ALLAHABAD HIGH COURT

Ram Swarup

Vs.

State, (Allahabad)

Criminal Appeal No. 190 of 1960. , against decision of Asstt. S.J. Pilibhit

(D.P. Uniyal and Kailash Prasad, JJ.)

12.01.1960. 03.02.1961

JUDGMENT

D.P. Uniyal, J.

1. This reference raises an important question with regard to the true scope and effect of Section 116(d) Criminal Procedure Code (Amendment) Act XXVI of 1955, hereinafter referred to as the Amending Act.

2. The facts are briefly stated as follows. The appellant was prosecuted under Sections 409 and 477-A Indian Penal Code. The trial of the accused commenced on 17-10-55 in the court of Sri Onkar Singh, Sessions Judge of Pilibhit, with the aid of assessors. After a substantial part of the prosecution evidence had been recorded the accused came up in Revision to the High Court and obtained the stay of further proceedings in the case. The Revision was dismissed sometime in July 1959 and the case was then sent back to the Sessions Judge for trial. During the pendency of the said Revision, however, two events had occurred; one was the coming into force on, 2-1-56 of the Criminal Procedure Code (Amendment) Act XXVI of 1955, and the other was the posting of Sri Visheshwari Pd. Mathur as Sessions Judge in place of Sri Onkar Singh since transferred. This time the trial of the accused commenced before the new Sessions Judge without the aid of assessors in accordance with the Amending Act. The Sessions Judge eventually convicted the appellant of the offences charged. The accused then filed an appeal to the High Court from his conviction and sentence. It was contended before Bishambhar Dayal, J. who heard the appeal, that the trial of the accused should have been conducted with the aid of assessors. On behalf of the appellant reliance was placed on Section 116, (d) of the Amending Act and it was urged that the entire proceedings before the Sessions Judge ending in the conviction of the appellant were wholly void.

3. B. Dayal, J. considered that the question involved in the case was of considerable importance

and, therefore, referred the following question for consideration by a Division Bench.

> "Whether in the circumstances of this case the present trial held without the aid of assessors was vitiated?"

In order to appreciate the controversy it is necessary to refer to the provisions of Section 116 of the Amending Act. Section 116 runs as follows:

> "Notwithstanding that all or any of the provisions of this Act have come into force in any State,
> (a) The provisions of Section 14, or Section 30 or Section 145 or Section 146 of the principal Act as amended by this Act shall not apply to or affect any trial or other proceeding which, on the date of such commencement, is pending before any Magistrate and every such trial or other proceeding shall be continued and disposed of as if this Act had not been passed:
> (b) the provisions of Section 406 or Section 408 or Section 409 of the principal Act as amended by this Act shall not apply to, or affect any appeal which on the date of such commencement is pending before the District Magistrate or any Magistrate of the First Class empowered by the State Government to hear such appeal and every such appeal shall, notwithstanding the repeal of the first provision of Section 406 or of Section 407 of the principal Act, be heard and disposed of as if this Act had not been passed;
> (c) the provisions of clause (w) of Section 4 or Section 207-A or Section 251-A or Section 260 of the principal Act as amended by this Act shall not apply to or affect any inquiry or trial before a Magistrate in which the Magistrate has begun to record evidence prior to the date of such commencement and which is pending on that date, and every such inquiry or trial shall be continued and disposed of as if this Act had not been passed;
> (d) the provisions of Ch.XXIII of the principal Act as amended by this Act shall not apply to or affect any trial before a court of Session either by Jury or with the aid of assessors in which the court of Session has begun to record evidence prior to the date of such commencement and which is pending on that date, and every such trial shall be continued and disposed of as if this Act had not been passed;

But save, as aforesaid the provisions of this Act and the amendments made thereby shall apply to all proceedings instituted after the commencement; of this Act and also to all proceedings pending in any criminal court on the date of such commencement."

4. It will be seen that the words used in clause (d) of Section 116 of the Amending Act "and every such trial shall be continued and disposed of as if this Act had not been passed" would suggest that a trial which was pending on the date of the commencement of the Amending Act shall be held in accordance with the provisions of the principal Act. The saving clause added to the section is not. however, in conformity with the last portion of the section inasmuch as it says that "the provisions of this Act and the amendments made thereby shall apply to all proceedings instituted after the commencement of the Act and also to all proceedings pending in any criminal

court on the date of such commencement."

5. The apparent conflict between the section and the saving clause came to be considered by their Lordships of the Supreme Court in *Anant Gopal Sheorey v. State of Bombay*[1], In that case their Lordships were considering the interpretation of clause (c) of Section 116. The provisions of clauses (c) and (d) of Section 116 are in pari

[1] AIR 1958 SC 915

materia and therefore, the reasoning adopted by their Lordships would, mutatis mutandis, apply to the facts of the present case. The facts of the case before their Lordships of the Supreme Court were these. A complaint had been filed against the accused under Section 282 of the Indian Companies Act and Sections 465 and 477-A Indian Penal Code. The proceedings commenced in 1954 before a Magistrate but subsequently they were transferred to a Special Magistrate who commenced the recording of evidence on 4-7-55 i.e., before the Amending Act had come into force.

During the pendency of the case before the Magistrate and after the Amending Act had come into force an application was made to the Magistrate by the accused claiming the right to appear as a witness on his behalf under Section 342-A of the Amending. Act The application of the accused was dismissed by the Magistrate and so was his revision to the High Court of Nagpur. The High Court of Nagpur was of the opinion that the proceedings pending before the Special Magistrate would be according to the procedure laid down in the unamended Code and the accused could not, therefore, claim the right to appear as a witness under Section 342-A of the Amending Act.

6. Their Lordships after considering the provisions of Section 116 of the Amending Act observed that there was conflict in different parts of the main Section 116 but that conflict could be avoided by giving a beneficial construction to the section. Their Lordships observed as follows:

> "Thus construed, the words of clause (c) and the words of the rest of the Section 116 would mean this that the provisions of Section 4(w), 207-A, 251-A or 260 of the Code as amended shall not apply to or affect any inquiry or trial before a Magistrate where the recording of evidence has started prior to the date of commencement of the Amending Act and every such inquiry should be continued and disposed of as if these sections had not been enacted. Except as to this and as to the provisions mentioned in sub-clauses (a), (b) and (d), the other provisions of the Amended Code shall be applicable to such proceeding which is also in accordance with the general principle applicable to amendments in procedural law." They held that the accused was entitled to avail the right granted to him under Section 342-A of the Amending Act.

7. Applying the reasoning of their Lordships of the Supreme Court to the facts of the present case, it would appear that the proper construction of clause (d) of Section 116 would be that the words of clause (d.) and the words of the rest of Section 116 would mean this that the provisions

of Ch.XXIII of the principal Act as amended by this Act shall not apply to or affect any trial before a Court of Session either by jury or with the aid of assessors in which the court of session has begun to record evidence prior to the date of such commencement, and which is pending on that date, and every such trial shall be continued and disposed of as if this Act had not been passed.

8. It would follow, therefore, that the appellant before us would have a right to be tried in accordance with the provisions of the unamended Code, that is to say, he would be entitled to claim a trial with the aid of assessors as if the provisions of Ch.XXIII of the Amending Act had not been enacted.

9. It was, however, argued by the learned State counsel that the trial which commenced on the 6th August, 1959 before Sri Visheshwari Prasad Mathur, Sessions Judge of Faizabad, was a new trial and, therefore, the provisions of Ch.XXIII of the principal Act as amended by this Act shall apply to the case. The issue depends on what exactly the term "trial" means in Ch.XXIII of the Code. The word "trial" has not been defined in the Criminal Procedure Code of 1923 or in the amended Code of 1955. The Criminal Procedure Code of 1872 defined "trial" as meaning "the proceedings taken in court after the charge has been drawn up and includes the punishment of the offender". This definition was, however, omitted from the subsequent Acts. We can, therefore, legitimately presume that the Legislature did not intend to assign a uniform or fixed meaning to the word "trial" in the various provisions of the Code. The various High Courts in India have held that the word "trial" has no fixed or universal meaning, vide *Jiban Molla v. Emperor*[2], *Ramjeet v. State*[3], and *Piarey Dusadh v. Emperor*[4], In the last mentioned case it was observed by the Federal Court that:

> "the meaning of the word "trial" must largely depend on the context and the scheme of the enactment in which it occurs."

Their Lordships were of opinion that ordinarily a trial must comprise all stages of the proceeding, including imposition of the sentence.

10. The next question that falls to be considered is whether the "proceeding" which commenced before Sri Visheshwari Prasad Mathur,. Sessions Judge, on the 6th August, 1959 was a continuation of the trial which had started before the Amending Act came into force, or whether it was an entirely new and different trial. The argument was that the trial which had commenced before Sri Onkar Singh, Sessions Judge, on the 17th October, 1955 came to an end when he was transferred from the district. Thereafter when the proceedings re-commenced before Sri Visheshwari Prasad Mathur in August 1959 it was a new trial altogether. We are not prepared to accede to this argument, because in our opinion a 'trial' consists of all the steps beginning with the indictment of the accused and ending with his conviction or acquittal. The proceedings against an offender in a case triable by a Court of Session start when a charge is framed against him and the "proceedings" do not terminate till he is acquitted or convicted.

11. It would be useful in this connection to refer to the case of *Regina v. John Corss Smith*[5], in which Earle, C.J. stated:

> "Then the matters mentioned in the case stated for our consideration are all steps taken in one proceeding, which is completed and brought to a consummation by indictment and conviction. They are all proceedings pending, and the indictment was a part of those proceedings. Every statute must be construed with reference to itself and to the following questions, what was the state of the law previously to the passing of the statute, and what was the apparent purpose of the new statute?.....The new statute abolished those

[2] AIR 1933 Cal 551 [4] AIR 1944 FC 1
[3] AIR 1958 All 439 [5](1862) 169 ER 1333

> offences and substituted others. If the repeal is to be qualified one would suppose that it would be qualified in respect to rights and liabilities acquired or incurred before the new statute is to come into operation. If it is not so qualified, all former proceedings would be rendered null and impunity given to all offenders. There is no rational ground for supposing that the Legislature so intended. It is provided that the repeal shall not affect any proceeding pending."

12. It is thus clear that the Amending Act. did not take away the "rights and liabilities acquired or incurred" by the accused before the new statute came into force. So that he could claim to be tried in accordance with the procedure in force at the time the proceedings relating to the offence commenced against him.

13. It is no doubt true that no one has a vested right in procedure but there are certain rights which though procedural in nature are of such a character that any interference with those rights would amount to depriving an accused person of a statutory right. In *Dal Singh v. Emperor*[6], their Lordships of the Privy Council held that –

> "error in procedure may be of a character so grave as to warrant the interference of the sovereign.....Such error may, for example, deprive a man of a constitutional or a statutory right to be tried by jury or by some particular tribunal."

Thus it has always been regarded as a valuable right of an accused person to be tried by a jury or by a judge with the aid of assessors.

14. One of the leading cases is that of *Colonial Sugar Refining Company v. Irving*[7], In that case a suit was started by issue of a writ on the 25th October, 1902 and the case was set down for argument in the Supreme Court in 1903. On the 25th August, 1903 any right of appeal to their

Lordships of the Privy Council was taken away by the Judiciary Act of 1903. It was held by their Lordships that the question whether the right of appeal had vested in the appellant before the date of the passing of the Act did not admit of doubt. Their Lordships observed;

> "In principle we see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear indication to that effect is manifested."

15. In *Emperor v. Fitz Maurice*[8], a European British subject with a right under the Code to trial by jury was committed on the 11th June, 1923 to the court of session. But by an Act which came into operation on the 1st September, 1923 the right of trial

[6] ILR 44 Gal 876: (AIR 1917 PC 25) [8] ILR 6 Lah 262: (AIR 1925 Lah 446)
[7] 1905 AC 369

by jury was taken away. It was
contended in that case that by virtue of the amending Act the accused had no right of trial by jury. Their Lordships of the Privy Council repelled the contention and held that the right of trial by jury was a substantive right and was not a mere matter of procedure and the right of the accused, therefore, subsisted.

16. In *Hari v. Emperor*[9], the accused was tried before the Additional Judicial Commissioner of Sind by a jury of 9 jurors. Some of the accused were convicted and they then appealed to the court of the Judicial Commissioner. The Judicial Commissioner set aside the conviction of the appellants and ordered the case to be retried, by the Sessions Judge of Hyderabad. It, however, appears that whereas at Karachi the appellant was tried before a jury, he had no such right of trial in the court of the Sessions Judge of Hyderabad. In disposing of the appeal the Privy Council held that:

> "Their Lordships entertain the view that an order of this kind which directs that a case which has originally been heard before a jury should be re-heard before a court without a jury, is an order which ought not to be made unless it is justified by, exceptional circumstances.....It is obvious that it has and is likely to have very serious effect upon the rights of the accused, and the privilege which he has previously enjoyed of trial by jury he ought in general to retain."

17. The case of ILR 59 Bombay 496: (AIR 1935 PC 122) (supra) fully applies to the facts of this case. There also it was a case of re-trial and the judge before whom the case was sent for re trial had no power to try by jury. Their Lordships held that the right of trial by jury was a valuable right which could not be taken away, particularly when that right had been exercised by the accused when the case was originally heard. The present case stands even on a stronger footing

because here clause (d) of Section 116 of the Amending Act provides that the trial of an accused before a court of session shall be continued as if the provisions of Ch.XXIII of the Amending Act had not been enacted.

18. We are, therefore, of opinion that the trial of the appellant before Sri Visheshwari Prasad Mathur, Sessions Judge of Pilibhit, without the aid of assessors was null and void.
Question answered.
[9] ILR 59 Bom 496: (AIR 1935 PC 122)