stage of appeal. As the point is one of law and is alleged to strike at the very

competence of the trial Court to try accused No. 1, we allowed Mr. Purshottam to argue that point. The learned Counsel has urged that under the

provisions of the Army Act, which would apply to accused No. 1 alone, he could not be tried by the ordinary criminal Court for the. offences with

which he was charged. The submission is that accused No. 1 could be tried by the court-martial alone under the provisions of the Army Act.

Alternatively it was argued that even assuming that the ordinary criminal Court has jurisdiction over the offences alleged to have been committed by

accused No. 1 along with others, the provisions of Sections 125 and 126 of the Army Act read with the relevant Rules framed under the Act, have

not been complied with.

15. In order to examine these submissions, it would be necessary to deal in some detail with the provisions of the Army Act, 1950, and the Rules

made thereunder. Section 2(1) of the Act gives a list of persons who are subject to the Act. u/s 3(ii) ''civil offence'' is denned as ''an offence which

is triable by a criminal Court'', and u/s 3(viii) ''criminal Court'' is defined as ''a court oil ordinary criminal justice in any part of India, other than the

State of Jammu and Kashmir.'' Under Sub-clause (xviii) ""offence"" means any act or omission punishable under the Act and includes a civil offence

as hereinbefore defined. Chapter VI of the Army Act gives a list of offences and, according to Mr. Purshottam, Sections 34 to 68 deal with

offences ''which are triable by a court-martial alone, while Section 69 deals with civil offences over which there would be concurrent jurisdiction

both of the military Court as well as the ordinary criminal Court. Section 70 deals with civil offences not triable by court-martial, but the provisions

of this section are further subject to certain exceptions. According to Mr. Purshottam, therefore, there are three categories of offences dealt with

by Chap. VI of the Army Act, Sections 34 to 68 dealing with purely military offences, Section 69 dealing with offences over which there is

concurrent jurisdiction of the military Court as well, as of the ordinary criminal Court, and Section 70 dealing with offences over which the military

Court would have no jurisdiction subject to certain exceptions. In developing his arguments, Mr. Purshottam relied on the provisions of Section 52

of the Act which deals with offences in respect of property. Section 52(b) refers to dishonest misappropriation or conversion by a military officer

to his own use of property belonging to the Government, and Section 52(f) refers to a person, subject to the Army Act, who commits an offence

by doing any other thing with intent to defraud, or to cause wrongful gain to one person or wrongful loss to another person. It is Mr. Purshottam''s

contention. that the offence of criminal conspiracy and criminal misconduct with which his client is charged would be covered by Sections 52(b)

and (f) of the Army Act and he submits that since Section 52 would fall within the sections in respect of which military Courts alone have

jurisdiction, the Court of the Special Judge was not competent to try accused No. 1. In our opinion, this contention is not well founded. Accused

No. 1 is charged in this ease with having entered into a, criminal conspiracy with five others, two of whom are public servants and three are not

public servants. It is no doubt true that the offences falling u/s 5(1)(c) and (d) of the Prevention of Corruption Act might fall u/s 52(b) of the Army

Act. But, in our opinion, the argument that the offence of criminal conspiracy with which accused No. 1 is charged would fall within the ambit of

the provisions of Section 52(f) of the Army Act cannot be accepted. Section 52 of the Army Act deals with offences in respect of Government

property or property belonging to any military, naval or air force mess, band or institution or to any person subject to military, naval or air force

law. The several clauses in that section deal with different kinds of offences which are liable to be committed in respect of such property. In our

opinion, the language of Section 52(f) must be construed ejusdem generic and would not include the offence of criminal conspiracy, much less

criminal conspiracy entered into with persons not governed by the provisions of the Act.

16. In this view of the matter, it is really not necessary to consider Mr. Purshottam''s argument that Sections 34 to 68 of the Army Act deal, with

the offences which are triable by court-martial alone and they would exclude the jurisdiction of the ordinary criminal Courts, However, we are

inclined to hold that the jurisdiction of the ordinary criminal Court would not be ousted in respect of such of the offences which are covered by

Sections 34 to 68 of the Army Act but which would also fall within any of the provisions of the Indian Penal Code or any other penal law. Taking

the case of theft or misappropriation of Government property in a Military Depot, though such an offence would fall within the provisions of

Section 52(a) and (b) of the Army Act, we see no reason why the jurisdiction of the ordinary criminal Court should be excluded provided the

other provisions of the Army Act are complied with. Our attention has not been drawn to any provision of the Army Act which would exclude the

jurisdiction of the ordinary criminal Court in such a case. On the other hand, in Chap. X of the Act which deals with courts-martial there is one

section which contemplates a trial by a criminal Court after a trial by a court-martial. u/s 127(1) of the Act, a person convicted or acquitted by a

court-martial may, with the previous sanction of the Central Government, be tried again by a criminal Court for the same offence, or on the same

facts. If a person were convicted or acquitted by a court-martial for the offence of theft or criminal misappropriation of Government property

which is covered by Section 52(a) and (b) of the Act, Section 127 specifically provides that he may be tried again by a criminal. Court for the

same offence or on the same facts, provided the sanction of the Central Government is obtained. To accept Mr. Purshottam"s argument that

offences covered by Section 52(a) and (b) would be triable by a military Court alone would make the provisions of Section 127 superfluous, so

far as offences under Sections 34 to 68 of the Army Act are concerned, even though some of those offences or facts constituting them may fall

within the provisions of the Indian Penal Code or the Prevention of Corruption Act or any other penal law and thus be civil offences triable by a

criminal Court. The Legislature did not define a civil offence as excluding offences which might fall within the ambit of Sections 34 to 68 of the

Army Act. We are, therefore, inclined to hold that, even assuming Mr. Purshottam"s argument that the charge of criminal conspiracy alleged

against Mr. Barsay would fall u/s 52(f) of the Army Act and thus be within the jurisdiction of the court-martial is correct, the jurisdiction of the

Court of the Special Judge would not be excluded.

17. That takes us to the second part of Mr. Purshottam"s argument that the provisions of Section 69 read with Section 125 and Section 126 of the

Army Act have not been complied with so far as accused No. 1 is concerned and, therefore, his trial is without jurisdiction. u/s 69 of the Army

Act, subject to the provisions of Section 70, any person subject to the Act who at any place in or beyond India commits any civil offence shall be

deemed to be guilty of an offence against the Act and, if charged therewith under this section, shall be liable to be tried by a court-martial and, on

conviction, be punishable in the manner provided in Clauses (a) and (b) of that section. According to Mr. Purghottam, under this section any

Military Officer who is subject to the Act who commits any civil offence will be deemed to be guilty of an offence under the Army Act and then,

according to Mr. Purshottam, he shall be liable to be tried by a court-martial. Therefore, says Mr. Purshottam, as soon as a civil offence is

committed by a person subject to the Army Act, he becomes subject to two jurisdictions, one of the ordinary criminal Court and the other of the

court-martial. In such a case, the provisions of Section 125 have to be looked to for the purpose of deciding how this conflict between the two

jurisdictions has to be resolved. u/s 125, when a criminal Court and a court-martial have each jurisdiction in respect of an offence, it shall be in the

discretion of the officer commanding'' the army corps, division or independent brigade in which the accused person is serving or such other officer

as may be prescribed to decide before which Court the proceedings shall be instituted, and, if that officer decides that they should be instituted

before a court-martial, to direct that the accused person shall be detained in military custody. Under this section, therefore, as soon as an ordinary

criminal Court and a court-martial have concurrent jurisdiction in respect of an offence, it is for the military officer to decide before which Court the

proceedings shall be instituted, and, if the decision of the officer is that the proceedings should be instituted before the court-martial, he would

direct that the accused person should be detained in military custody. u/s 126(1), when a criminal Court having jurisdiction is of opinion that

proceedings shall be instituted before itself in respect of any alleged offence, it may, by written notice, require the officer referred to in Section 125

at his option, either to deliver over the offender to the nearest Magistrate to be proceeded against according to law, or to postpone proceedings

pending a reference to the Central Government; and under Sub-section (2) of this section, in every such case the said officer shall deliver over the

offender in compliance with the requisition, or shall forthwith refer the question as to the Court before which the proceedings are to be instituted for

the determination of the Central Government, whose order upon such reference shall be final. At one stage of his arguments, Mr. Purshottam

submitted that Section 126 should be read apart from the provisions of Sections 69 and 125, and his contention was that even assuming that the

provisions of Sections 69 and 125 of the Army Act were not applicable, the provisions of Section 126 would make it obligatory on a criminal

Court to give a written notice to the officer referred to in Section 125 to deliver over the offender. We are not prepared to accept this argument.

Section 126 in terms refers to the officer-referred to in Section 125 and also under certain circumstances it contemplates the officer postponing the

proceedings pending a reference to the Central Government, which must necessarily mean proceedings before a court-martial. In our opinion,

Section 69 and Sections 125 and 126 of the Army Act must be read together and they deal with the case when both the ordinary criminal Court

and the court-martial have jurisdiction in respect of an offence.

18. Mr. Amin on behalf of the State in the first instance attempted to counter this argument by relyng on the provisions of the Criminal Law

Amendment Act, 1952. According to Mr. Amin, this Act amended the Indian Penal Code and the Code of Criminal Procedure and provided for a

more speedy trial of certain offences, the offences being enumerated in Section 6 of the Act, and for the trial of those offences the State

Government has the power to appoint Special Judges, and Section 7(i) of that Act provides that notwithstanding anything contained in the Code of

Criminal Procedure, 1898, or in any other law the offences specified in Sub-section (1) of Section 6 shall be triable by Special Judges only. Mr.

Amin contended that, by virtue of this non obstante clause, the jurisdiction of the court-martial was excluded in respect of the offences with which

accused No. 1 was charged and the Special Judge alone was competent to try those offences. Mr. Purshottam contended, on the other hand, that

the provisions of Section 7 of the Criminal Law Amendment Act could not abrogate the provisions of the earlier special Act, which is the Army

Act in this case, on the principle of generaliaspecialibus non derogant. It is true that a general law does not abrogate an earlier special one by mere

implication. Where there are general words in a later Act which are capable of reasonable and sensible application without extending them to

subjects specially dealt with by earlier legislation, the earlier and special legislation cannot be held to have been indirectly repealed, altered or

derogated from merely by force of such general words, without any indication of a particular intention to do so. See Seward v. ""Vera Cruz"" (1884)

10 App. Cas. 59; Barker v. Edger [1898] A.C. 748; and Maxwell on Interpretation of Statutes, 10th edn., 176. In our opinion, however, it is not

necessary to have recourse to the principle and cases relied upon by Mr, Purshottam, because though u/s 7 of the Criminal Law Amendment Act

offences falling within the purview of Section 6(1) will be triable by Special Judges only, that, in our opinion, would not affect the jurisdiction of the

Court-martial because the offence with which the Court-martial will be dealing would not be an offence under the Prevention of Corruption Act but

an offence u/s 69 of the Army Act. As soon as a civil offence is committed by a military officer governed by the Army Act, u/s 69 by legal fiction

he is deemed to be guilty of an offence under the Army Act; and in that ease, provided the conditions of Section 69 are satisfied, the Court-martial

will be trying him for an offence u/s 69 and not for any offence under the Prevention of Corruption Act, and as an offence u/s 69 is not an offence

falling within the purview of Section 6 of the Criminal Law Amendment Act, a Special Judge would have obviously no jurisdiction to try such an

offence. The argument of Mr. Amiri, therefore, that it is the Special Judge alone who has jurisdiction to try the offence committed by accused No.

1 and that the provisions of the Army Act would not apply to such a case cannot be accepted.

19. But that does not solve the difficulty of Mr. Purshottam. u/s 69 of the Army Act certain conditions have to be satisfied before a civil offence

committed by a military officer, is liable to be tried by a Court-martial. In the first instance, the military officer must commit a civil offence. As soon

as he commits a civil offence, he is to be deemed to be guilty of an offence against the Army Act. But he must be charged with the offence u/s 69,

before he shall be liable to be tried by a Court-martial Unless, therefore, a person subject to the Army Act is charged with the offence u/s 69 he is

not liable to be tried by a Court-martial, and there is nothing in this ease to indicate that accused No. 1 was charged with the offence u/s 69 of the

Army Act, which would make him liable to be tried by a Court-martial.

20. In this connection, it is necessary to refer to some of the rules framed under the Army Act under the rule making1 power of the Central

Government u/s 191(2)(d) of the Army Act. Before, however, I refer to these rules, reference may be usefully made to Section 101 of the Army

Act, under which any person subject to the Act who is charged with an offence may be taken into military custody. Such person may be ordered

to be taken into military custody by any superior officer. u/s 102 it shall be the duty of every commanding officer to take care that a person under

his command when charged with an offence is not detained in custody for more than forty-eight hours after the commital of such person into

custody is reported to him, without the charge being investigated, unless investigation within that period seems to him to be impracticable having

regard to the public service. So that it would appear that in the case of a person subject to the Army Act who is charged with an offence and taken

into military custody, the charge has to be immediately investigated and he cannot be detained in custody for more than 48 hours after the

committal of such person into custody is reported to the commanding officer, without the charge being investigated. u/s 108 there are four kinds of

Courts-martial and they are (a) general courts-martial, (b) district courts-martial, (c) summary general Courts-martial, and (d) summary courts-

martial. Chapter V of the Army Rules, 1954, deals with investigation of, charges and trial by Court-martial, and Rule 22 refers to the hearing of

charge in the presence of the accused, Under Sub-rule (2) of Rule 22, the commanding officer shall dismiss a charge brought before him if, in his

opinion, the evidence does not show that an offence under the Act has been committed, and may do so if, in his discretion, he is satisfied that the

charge ought not to be proceeded with. Under Rule 25, where an officer is charged with an offence under the Army Act, the investigation shall, if

he requires it, be held and the evidence, if he; so requires, be taken in his presence in writing. There are rules for the framing of charges and under

Rule 28 a charge-sheet must contain the whole issue or issues to be tried by a Court-martial at one time. Under Rule 28(2) a charge means an

accusation contained in a charge-sheet that a person subject to the Act has been guilty of an offence, and under Rule 28(3) a charge-sheet may

contain one charge or several charges. Rule 30 deals with the contents of a charge. Under Rule 31, the charge-sheet shall be signed by the

commanding officer of the accused and shall contain the place and date of such signature. Rule 37 of Section 2, in Chap. V of the Army Rules,

deals with the convening of General and District Courts-martial. Under Rule 41, on the Court assembling, the order convening the Court shall be

laid before it together with the charge-sheet and the summary of evidence or a true copy thereof. Rule 106 and subsequent rules of Section 3 deal

with the procedure before Summary Courts-martial, and Rule 151 and other rules of Section 5 deal with the convening and procedure of Summary

General Courts-Martial. It is, therefore, clear that the Army Act provides for the investigation of a charge against a military officer governed by the

Army Act and also provides for the framing of a charge. The liability to be tried by a Court-martial, therefore, arises only after a preliminary

investigation and the framing of a charge. We are, therefore, of the opinion that u/s 69 of the Army Act, though a person subject to the Act may be

deemed to be guilty of an offence against the Act, he shall only be liable to be tried by a Court-martial if charged therewith u/s 69. The jurisdiction

of the Court-martial would, in our opinion, only arise if the offender is charged with an offence of which he is deemed to be guilty u/s 69. In this

case it is not contended on behalf of accused No. 1 that there has been any charge investigated or framed u/s 69 of the Army Act against him. If

that be so, neither Section 125 nor Section 126 of the Army Act would have any application.

21. But Mr. Purshottam relied further on rules framed u/s 549(1) of the Code of Criminal Procedure. That section empowers the Central

Government to make rules consistent with the Code and the Army Act and the other Acts mentioned therein, providing for the trial of persons

subject to military, naval or air force law by a Court, to which the Code of Criminal Procedure applies or by a Court-martial; and it also provides

that 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 the

Code of Criminal, Procedure 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 regiment, corps, etc. to which he belongs, for the

purpose of being tried by Court-martial It has to be noted that for the applicability of this section it is necessary that both the ordinary criminal

Court as well as the Court-martial should have jurisdiction. Rule 3 of the Rules framed u/s 549(1) of the Criminal Procedure Code runs as follows:

Where a person subject to military, naval or Air Force law is brought before a Magistrate and charged with an offence for which he is liable to be

tried by a court-martial, such Magistrate shall not proceed to try such person or to issue orders for his case to be referred to a Bench, or to inquire

with a view to his commitment for trial by the Court of Sessions or the High Court for any offence triable by such Court, unless

(a) he is of opinion, for reasons to be recorded, that he should so proceed without being moved thereto by competent military, naval or Air Force

authority, or

(b) he is moved thereto by such authority.

Under Rule 4, before proceeding under Clause (a) of Rule 3 the Magistrate shall give written notice to the commanding officer of the accused and

until the expiry of a period of seven days from the date of the service of such notice he shall not do certain things which are specified in Clauses (a),

(b) and (c) of that rule. Rule 2(i) defines a ""Commanding Officer"" and Rule 2(ii) defines a ""competent military authority"". Now, this rule again does

not support Mr. Purshottam''s contention, because before accused No. 1 is liable to be tried by a Court-martial under Rule 3 he must be charged

with an offence; and, as I have already stated, it is nobody''s case that a charge u/s 69 of the Army Act was either investigated into or framed

against accused No. 1. Secondly, in our opinion, this rule will also not apply to the Court of the Special Judge set up under the Criminal Law

Amendment Act, because both Section 549 and Rules 3 and 4 refer to what is to be done by a Magistrate. Mr. Purshottam in this connection

relied upon Section 3(32) of the General Clauses Act, 1897, which states that a Magistrate shall include every person exercising all or any of the

powers of a Magistrate under the Code of Criminal Procedure for the time being in force; end Mr. Purshottam''s contention is that a Special Judge

under the Criminal Law Amendment Act, 1952, is a Magistrate for the purposes of the rules framed u/s 549 of the Code of Criminal Procedure.

We are not prepared to accept this argument. It is no doubt true that a Special Judge will normally follow the procedure laid down in. the Code of

Criminal Procedure, but that does not mean that he is a person exercising all or any of the powers of a Magistrate under the Code of Criminal

Procedure. u/s 6(2) of the Criminal Law Amendment Act, a person shall not be qualified for appointment as a Special Judge under that Act unless

he is, or has been, a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1898.

u/s 8(i) a Special Judge may take cognizance of offences without the accused being committed to him for trial, and in trying the accused persons,

shall follow the procedure prescribed by the Code of Criminal Procedure, 1898, for the trial of warrant eases by Magistrates. Under Sub-section

(3) of that section, save as provided in Sub-section (2) or Sub-section (2), the provisions of the Code of Criminal Procedure, 1898, shall so far as

they are not inconsistent with the Act, apply to the proceedings before a Special Judge; and for the purposes of the said provisions, the Court of

the Special Judge shall be deemed to be a Court of Session trying eases without a jury or without the aid of assessors. It is clear, therefore, that the

Court of a Special Judge under the Criminal Law Amendment Act is on. a par with the Court of a Sessions Judge trying cases without a jury or

without the aid of assessors. It cannot, therefore, be said that the rules framed u/s 549 of the Code of Criminal Procedure would have to be

followed by the Court of a Special Judge.

22. In this connection Mr. Purshottam drew our attention to the observations of the Supreme Court in H.N. Rishbud and Inder Singh Vs. The

State of Delhi, in which their Lordships of the Supreme Court refer to a Special Judge, as one ""who for purposes of procedure at the trial is

virtually in the position of a Magistrate trying a warrant case."" It does not mean, however, that their Lordships meant to lay down that the Court of

a Special Judge under the Criminal Law Amendment Act was the Court of a Magistrate. Then Mr. Purshottam invited our attention to a ruling in

Emperor Vs. Jerry D''sena, , in which Mr. Justice Wadia and Mr. Justice Sen were considering the effect of Rules 1 and 2 corresponding to the

present Rules 3 and 4 framed u/s 549(1) of the Criminal Procedure Code. In that case, the trying Presidency Magistrate discharged the accused

on the ground that the Court had no jurisdiction to try the accused, who was subject to military law, as the prosecution had not produced the

permission of the military authorities. The Government name in revision against, this order and the contention was that the order of the Presidency

Magistrate was erroneous by virtue of Rule 1(a) of the then existing rules framed u/s 549. This Court held that as the Magistrate had refused to try

the accused when he found that he was not moved by the military authorities, he was not bound to record reasons for his opinion under Rule 1(a)

obviously because the Magistrate was under no obligation to record reasons for not being of the opinion that lie should proceed with the trial. It is

only when he is of the opinion that he should proceed with that trial that he has to record reasons. That case, therefore, cannot have any application

to the facts of the present case. Then Mr. Purshottam referred us to a decision of this Court in State v. Arjunan Sagdevan Naikar (1955)

Confirmation Case No. 13 of 1955. That case also cannot have any application, because the accused there was, in the first place, being tried by a

Court-martial but subsequently the Court-martial was dissolved and the military authority handed him over to the police for having the accused

tried by the ordinary criminal Court, The only question that was canvassed before the Court in that case was that the military authorities having

already decided that the accused should be tried by a Court-martial and that Court having been dissolved subsequently, whether they could

exercise the power of decision u/s 125 of the Army Act over again and hand over the accused to the police for trial by ordinary criminal Court,

and it was held that they could do so. That, decision, therefore, cannot have any application to the facts of the present cast.

23. Then strong reliance was placed on a decision of Mr. Justice Govinda Menon, as he then was, in Mistry, In re [1944] 2 M.L.J. 44. In that

case it was held that the language. of Section 549 of the Code and Rule 105 of the Criminal Rules of Practice was clear and mandatory. When a

person subject to the military law is brought before a Magistrate charged with an offence for which he is triable under the Army Act, the Magistrate

is bound to follow the procedure prescribed by those, provisions. This would be so even if the prescribed military authority u/s 69 of the Army Act

had come to the decision that the proceeding should be instituted in an ordinary criminal Court. It was further held that:

where the Court fails in its duty to give notice to the Commanding Officer of the accused, the proceedings before the Magistrate relating to the

recording of evidence, etc., would be illegal and without jurisdiction; and acquiescence on the part of the accused in an irregular or illegal

proceeding would not regularise or legalise the proceedings. A charge so framed would be without jurisdiction and has to be quashed.

It has to be noted that the matter had come before Mr. Justice Govinda Menon for quashing the proceedings which resulted in the framing of a

charge, and it was the Court of a Magistrate in that case that had disregarded the provisions of the relevant rule f ramie d u/s 549 of the Code of

Criminal Procedure. As we have already pointed out, it would not be necessary for the Court of a Special Judge under the Criminal Law

Amendment Act to have regard to rules framed u/s 549 of the Criminal Procedure Code because the Court of a Special Judge is not a Court of a

Magistrate. It may be also mentioned that the question whether the jurisdiction of a Court-martial arises u/s 69 of the Army Act without the military

officer being charged with the offence u/s 69 was not canvassed in that case. Mr. Purshottam also fairly pointed out to us the case of Blythe v. The

King AIR[1949] Cal. 641, in which it was held that the provisions of Section 549 of the Criminal Procedure Code would have no application to

trials before Special Tribunals constituted under the West Bengal Criminal Law Amendment Act. The Calcutta High Court held in that case that

Special Tribunals under the West Bengal Criminal. Law Amendment Act were not Magistrates, but they were in law Courts of Session; and that

was because of the provision in Section 5(2) of the West Bengal Criminal Law Amendment Act, which lays down that for the purposes of the

provisions of the Code of Criminal Procedure, the Special Tribunal shall be deemed to be a Court of Session, trying-eases without a jury, and that

being so, Section 549 would have no application to a person who would be brought before a Special Tribunal and charged with an offence for

which he is liable to be tried either by a Court to which the Criminal Procedure, Code applies or by a Court-martial. As the provisions of the

Criminal Law Amendment Act, 1952, seem to be in pari mataria with the provisions of the West Bengal Criminal Law Amendment Act, in our

opinion, this case clearly goes against the contention urged by Mr. Purshottam.

24. In our opinion, therefore, the trial of accused No. 1 by the Special Judge was not in any manner incompetent and against, the provisions of the

Army Act or the rales framed thereunder as also the rules framed u/s 549 of the Code of Criminal Procedure. We may also mention that this point

should have been taken on behalf of accused No. 1 in the trial Court. In this connection Mr. Purshottam referred us to the statement of accused

NO. 1 u/s 342 of the Criminal Procedure Code, in which he had challenged the legality of the sanction accorded, to his prosecution on the ground

that he came under the Army Act and any trial beyond the Army Act must be sanctioned only by the President. In our opinion, that objection

related to the validity of the sanction accorded to his prosecution and. had no reference to the competence of the Special Judge to try the accused

on the ground that the provisions of Section 125 and Section 126 of the Army Act and of the rules framed u/s 549 of the Criminal Procedure

Code were not complied with. Assuming'' that Mr. Purshottam''s contention has any substance, if the point had been raised in the trial Court, the

Court would have considered it and acted in. accordance with the rules framed under the Code of Criminal Procedure if it had found it necessary

to do so. Mr. Amin on behalf of the State wanted to rely on certain, papers which, he said, would have clarified the attitude of the military

authorities in this ease. It is worth noting that in the Madras ease decided by Mr. Justice Govinda Menon affidavits were riled which were

considered by the Court. In this case, we were referred to certain parts of the evidence of Brig. Wilson and Col. Sindhi and also of Mr. Jog, in

which there is some reference to a Court of Inquiry. Brig. Wilson, in his evidence clearly stated that he did not hold any departmental enquiry

against anybody and he did not know whether any Court of Inquiry functioned or gave any findings in. this case. He did "not make any inquiry in

that connection. According" to Col. Sindhi, a Court of Inquiry was convened in respect of this matter but it was adjourned sine die as the same

matter was entrusted for investigation to the police and he stated that the decision was taken by the higher military authorities. According to the

evidence of Jog-, he gave oral instructions to the army officers not to hold any inquiry regarding this offence as he was investigating the same, and it

would appear that the instructions he gave were to Col. Naidu who was the Station Commandant then. This witness could not say whether the

army officers held or did not hold any inquiry in the matter. In our opinion, the evidence on the record is not sufficient to hold that there was any

investigation into the offence by the military authorities and any charge-sheet was framed against the accused. This case has been argued at great

length and it is significant that no affidavit has been filed on behalf of accused No. 1 in support of the argument under the provisions of the Army

Act.

25. [The rest of the judgemnet is not material to the report.]