(13) In the result we cannot, but uphold the finding on the first appellate Court on issue No. 1(c). Consequently this appeal is dismissed, however, without any order as to costs.

SHARMA, J.—I agree.

B. S. G.

REVISIONAL CRIMINAL

Before Muni Lal Verma, J.

JAI PAL SINGH,—*Petitioner.*

versus.

THE STATE OF HARYANA.,—*Respondent.*

Criminal Revision No 113 of 1972

May 19, 1972.

Code of Criminal Procedure (Act V of 1898)—Section 549(1)—Army Act (XLVI of 1950)—Sections 3(ii), 69, 70, 125 and 126—Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules (1952)—Rules 3, 4, 5 and 6—Military Personnel on active service committing murder of a person not subject to military law—Offence triable both by criminal Court and Court Martial—Officers mentioned in section 125 not exercising discretion to have the accused tried by Court Martial—Proceedings in the criminal Court against the accused—Whether barred—Such accused person—Whether has any choice in the matter—Omission of the Magistrate to give written notice of the commitment proceedings to the Military authorities—Whether vitiates such proceedings.

Held, that under section 70 of the Army Act, 1950, offences of murder, culpable homicide and rape, when committed by a military personnel in relation to a person who is not subject to military, naval or air force law are exclusively triable by criminal Court. But when the offender is on active service at the time of commission of the offence, both Court martial as well as criminal Court have concurrent jurisdiction to try him. The provisions contained in sections 125 and 126 of the Act give the choice to the officer, mentioned in section 125, to choose the Court, out of the criminal Court and the Court-martial, in which the criminal proceedings could be instituted against the accused. If the said officer does not exercise his discretion and decide that the proceedings should be instituted before the Court-martial the Act does not debar the criminal Court from exercising its jurisdiction in the manner provided by law. Section 549, Criminal Procedure Code, has to be construed very strictly and jurisdiction

of the criminal Court to try the accused person for causing murder cannot be axed unless the provision contained in the Act or the Rules made thereunder exclude the same wholly and specifically. The law whether contained in the Army Act or under the Rules made thereunder or in the Criminal Procedure Code does not give any right to an accused person to say that he should be tried by the criminal Court or by the Court-martial. He has no choice in the matter.

Held, that failure of Courts in not observing provisions of section 549 of the Code and Rules made thereunder does not amount to illegality vitiating trial especially when no prejudice is caused to the accused. Hence the failure on the part of the committing Magistrate to give seven days' written notice to the Military authorities before committing an accused person for trial to the Court of Session and his failure to record reasons to proceed with the commitment proceedings without being moved by the Army authorities amounts to irregularity of procedure and not illegality. The commitment order passed in those proceedings cannot be impugned for want of jurisdiction, and the commitment proceedings are not vitiated.

Petition under section 439 of Code of Criminal Procedure for revision of the order of Shri Salig Ram Seth, Sessions Judge, Hissar, Ex-officio Additional Sessions Judge, Rohtak, dated 3rd January, 1972, dismissing the application under Section 549 Cr. P. C. read with Sections 125 and 126 of the Army Act, 1950, filed by the petitioner in Sessions Case No. 48 of 1970.

U. D. Gour, Advocate, *for the petitioner.*

C. P. Sapra, Advocate, *for the State of Haryana.*

JUDGMENT

VERMA, J.—The circumstances, giving rise to this criminal revision, may be briefly, stated as under:—

The petitioner was military personnel being, most probably, a Sepoy in the Army. In the month of June, 1969, he had gone on leave to his village Mokhra. On the night intervening 25th and 26th June, 1969, he murdered his father Bhagtu and his brother Balwan with gun fire in their enclosure and then he proceeded towards his house. There, he murdered his mother Shrimati Kamli, his daughters Sarvshrimati Murti and Sunehri and his son Hawa Singh. The report of the said incident was lodged with the Police, Meham, by Om Parkash who was eye-witness. The said police arrested the petitioner and, after necessary investigation, prosecuted him under section 302, Indian Penal Code. The learned Magistrate committed him to the Court of Sessions, Rohtak, for standing trial on

charges under section 302, Indian Penal Code, for committing the aforesaid six murders. The learned Second Additional Sessions Judge, Rohtak, who tried the case, convicted the petitioner under section 302, Indian Penal Code, and sentenced him to death. On appeal to this Court, his conviction and sentence were set aside and the case was remanded for fresh trial. Towards the close of the trial, an application was moved on behalf of the petitioner, in the trial Court, that since his commitment for trial was in contravention of provisions of the Criminal Procedure Code and the Army Act (hereinafter called the Act), his trial had been illegal and it was prayed that his commitment be quashed. The learned Ex-Officio Additional Sessions Judge, Rohtak, rejected the said application and the petitioner has come to this Court in revision.

The facts, that the petitioner was military personnel and had come to his village Mokhra on leave in the month of June, 1969, that on the night intervening 25th and 26th June, 1969, six persons were put to death and that the petitioner was arrested for causing the said six murders and had been committed for trial under section 302, Indian Penal Code, for causing the said murders, are not disputed. Relying on section 549, Criminal Procedure Code, and the relevant provisions contained in the Act and the Rules framed thereunder, the learned counsel for the petitioner contended that his trial stood vitiated since his commitment, being in contravention of the said provisions and rules was illegal. The relevant provision of section 549, Criminal Procedure Code, reads as under:—

> "549(1) The Central Government may make rules consistent with this Code and the Army Act———and any similar law for the time being in force, as to the cases in which persons subject to military————law, shall be tried by a Court to which this Code applies, or by 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 regiment————to which he belongs, or to the commanding officer of the nearest military————station, as the case may be, for the purpose of being tried by Court-martial.

(2) — — — — — — — —".

The provisions of the Act were undoubtedly applicable to the petitioner since he was employed in the Army. 'Active service' is defined in section 3(i) of the Act. The Central Government is, however, authorised by section 9 of the Act to extend the scope of the said definition of 'active service'. Through notification No. S.R.O.-6E issued by The Central Government on 28th November, 1962, it declared that all persons subject to the Act shall, wherever they may be serving, would be deemed to be on active service within the meaning of the Act. A similar notification had been issued by the Central Government under section 9 of the Air Force Act and while considering the said notification a Full Bench of this Court held in *Ajit Singh* v. *State of Punjab* (1) that a person employed in the Air Force was on active service though he was on leave when he committed the offence. Therefore, now, there can be no doubt that the petitioner has to be considered on active service because of the aforesaid notification No. S.R.O.6E issued by the Central Government, though he was on leave in his village on the night of incident. Sections 69, 3(ii), 70, 125 and 126 of the Act, which are relevant for the purpose of deciding this revision, read as under:—

"69. 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 follows, that is to say,—

(a) if the offence is one which would be punishable under any law in force in India with death or with transportation he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and

(b) in any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law in force in India, or imprisonment for a

(1) I.L.R. 1970 (2) Pb. & Hr. 69=A.I.R. 1970 Pb. & Hr. 351.

term which may extend to seven years, or such less punishment as is in this Act mentioned."

* * * * * *

3. In this Act, unless the context otherwise requires—

* * * * * *

(ii) 'civil offence' means an offence which is triable by a criminal court;

* * * * * *

70. 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.

* * * * * *

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, 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.

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.

(2) In every such case the said officer shall either 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."

Rules 3, 4, 5 and 6 of the Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1952, which are of relevance, are to the following effect :—

"3. Where a person subject to military———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 order for his case to be referred to a Bench, or to inquire with a view to his commitment for trial by the Court of Session 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 — — — authority, or

(b) he is moved thereto by such authority.

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—

(a) convict or acquit the accused under sections 243, 245, 247 or 248 of the Code of Criminal Procedure, 1898 (V of 1898), or hear him in his defence under section 244 of the said Code; or

(b) frame in writing a charge against the accused under section 254 of the said Code; or

(c) make an order committing the accused for trial by the High Court or the Court of Session under section 213 of the said Code.

5. Where within the period of seven days mentioned in rule 4, or at any time thereafter before the Magistrate has done any act or issued any order referred to in that rule, the Commanding Officer of the accused or competent military — — authority, as the case may be, gives notice to the Magistrate that in the opinion of such authority, the accused should be tried by a Court-martial, the Magistrate shall stay proceedings and if the accused is in his power or under his control, shall deliver him, with the statement prescribed in sub-section(1) of section 549 of the said Code to the authority specified in the said sub-section.

6. Where a Magistrate has been moved by competent military — — authority, — — — under clause (b) of rule 3. and the Commanding Officer of the accused or competent military — — — authority, as the case may be subsequently gives notice to such Magistrate that, in the opinion of such authority, the accused should be tried by a court-martial, such Magistrate, if he has not before receiving such notice done any act or issued any order referred to in rule 4, shall stay proceedings and, if the accused is in his power or under his control, shall in the like manner deliver him, with the statement prescribed in sub-section (1) of section 549 of the said Code to the authority specified in the said sub-section."

(3) It would, thus, appear from section 69 read with section 3(ii) of the Act that all offences punishable under Indian Penal Code except that of murder, culpable homicide not amounting to murder and rape committed by a military personnel are triable by the court-martial as well as by the criminal courts. The offences of murder culpable homicide and rape, when committed by a military personnel in relation to a person who is not subject to military, naval or air force law are exclusively triable by criminal Court and shall not be tried by court martial (vide section 70 of the Act). But the said bar, provided by section 70 of the Act, against the trial of military personnel with regard to the aforesaid offences is removed when the offender, who is admittedly military personnel, was on active service

at the time of commission of the offence. Since in view of the notification No. S.R.O. 6E issued by the Central Government on 28th November, 1962, the petitioner, though he was on leave, has to be deemed to be on 'active service', therefore, section 70 of the Act would not exclude the jurisdiction of the court-martial and it has to be conceded that court-martial as well as criminal Court have concurrent jurisdiction to try him for causing the six murders. The provisions of section 549, Criminal Procedure Code, have to be construed very strictly and the jurisdiction of the criminal Court to try the petitioner for causing the six murders cannot be axed unless the provisions contained in the Act or the Rules made thereunder exclude the same wholly and specifically. Sections 125 and 126 of the Army Act or the Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1952, do not bar, much less expressly, the jurisdiction of the criminal Court to try the petitioner for the offence of murder. As indicated above, the offences of murder, committed by the petitioner, are triable both by the criminal Court and the court-martial. Sections 125 and 126, and the Rules referred to above, have made suitable provisions to avoid a conflict of jurisdiction between the criminal Court and the court-matrial. It may be noted that, in the first instance, discretion was left to the officer, mentioned in section 125 of the Act, to decide before which Court the proceedings could be instituted and the Officer-Commanding of the Army, the Division or Brigade, in which the petitioner was serving, or any other officer so prescribed, was to exercise his discretion and decide, under section 125 of the Act, in which Court the proceedings should be instituted against the petitioner. It was only when he so exercised his discretion and decide that the proceedings should be instituted before the court-martial that the provisions of section 126(1) could come into operation. If the said officer, i.e., mentioned in section 125 of the Act, did not exercise his discretion and decide that the proceedings should be instituted before the court-martial, the Army Act could not debar the criminal Court from exercising its jurisdiction in the manner provided by law. I am guided in this view by the judgment of the Supreme Court recorded in *Joginder Singh* v. *The State of Himachal Pradesh* (2). It is, therefore, clear that the provisions contained in sections 125 and 126 of the Army Act give the choice to the officer, mentioned in section 125 of the Act, to choose the Court, out of the criminal Court and the court-martial, in which the criminal proceedings could be instituted against the petitioner. But there is nothing in the said sections, and no provsion of law

(2) A.I.R. 1971 S.C. 500.

was referred to me, to show that the petitioner had any choice in the matter. In other words, the law, as now stands, whether contained in the Army Act or under the Rules made thereunder or in the Criminal Procedure Code, does not give any right to the petitioner to say that he should be tried by the Criminal Court or by the court-martial. It appears that the petitioner was arrested by the police on 26th June, 1969 and he had been in jail thereafter. He had gone on leave in the month of June, 1969 to his village. After expiry of his leave period; the Army Authorities; especially the officers of the Regiment; in which the petitioner had been employed, must have made inquiry for the non-return of the petitioner from leave to his Regiment. It is, therefore, reasonable to presume that in the said inquiry they must have come to know about the arrest of the petitioner for the offence of murders, relating to the death of six persons. Not only that the petitioner had been committed to the Court of Session, Rohtak, more than two years ago, he was also convicted and sentenced to death on 20th March, 1970, for causing the aforesaid murders. His appeal against the conviction and sentence was allowed by this Court on 1st September, 1970 and the case was remanded for *de novo* trial and the same had been pending since then. Therefore, in the circumstances of the case, it is reasonable to assume that the Army Authorities had ample time to know that the petitioner was being prosecuted for causing murder of six persons. So, they had adequate and full opportunity to exercise the discretion, allowed by section 125 of the Act, to choose or to determine the Court, whether criminal Court or court-martial, where the petitioner could be tried for the aforesaid offences of murder. It was not represented by the learned counsel for the petitioner that the Army Authorities concerned had ever taken the decision that he (the petitioner) should be tried by the court-martial. In that view of the matter, when the Army Authorities had sufficient time to know and, in fact, that knowledge can be safely attributed to them, that the petitioner was being prosecuted for causing murders in the criminal Court, and they had ample opportunity to exercise the discretion, allowed by section 125 of the Act, but they did not decide that he should be tried by court-martial, the inherent jurisdiction vested in the Magistrate, to inquire into the offence and to commit the petitioner for trial, could not be taken away. The provisions, contained in section 549, Criminal Procedure Code, sections 125 and 126 of the Act and in Rules 3, 4, 5 and 6 of the Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1952, referred to

above, deal with the proceedings instituted in the court of Magistrate. The said provisions do not relate to the Court of Session. It may be seen that the Magistrate, before making inquiry into the commitment proceedings, is required to give written notice to the Commanding Officer of the accused, who is military personnel, at least of seven days and, after giving the said notice, he could proceed with the inquiry, though after recording reasons thereof, without his being moved in that respect by the Army Authorities. The purpose of the Rules seems that when an accused, who is military personnel, is brought before the Magistrate for trial, or for inquiry into the commitment proceedings, he should inform the Army Authorities so that they can exercise their discretion, allowed by section 125, and take up decision with regard to the forum of the trial of the said accused. When, in the circumstances of a given case, it can be reasonably presumed that it is in the knowledge of the Army Authorities concerned that the military personnel, accused of a criminal offence, is being prosecuted in the criminal Court, the omission on the part of the Magistarte to give the written notice, as required by Rule 4, or to record reasons for proceeding with the case, as required by clause (a) of Rule 3, does not *per se* vitiate proceedings taken by him and does not divest him of the jurisdiction given to him by the statute. It has been observed in *Joginder Singh* v. *State* (3), that—

> "Violation of rules 3 and 4 of the Rules does not by itself deprive the Magistrate of his inherent jurisdiction, thereby automatically nullifying all subsequent proceedings and that the effect of the violation is to be determined on the facts and cricumstances of each case keeping in view the nature of the violation and all other relevant factors."

Similarly, it has been ruled in *Ajit Singh* v. *State of Punjab* (1), that failure of Courts in not observing provisions of section 549, Criminal Procedure Code, and rules made thereunder, did not amount to illegality vitiating trial especially when no prejudice was caused to the accused. It, thus, follows that failure on the part of the learned committing Magistrate to give seven days' written notice to the Commanding Officer of the petitioner, before committing him (the petitioner) for trial to the Court of Sessions Rohtak, constitutes non-observance of Rule 4 and his failure to record reasons to proceed with the commitment proceedings without being moved by

(3) (1969)71 P.L.R. 61.

the Army Authorities constitutes non-observance of Rule 3(a). But non-observance of the asid Rules by the learned committing Magistrate, in the circumstances discussed above which go a long way to show that the Army Authorities concerned must have come to know about the arrest and prosecution of the petitioner for the offences of murder and they did not decide that he should be tried by the court-martial and did not move the criminal Court in that respect, would constitute irregularity of procedure and would not be regarded as illegality. An order of commitment may be quashed challenged on the ground of illegality, but irregularity in the matter of procedure cannot vitiate commitment order passed by the learned Magistrate. It is important to note that the learned Magistrate had inherent jurisdiction to make inquiry into the offence and also to record the order of commitment. Therefore, the commitment order cannot be impugned for want of jurisdiction. The petitioner was arrested as back as on 26th June, 1969. He was then prosecuted and committed to the Court of Session and his trial, in the first instance, resulted into his conviction on 20th March, 1970. His appeal was allowed on 1st September, 1970 and even after remand the prosecution evidence had been mainly recorded, and it was on 16th February, 1971, when the application was moved for quashing the order of commitment. It is, therefore, clear that the application for quashing the commitment order had been moved after inordinate delay.

(4) It, thus, follows from the discussion above that it cannot be maintained that the learned Magistrate lacked jurisdiction to make inquiry into the commitment proceedings or to record the order of commitment and his non-observance of the procedure, laid in Rules 3 and 4, in the circumstances of the case, amounts to illegality. So, there is no ground, much less just, for quashing the commitment order. As soon as it is held, as I do, that the commitment order was not illegal, the trial of the petitioner, by the Court of Session, cannot be challenged. In view of the inordinate delay, extending to more than two years in making the application for quashing the commitment order by the petitioner, and the fact that the Army Auhorities concerned must have come to know about the prosecution of the petitioner in the criminal Court and never intimated to criminal Court that they intended to institute proceedings in the court-martial against the petitioner, the refusal to set aside the order of commitment would not result into any prejudice to the petitioner. In that view of the matter, there is no merit in the revision petition and it must fail and the trial of the petitioner should proceed.

(5) Consequently, I dismiss this revision petition. The learned Ex-Officio Additional Sessions Judge, Rohtak, will now proceed to decide the case on merits.

N. K. S.

CIVIL MISCELLANEOUS.

Before Bal Raj Tuli, J.

JAY KAY MOTORS,—*Petitioner.*

versus

THE ASSESSING AUTHORITY, Chandigarh ETC.,—*Respondents.*

Civil Writ No. 4877 of 1971

May 22, 1972.

Punjab General Sales Tax Act (XLVI of 1948)—Section 9—Security from a person for grant of registration certificate—Whether should be in proportion to the payment of tax—Demand of excessive and prohibitory cash security—Whether proper exercise of discretion under section 9—Past conduct of the person—Whether justifies imposition of arbitrary restrictions.

Held, that the amount that can be demanded as security under section 9 of the Punjab General Sales-tax Act, 1948, from a person as a condition precedent for the grant of a registration certificate under section 7 of the Act must have relation to the amount of the tax for which he may be or become liable under the Act. The amount must depend on the nature of the business, its turnover and the amount of tax payable thereon by him. The past conduct of the person should not be the sole ground for imposing arbitrary and unreasonable restrictions making it well nigh impossible or extremely difficult for him to carry on business like an ordinary citizen. If a demand for payment of a cash security is excessive and out of all proportion and disables him from carrying on his business, it does not remain a regulatory and enabling restriction but becomes prohibitory and disabling and cannot be said to be a proper exercise of discretion under section 9 of the Act. The powers of the Assessing Authority are quite wide and as soon as it is found that the volume of business of such a person has increased, the amount of security can also be increased and it only requires vigilance on the part of the Assessing Authority. (Para 3).

Petition under Articles 226 and 227 of the Constitution of India praying that an appropriate writ, order or direction be issued quashing the order's