FEDERAL HIGH COURT

Piare Dusadh

Vs

Emperor

(Spens, C.J.)

01.12.1943

JUDGMENT

Spens, C.J.

1. These appeals (from judgments of different High Courts) were heard together, as they raised common questions of law. The appellants had been convicted by Courts functioning under the Special Criminal Courts Ordinance (Ordinance 2 of 1942). On 4th June 1943, this Court (by a majority) held that the Courts constituted under that Ordinance had not been duly invested with jurisdiction, in view of the nature of the provisions contained in Sections 5, 10 and 16 of that Ordinance. The next day, the Governor. General made and promulgated another Ordinance, (Ordinance 19 of 1943) whereby Ordinance 2 of 1942 was repealed and certain provisions (to be referred to presently in detail) were made in respect of sentences which had been passed by the special Courts and in respect of cases which were pending before them on that date. By Sub-section (2) of Section 3 of the new Ordinance, a right of appeal against sentences which had already been passed by the special Courts was given and appeals were accordingly preferred to the High Court in some cases. In certain other cases, applications for a writ in the nature of habeas corpus were made. In both sets of cases, it was contended on behalf of the accused that the new Ordinance did not, and in any event could not, give validity to the sentences which had been passed by the special Courts, and it was claimed that the sentences should be treated as void or set aside without any examination of the merits of the case, and that the accused should, if necessary, be directed to be tried by the ordinary criminal Courts in due course of law. The various High Courts which had to deal with the cases that have now come up before us declined to accede to this contention, though in the Allahabad High Court one learned Judge (Bajpai J.) dissented. The habeas corpus applications were dismissed and in some instances the appeals were also dismissed on the merits. In the cases from Nagpur, the High Court pronounced a preliminary judgment in the appeals, overruling the appellants' contentions on the points of law above referred to and gave a certificate under Section 205, Constitution Act, even before the appeals had been finally disposed of. It may be a question whether it is proper to entertain an appeal merely against the preliminary judgment. It may also be a question whether the validity of Ordinance 19 of 1943 can be challenged in an appeal preferred under and by virtue of the Ordinance itself. , Such objections were however not raised by counsel for the Crown and as the points of law had in any event to be decided in the habeas corpus cases, we permitted the questions of law to be argued on behalf of all the appellants. It may be mentioned that among the

High Courts whose decisions are not directly now before us on appeal but which we have had to consider, the Bombay High Court upheld the validity of the Ordinance and placed on it the same interpretation as had been adopted by the High Courts at Allahabad, Madras, Nagpur and Patna. In the Calcutta High Court, two learned Judges; (Derbyshire C.J. and Khundkar J.) placed the narrower interpretation on the impugned provision of the Ordinance rather than hold it to be invalid; Sen J. held the Ordinance to be invalid.

2. It will be convenient to set out here the material provisions of the new Ordinance. Section 2 repealed the earlier Ordinance and Section5 provided an indemnity for all officers, judicial or executive, in respect of what they had done under the repealed Ordinance. Section 4 provided that where the trial of any case pending before a Court constituted under the said Ordinance has not concluded before the date of the commencement of this Ordinance, the proceedings of such Court in the case shall be void and the case shall be deemed to be transferred to the ordinary criminal Courts for enquiry or trial in accordance with the Code of Criminal Procedure. Section 3 is in the following terms:

3. Confirmation and continuance, subject to appeal, of sentences-

> (1) Any sentence passed by a Special Judge, a Special Magistrate or a Summary Court in exercise of jurisdiction conferred or purporting to have been conferred by or under the said Ordinance shall have effect, and subject to the succeeding provisions of this section shall continue to have effect, as if the trial at which it was passed had been held in accordance with the Code of Criminal Procedure, 1898 (V of 1898), by a Sessions Judge, an Assistant Sessions Judge or a Magistrate of the first class respectively, exercising competent jurisdiction under the said Code.
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> (2) Notwithstanding anything contained in any other law, any such sentence as is referred to in Sub-section (1) shall, whether or not the proceedings in which the sentence was passed were submitted for review under Section 8, and whether or not the sentence was the subject of an appeal under Section 13 or Section 19, of the said Ordinance, be subject to such rights of appeal as would have accrued, and to such powers of revision as would have been exercisable under the said Code if the sentence had at a trial so held been passed on the date of the commencement of this Ordinance.
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> (3) Where any such sentence as aforesaid has been altered in the course of review or on appeal under the said Ordinance, the sentence as so altered shall for the purposes of this section be deemed to have been passed by the Court which passed the original sentence.

3A. Two lines of argument have been advanced on behalf of the accused: first, it was said that on a reasonable construction of all the provisions of Ordinance 19, it could not have been intended to, and did not, in fact, give validity to the sentences passed by the special Courts, but only gave them a kind of provisional regularity of existence till they were brought before a Court of appeal or revision by whom they were expected to be immediately set aside on the ground that they had been passed without jurisdiction. Secondly, it was contended that if the Ordinance sought to give validity to those sentences, it was beyond the competence of the Governor-General to enact it. To appreciate and assess the force of these contentions, it is necessary briefly to advert to the

provisions of Ordinance 2 of 1942 and to the precise terms of the judgment pronounced by this Court in relation to their operation. The Ordinance was promulgated under Section 72 of Schedule 9, Constitution Act which empowers the Governor-General "in cases of emergency" to make and promulgate Ordinances for the peace and good government of British India or any part thereof. The Ordinance accordingly recited that an emergency had arisen which made it necessary to provide for the setting up of special criminal Courts. Sub-section (3) of Section 1, however, enacted that the Ordinance should come into force in any Province only if the Provincial Government (being satisfied of the existence of an emergency arising from a hostile attack, etc.), should by notification declare it to be in force in the Province. This way of framing the Ordinance gave rise to a contention that it had not been enacted in accordance with and in circumstances contemplated by Section 72. This point was left open in the previous judgment of this Court. The Ordinance proceeded to empower the Provincial Governments to constitute certain classes of special Courts, defined the classes of persons who could be appointed to those Courts, specified the sentences which each of those Courts was authorised to impose, prescribed certain special rules of procedure for the conduct of trials before those Courts and to that extent excluded the application of the provisions of the Code of Criminal Procedure. It also made provision for appeals in certain classes of cases and a special provision for what is spoken of as "review" in certain other cases and completely excluded the jurisdiction of the High Court either as a Court of appeal or revision or as a Court exercising powers under Section 491 or Section 526, Criminal P.C. As the Courts created under the Code of Criminal Procedure continued to function alongside of these special Courts, an attempt was made by Sections. 5,10 and 16 of the Ordinance to define the cases or classes of cases that should be tried by the special Courts under the Ordinance and not by the ordinary Courts in the ordinary way. It was enacted that they should try such offences or classes of offences or such cases or classes of cases as the Provincial Government or certain executive officers may, by general or special order in writing, direct.

4. The validity of Ordinance 2 of 1942 and the legality of sentences passed by Courts functioning under that Ordinance were questioned before all the High Courts and all but the Calcutta High Court held the Ordinance to be valid and the sentences to be legal. The Calcutta High Court however took a different view and directed the release of persons who had been sentenced by the special Courts subject of course to their liability to be tried before the ordinary Courts. It was on an appeal by the Crown against this judgment of the Calcutta High Court that the matter came before this Court in May-June 1943. This Court (by a majority judgment) held that so long as the Code of Criminal Procedure had not been repealed or validly and effectively excluded, a trial for any crime could only be held by a Court constituted under the Code and in accordance with the procedure therein prescribed. It further held that it was only by a legislative provision that the Courts constituted under the Ordinance could be invested with jurisdiction to hold a criminal trial, and that Sections. 5, 10 and 16 which left it entirely to the executive authorities to determine what cases should be tried by the regular Courts and by the special Courts respectively, were not valid legislative provisions and that they were accordingly inoperative either to divest the regular criminal Courts of their jurisdiction or to invest the special Courts with jurisdiction. It also pointed out that the powers of the High Court were only taken away by the executive orders under Sections. 5,10 and 16 and that this was not permissible in view of Section 223, Constitution Act. It was, however, expressly stated in that judgment that there could be no suggestion that the Ordinance was ultra vires the Governor-General on the ground that its subject-matter lay outside his Ordinance-making powers. There could be no doubt that by a properly framed Ordinance the Governor-General could have constituted special Courts, invested

them with jurisdiction to try specified cases or classes of cases and prescribed the procedure to be followed by them in the trial of such cases even to the exclusion of material provisions of the Code of Criminal Procedure. Whatever opinion might be held as to the expediency of curtailing the safeguards enacted by the Code to ensure a fair trial, no doubt could be cast upon the competence of the Ordinance-making authority to restrict or even remove any of these safeguards: *Riel v. The Queen*[1]

5. The arguments now urged before us on behalf of the appellants were based on two assumptions, (i) that Ordinance 19 of 1943 had been enacted on the admitted footing that Ordinance 2 of 1942 was void and inoperative and (ii) that the new Ordinance attempted to do something which this Court had held that the Ordinance-making authority had no power to do. Neither of these assumptions seems to us to be justified. The situation as it stood on 5th June 1943, was as follows: The Calcutta High Court and two Judges of this Court had held that Sections. 5, 10 and 16 of the Ordinance were not the proper way of investing the special Courts with jurisdiction. All the other High Courts in India and one Judge of this Court had taken a different view and this Court had granted leave to the Government to take the matter on appeal to His Majesty in Council. The Government had however to make immediate provision for the numerous cases which had before that date been decided by the special Courts in the various Provinces and in respect of the cases which were at the time pending before those Courts. It would have been scarcely reasonable to keep the whole position problematical till the matter could be decided by the Judicial Committee. It must have seemed equally unreasonable to ignore the judgment of this Court. A solution in the nature of a compromise between the two extreme positions seems to have been thought to be the best in the circumstances. As regards pending cases, the best that could be done in the light of this Court's judgment was to direct them to be tried by the regular Courts. It would no doubt have been possible to continue the special Courts by reframing Sections. 5, 10 and 16; but this Court had also strongly commented on the provisions excluding the jurisdiction of the High Court. As regards cases where sentences had already been passed by the special Courts, it would have been a serious demand on public time, not to speak of public funds, to think of the retrial of all the accused who had been thus sentenced, as their number must have been very large. Nor could it be assumed that it would in all cases have been to the interest of the accused themselves to be retried, if they could in some other way be given an opportunity of showing that their conviction was not justified. In view of this Court's observations on the policy of excluding the High Court's jurisdiction, it was apparently felt that the best thing to do in the circumstances was to maintain the convictions, but to allow them to be questioned by way of appeal and revision as provided by the Code of Criminal Procedure. Whether it was competent to the Ordinance-making authority to make these provisions or not is not the question, when we have to interpret the provisions of the Ordinance. It may be that when there are two possible constructions, one of which will make the enactment void and the other give it some effect, the latter may have to be preferred, though it may not wholly achieve the purpose of the framers. But in the view that we take on the question of the validity of the Ordinance, no such difficulty arises in the present case. It is not right to assume that Ordinance 19 admitted that Ordinance 2 of 1942 was void. On that assumption, even its formal repeal would not have been necessary, further, it is not easy to reconcile the provisions of Sub-sections. (1) and (2) of Section 3 with that assumption. Even Section 4, which declares pending trials before the special Courts void, does not necessarily import that the previous Ordinance was void, it only shows that Government preferred to have the pending eases tried by the regular Courts rather than hold them up till the question of the operativeness of Ordinance 2

of 1942 was decided by the Privy Council.

6. It was strongly insisted that Sub-section (1) of Section 3 did not use familiar words like "validation" or "confirmation," though the word "confirmation" is used in the heading. The question has however to be determined by a consideration of the words actually used and not by speculation as to why other words had not been used. It had to be admitted on behalf of the accused that some kind of operativeness had been given by Section 3 (1) to the sentences that had been passed by the special Courts, but it was said that this was only to the extent required to make proceedings by way of appeal or revision possible. And, as the formality of an appeal or revision need not have been insisted on if the Legislature had proceeded on the assumption that the sentences were void, it was suggested that it must have been the intention to leave it to the convicted persons either to acquiesce in the sentences or avail themselves of the opportunity given by the Ordinance to get the sentences set aside. It was explained that the cases dealt with under Section 3 (1) were not assimilated to those dealt with by Section 4, because an accused person who had already been convicted might in some cases prefer to undergo the sentence that had been imposed upon him rather than face a retrial which would be the result if the sentence had been declared void as one passed by a Court which had no jurisdiction. It was also said that having regard to the disabilities imposed on the accused at a trial by the special Courts, it would not be fair to assume that the Ordinance-making authority intended to confirm sentences passed at such a trial or believed that adequate justice would be done to the accused in such cases merely by giving them a right of appeal or revision on the record as it stood. We are not satisfied that there is much force in these arguments. In our opinion, they do not give due effect to the language of Sub-sections (1) and (2) of section 3.

7. Sub-section (1) of Section 3 requires the sentence to be treated as if (1) "the trial at which it was passed had been held in accordance with the Code of Criminal Procedure," (2) by an officer "exercising competent jurisdiction under the said Code." It is obvious that these two groups of words were employed for the purpose of meeting the two requirements insisted on by this Court in the previous judgment, namely, that so long as the Criminal Procedure Code had not been effectively excluded, the trial must be held in accordance with the Code and by Courts having jurisdiction under the Code. The suggestion that they might have been put in to indicate the forum for the appeal or to indicate the classes of cases where remedies should be sought by appeal and revision respectively is unconvincing. The purpose would have been achieved even by the remaining words found in the section, namely, as if "they had been passed by a Sessions Judge, an Assistant Sessions Judge or a Magistrate of the First Class respectively." That the purpose of this section was, to indicate not merely the forum but also the nature and extent of the relief to be had is made clear by Sub-section (2) which subjects the sentence "to such rights of appeal as would have accrued and to such powers of revision as would have been exercisable under the Code" and then repeats the words "if the sentence had at a trial so held been passed." "At a trial so held" obviously means, as set out in Sub-section (1), a trial held in accordance with the Code and by a Court having competent jurisdiction under the Code. As Sub-section (2) gives the right of appeal and the power of revision only on this hypothetical footing, the appellate or revisional authority cannot ignore this basic postulate and give relief on the very ground that the trial had not been held under the Code or before a Court exercising competent jurisdiction under the Code. If Section 3(1) gives any validity at all to the sentences that had been passed by the special Courts, there is nothing to limit such validity up to the time that the sentences are appealed against. As for the argument based on the improbability of an intention to confirm

sentences passed at trials which were characterised as unfair to the accused, it seems to us incorrect to assume that the authority which enacted Ordinance 19 would have thought that the procedure prescribed by itself in Ordinance 2 of 1942 was not in the circumstances sufficiently fair to the accused. It might well have thought that any hardship even on this score would be remedied by allowing the right of appeal or revision. It was only reasonable to expect that if the appellate or revisional authority found reason to think on going into the merits that the accused had been prejudiced by the nature of the trial, it would set things right. But this is different from saying that the appellate or revisional authority should automatically set aside the sentence merely on the ground that the accused had not been tried in accordance with the Code. It has been suggested that the right of appeal would in the circumstances be illusory. We are by no means satisfied that that would be so. We see no justification for importing a fictitious or notional "trial by jury" and on that assumption limiting the powers of the appellate Court. Even this possible doubt has been removed by Ordinance 32 of 1943, which allows a right of appeal both on questions of fact and on questions of law. In any event, questions of fairness or policy are not matters which the Court can take into consideration when the language of the enactment leaves little or no room for doubt.

8. It has been further contended that as Section 4 proceeds on the footing that the trials before the special Courts were void, consistency requires that Section 3 also must be interpreted on the same assumption. It was even said that any other view would make the provisions of the Ordinance illogical and self-contradictory. It is difficult to follow this argument. It seems to us that on this basis there would have been no need to make separate provisions for the two classes of cases respectively dealt with by Sections. 3 and 4. Even Section 4 cannot be said to have proceeded on the assumption that the trials before the special Courts were void. On the principle embodied in Section 6(e), General Clauses Act, the result of the repeal of an enactment on cases pending at the time of the repeal would be that they would continue as if the enactment had not been repealed. But this is subject to the qualification that the repealing enactment contains no provision or indication to the contrary. It was open to the Government to insist that in spite of the decision of this Court on the last occasion, cases pending before the special Courts at the time should continue to be tried before them, in the expectation that the Judicial Committee might take a different view as to the operation of Ordinance 2 of 1942. This would have been the position even after the repeal, if the matter had been allowed to rest upon Section 6(e), General Clauses Act. But apparently as the Government were not prepared to adopt that attitude, they have enacted Section 4 in its present terms. As already explained, there is sufficient reason for making a distinction between cases dealt with by Section 3 and cases dealt with by Section 4 and there is no illogicality or contradiction involved in such distinction. A point has been made that Section 3(1) seeks to give validity only to the sentence and not to the conviction. Nothing turns on this, because the section requires the sentence to be treated as one passed by a competent Court at a proper trial. On this footing no separate provision referring to the "conviction" was necessary.

9. In arguing the question as to the validity of the Ordinance, counsel for the accused recognised that the principle of validation by subsequent legislation was quite as applicable to judicial as to ministerial proceedings. This is expressly so stated in the very passage on which they relied from Cooley's "Constitutional Limitations" Edn. 8, p. 205 (see also pp. 773-776). They laid stress on the author's statement as to the limitations on that power and contended (1) that the Ordinance had sought to give validity to what the Ordinance-making authority could not have authorised

even by antecedent legislation; (2) that while such legislation might seek to aid and support judicial proceedings, the Legislature could not under the guise of legislation be permitted to exercise judicial power, and (3) that it was not competent to the Legislature by retrospective legislation to make valid any proceedings which had been held in the Courts, but which were void for want of jurisdiction over the parties. The first of these limitations is without doubt recognised in the English law: see per Willes J. in *Eyre v. Phillips*[2] In support of limitations (2) and (3), Cooley cites the decisions in *McDaniel v. Correll*[3] and *Denny v. Mattoon 2 Allen 361* see also *Pryor v. Downey* [4]

10. The argument with reference to the first limitation was based on the assumption that Ordinance 19 sought to validate the very delegation of power to the executive which was attempted by Sections. 5, 10 and 16 of Ordinance 2 of 1942 and which, it was held by this Court in the previous case, could not be validly done. This assumption is, in our opinion, unwarranted. The expression "what could have been antecedently authorised" implies that this had not as a matter of fact been done previously. In the circumstances of this case that could not be said of the delegation of power to the executive authorities, because that had, in fact, been done by Sections. 5, 10 and 16 of the previous Ordinance. It is the acts of the special Courts in trying cases and passing sentences as they had done that had not in fact been duly authorised on the previous occasion and it is those acts that are now sought to be declared valid. The enquiry under this head must therefore be whether the Ordinance-making authority had power (if only it had properly exercised such power) to create these special Courts and authorise them to try cases and pass sentences. On the existence of such power no doubt was cast by this Court on the previous occasion and it has not been denied even by counsel for the accused in these cases. There is accordingly no substance in this objection. In this view, no question arises of the legislating authority attempting to do indirectly what it could not do directly. We were in this connexion invited to express a definite opinion on the point which we had left open in *Emperor v. Benoari Lal Sarma*[5], viz., whether Ordinance 2 of 1942 was promulgated on a declaration of emergency of the kind contemplated by Section 72 of Schedule 9. We do not see that it would make any difference to the decision of the present question even if Ordinance 2 of 1942 should be held to have been inoperative on that ground; that would not imply the absence of power in the Governor-General, but would only involve the conclusion that the power had not been properly exercised on the previous occasion.

11. Turning to the other two objections referred to above, it is necessary to consider how far they rest upon peculiarities of the American Constitution. As a general proposition, it may be true enough to say that the legislative function belongs to the Legislature and the judicial function to the judiciary. Such differentiation of functions and distribution of powers are in a sense part of the Indian law as of the American law. But an examination of the American authorities will show that the development of the results of this distribution in America has been influenced not merely by the simple fact of the distribution of functions, but by the assumption that the constitution was intended to reproduce the provision that had already existed in many of the State Constitutions, positively forbidding the legislature from exercising judicial powers: [see paras. 520 et seq in Story's "Commentary on the Constitution of the United States"]. The reasons contained in the passages cited from the "Federalist" in paras. 1585, etc., of Story and the quotation from Mr. Tucker in the foot-note to para. 1637 will explain the development of the American rule. In one case, it was observed:

It is a fundamental principle that every person restrained of his liberty is entitled to have the cause of such restraint enquired into by a judicial officer. The judicial department of the Government cannot by any legislation be deprived of this power or relieved of this duty." [In re Boyett 103 Am. St. Rep. 944 quoted in the foot-note on page 185 in Cooley's "Constitutional Limitations].

This view is partly based on considerations which will be discussed when dealing more specifically with the third objection. One result of the application of this rule in the United States has been to hold that legislative action cannot be made to retroact upon past controversies and to reverse decisions which the Courts in the exercise of their undoubted authority have made.

The reason given is that this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the Legislature would in effect sit as a Court of review to which parties might appeal when dissatisfied with the rulings of the Courts." [See Cooley's "Constitutional Limitations," page 190].

In India, however, the legislature has more than once enacted laws providing that suits which had been dismissed on a particular view of the law must be restored and retried. Two well-known instances are Section 31(2), Limitation Act, 1908, which provided for the restoration of suits dismissed on the ground that the 12 years' period of limitation under Article 132, Limitation Act, applied to suits for sale by holders of simple mortgages and the Public Suits Validation Act (11 of 1932) which provided for the restoration of suits dismissed on a particular interpretation of Section 93, Civil Procedure Code Again, debt relief legislation in the various provinces has provided even for the reopening of decrees passed inter partes. In view of the history of the rule in America, it is questionable whether it would be right to apply the same rule in this country. Further, the American authorities themselves show that, even in the United States, limitations had to be placed on the strict American rule and that it was not found possible to differentiate by a clear-cut definition the exercise of legislative power from the exercise of judicial power. [See Willi's "Constitutional Law of the United States," p. 142].

12. An Australian case *Federal Commissioner of Taxation v. Munro*[6] to which we were referred by the Advocate-General of India, bears some resemblance to the present case. An Act of 1922 had constituted a Board of Appeal to deal with appeals in Income Tax matters and this Board had given certain decisions. But the law Courts declared that the Australian Parliament had no power to invest this Board of Appeal with judicial power. A later Act established what was described as a Board of Re view and assigned to it functions which were held to be different in character from those assigned to the former Board of Appeal. It, however, went on to provide that decisions which had already been pronounced by the Board of Appeal "should be deemed to be and at all times to have been decisions of a Board of Review given in pursuance of the provisions of the later Act." The later Act was also challenged as vesting judicial power in the Board of Review, but this contention was overruled. The validating provision in the later Act was next challenged as constituting "an attempt by Parliament itself to exercise the judicial power of the

Commonwealth." The answer to this argument is relevant here. One learned Judge (Isaacs J.) interpreted this provision as implying a "retrospective creation" of the Board of Review and placing the decisions of the old Board of Appeal on the same footing as they would be on if the now existing Board of Review had then pronounced them (pp. 173, 174). Another learned Judge (Starke J.) observed:

> Parliament simply takes up certain determinations which exist in fact, though made without authority, and prescribes not that they shall be acts done by a Board of Review, but that they shall be treated as they would be treated if they were such acts. The sections, no doubt, apply retrospectively, but they do not constitute an exercise of the judicial power on the part of the Parliament (p. 212).
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> We think that this latter description is apposite to what happened in the present case and also answers the argument that it is an impossible feat to convert what was not a trial under the Code of Criminal Procedure into a trial under the Code.

13. Judged by any reasonable test, it seems to us difficult to hold that what the Ordinance has attempted to do in this case amounts to an exercise of judicial power. A passing reference was made in this connexion to Section 71(3), Constitution Act, which precludes the legislative chambers from conferring on themselves "the status of a Court." This and the similar provision in Section 28(3) have no bearing upon the present question. They were intended to set at rest the question whether these legislative bodies had the power to punish for contempt. *Doyle v. Falconer* [7]*Barton v. Taylor*[8] and *Fielding v. Thomas*[9] Section 313(1) which was also relied on in this connexion relates to the "executive" authority of the Governor-General in Council and not to the "law-making" capacity of the Governor-General. It was contended that once the decisions of the special Courts were held void for want of jurisdiction, the position in the present case would be nothing different, from a sentence imposed by the Legislature directly on each of the accused in all the cases that had been before the special Courts. This does not seem to us to be a fair or correct view of the position. The Legislature has not attempted to decide the question of the guilt or innocence of any of the accused. That question had as a matter of fact been decided by tribunals which were directed to follow a certain judicial procedure. The effect of the absence of jurisdiction in these tribunals falls to be considered when dealing with the third objection. For the present purpose, however, we see no justification for importing a fiction that there had in fact been no judicial trial and that it is the legislation that declares the guilt of the accused in all the cases and imposes sentences upon them. It must be remembered that even under the Ordinance, the sentences are in due course subject to appeal to and revision by the regular Courts of the land.

14. In dealing with the third objection, it is again necessary to examine the basis of the Amercian rule in order to determine whether it can be followed here. It is clear from the Amercian authorities that this limitation has been derived from the interpretation placed by the American Courts on what are known as the Fifth and Fourteenth Amendments which provide against any person being "deprived of life, liberty or property without due process of law." The expression "due process of law" has been interpreted as referring only to "judicial process" and as not including legislation, and "judicial process" was held to imply competence or jurisdiction in the Court and an opportunity for a hearing. As this requirement had been made part of the written constitution, it followed that no enactment passed by a Legislature limited by that constitution

could authorize anything in violation of it. [See Willoughby's "Constitution of the United States," paras. 1115 to 1117, 1122 and 1123]. Hence the rule (stated by Cooley) that it would be incompetent for the Legislature, by retrospective legislation, to make valid any proceedings which had been had in the Courts but which were void for want of jurisdiction over the parties.

> The constitutional position in India is different. Comparing the American Amendments with the provisions of the Constitution Act, 1985, it will be seen that the latter contains nothing corresponding to so much of the Amendments as related to deprivation of "life or liberty" and that even as to "property" it only requires that such deprivation should be "by authority of law": see Section299. This does not of course mean that the well-established principle of British jurisprudence as to the sacredness of personal freedom is not part of the law of British India. But as pointed out by Dicey, the rule remains only as a principle of "private law" and is not a part of the Constitution: {See Dicey's "Law of the Constitution," Edn.9, p. 203 and Wade and Phillips, "Constitutional Law," Edn. 2, p. 354]. While its enactment as an article of the Constitution would have placed it beyond the power of the Indian Legislature to alter it, the position must be different so long as it remains a rule of private law, however cardinal and fundamental: [See Dicey, p. 200, foot-note]. The principle of the English law as to personal liberty was stated by Lord Atkin in *Eshugbayi Eleko v. Nigeria Administration*[10], in the following terms:
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> In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice. Comparing the language of the American Amendments with this statement of the English rule, it will be noticed that what is required under the English rule is not "due process of law," but "legal justification" and such justification may be shown as much by legislation or statutory rules as by production of an order of Court: *Rex v. Halliday*[11] It does not however follow that Legislatures in India can arbitrarily interfere with the life or the liberty of the citizen, because they have only such powers as have been conferred on them by Schedule7, Constitution Act.

15. The real question in the present case therefore is whether the Ordinance is covered by any of the entries in Schedule7, Constitution Act. It was not contended that the mere absence of a specific provision about "validating laws" was by itself of much significance. As observed by this Court in *United Provinces v. Mt. Atiqa Begum,*[12] the power of validation must be taken to be ancillary or subsidiary to the power to deal with the particular subjects specified in the Lists. No question arises in this case as to the distribution of the subjects between the Provincial Legislature and the Central Legislature, because a declaration of emergency under Section 102, Constitution Act, has been proclaimed. It was contended that under the terms of Section 102 (1) the Legislature could make laws only "for a Province," that is, separately for each Province and not for a number of Provinces together. There is no basis for this contention. Under the Interpretation Act, the use of the singular number will, in the absence of any indication to the contrary in the context or the nature of the subject, include the plural; the clause has apparently been worded in that particular form, because it has been enacted as an exception to Section 100(3) which excludes the power of the Federal Legislature "to make laws for a Province" in

certain cases. If the Central authority can make laws for each of the Provinces, there is no principle in insisting that even when a uniform law has to be enacted for each of several Provinces, there can be no single enactment, but that there must be as many enactments as there are Provinces. It was further contended that where, as in this case, a proclamation of emergency under Section 102 referred only to a threat "by war," the Central Legislature could encroach on provincial subjects only in respect of matters necessitated by the war and not in respect of subjects relating to "internal disturbance." The words of the section do not justify any such limitation. As regards authorization by the Lists in Schedule 7, it seems to us sufficient to say that the subject-matter of the present Ordinance is in our judgment covered by the expression "administration of justice" in entry No. 1 of List II and the expression "criminal procedure" in entry No. 2 of List III.

16. On behalf of the Crown, strong reliance was placed on the decision of the Judicial Committee in *Tilonko v. Attorney-General of Natal*[13] and of the Hight Courts in India in *Emperor v. Chanappa,*[14] and *Jogendrachandra Ray v. Superintendent, Dum Dum Special Jail*[15], and as much controversy raged round them we feel we should refer to them shortly. The decision in *Tilonko v. Attorney-General of Natal*[16] is on the face of it, a strong authority in support of the contention advanced on behalf of the Crown. Their Lordships were dealing with an Act passed by the Natal Parliament which provided that all sentences passed by any person administering martial law...are hereby confirmed and made and declared to be lawful and...shall be deemed to be final sentences passed by duly and legally constituted Courts of this Colony.

It is no doubt true that the matter was then before their Lordships on an application for special leave and it might have been sufficient answer to the application to say that the decision of a martial law authority was not that of a judicial tribunal at all and could not therefore be brought up before their Lordships. But their Lordships nevertheless proceeded to give other reasons in support of their dismissal of the application. The sentences in the judgment which have been particularly relied on by counsel for the Crown run as follows:

> An Act of Parliament has been passed in Natal which in terms enacts the legality of the sentences in question and provides that they shall be deemed to be sentences passed in the regular and ordinary course of criminal jurisdiction. This board has no power to review these sentences or to enquire into the propriety or impropriety of passing such an Act of Parliament... The Act has been assented to by the Governor and having the force of law, is binding on their Lordships.
>
> We have been asked to treat this as a complete answer to two of the contentions advanced on behalf of the appellants, namely, that legislation conferring validity on sentences passed by an authority which had no jurisdiction in law is not permissible and that such legislation is in the nature of the exercise of judicial authority. On behalf of the appellants, two grounds of distinction (mentioned in the judgment of Bajpai J.) were relied on. It was said (on the strength of an observation of Mr. Brand in his book on the Union of South Africa referred to by Bajpai J.) that under the South African Constitution, the Parliament was supreme and that even in Natal, as in Great Britain, the Courts had no authority to act as interpreters of the Constitution. This was answered by counsel for the Crown by

pointing out that whatever might be the position in South Africa after the Statute of Westminster and after certain South African legislation of 1934, the position in 1906, when the Natal legislation considered by their Lordships was passed, was nothing different from that of any other Crown Colony, as the Natal Charter of 1856 only contained the usual clause authorizing legislation for the peace and good government of the Colony. That the same continued to be the legal position even after the Union of South Africa Act till the enactment of the Statute of Westminster was shown by comparing the decision in *Rex. v. Ndobe* [17]with that in *Ndlwana v. Hofmeyr*[18] It was next urged by counsel for the appellants that this decision had been treated by certain writers on Constitutional Law only as an authority for the proposition that an English Court could not enter into the propriety as opposed to the legal validity of a colonial statute (Chalmers and Asquith "Outlines of Constitutional Law," 3rd Edn., p. 203 and Eidges' "Constitution Law of England," 6th Edn., p. 491) and they asked us to infer therefrom that the question of the validity of the statute had apparently not been argued before their Lordships. On behalf of the Crown, attention was drawn to the report in Ex parte Mgomini (1906) 22 T.L.R. 413 where the history of the proceedings of the martial law tribunal in Natal has been set out and the arguments at the Bar at that stage have also been more fully stated and we were asked to say that the same learned counsel who appeared for the petitioner in *Tilonko v. Attorney-General of Natal*[19] could not have omitted to raise the question of validity. Lastly, it was contended that a martial law tribunal was more analogous to an executive authority than to a judicial authority and that the decision was no authority for the contention that a void judgment of a judicial tribunal could be validated by subsequent legislation. Their Lordships' observation is very general and it seems rather difficult to restrict its effect in the way that counsel for the appellants asked us to do.

17. The decision in *Emperor v. Chanappa* [20]is no doubt an authority in favour of the Crown in so far as it held Section 11 of the Ordinance then in question to be valid, but there is little discussion of the point there. In *Jogendrachandra Ray v. Superintendent, Dum Dum Special Jail*[21], the Court had not to consider the questions arising in the present case. Trustees of the *Ottawa Roman Catholic Schools v. The Quebec Bank*[22] which was also cited before us, throws little light on the questions arising here. Their Lordships had not to deal with a question of validation but only with a limited plea of ultra vires based on the exception to Section 93 (1), British North America Act, to the effect that the law should not prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the province at the Union.

18. Two other grounds of invalidation were suggested, though but faintly. It was said that the provisions of the Ordinance were hardly likely to conduce to peace and good government, and were not therefore authorized by Section 72 of Schedule 9. It is sufficient answer to this to say that the Judicial Committee have laid down that this is not a matter for the Courts to investigate. It was next said that Section 3(1) of the Ordinance was retrospective in its operation and that the Governor-General had no power to pass Ordinance with retrospective effect. This question has been discussed at some length in Federal Court Cases Nos. 13 to *Emperor v. Sibnath Banerjee, etc.*[23], and Section 3(1) of Ordinance 19 is no more retrospective in its operation than Section 3 of Ordinance 14 of 1943 which was then held to be valid. We accordingly hold that Section 3(1)

of Ordinance 19 of 1943 confers validity and full effectiveness on sentences passed by special Courts functioning under the Special Criminal Courts Ordinance (ordinance 2 of 1942) and that this provision is not ultra vires the Governor-General.

19. Two questions have arisen in the course of the hearing on the construction of Section 4 of the Ordinance. It has been brought to our notice that in some instances (cases Nos. 39 and 54 before us) references which had to be made or have been made under Section 8 of Ordinance 2 of 1942 had either not been made or had not been disposed of by the Review Judge, when the new Ordinance (19 of 1943) came into operation. A question arises whether such cases fall under Section 3(1) or Section 4 of the Ordinance. Section 4 purports to deal with cases of which the "trials" before the special Courts had not "concluded." The Advocate-General of the United Provinces admitted that the trial could be said to be concluded only when the Judge had pronounced his judgment (vide the way that the sections are grouped in sub-divisions F. and H. of Chap. 23, Criminal P.C.), but he maintained that the "review" proceedings under Section 8 of the Ordinance were no part of the trial. The Advocate-General of Bihar maintained that the trial must be held to have concluded as soon as the case became ripe for judgment (vide Chap. 26 of the Code which treats the judgment as coming after the close of the trial). Our attention was drawn in this connexion to *Jiban Molla v. Emperor* [24]and *Bakshi Ram v. Empero*[25]*r* The discussion in these cases only confirms what one would have thought even independently of them, viz., that the meaning of the word "trial" must largely depend on the context and the scheme of the enactment in which it occurs. Though the word may sometimes denote only the recording of evidence, it is obvious that in the context in which it occurs in Ordinance 19 of 1943 it must comprise all stages of the proceeding, including the imposition of the sentence. The contradistinction made by the Ordinance is between cases in which a sentence had been passed by the special Courts and cases in which no such sentence had been passed, the former falling under Section 3(1) and the latter under Section 4. If it should be assumed that the two categories might not be exhaustive and cases might be conceived which even while not falling under Section 4 might not fall under Section 3(1), the result would only be that the proceedings in such cases would be void under the former decision of this Court and the accused would have to be retried before the regular Courts. The cases which are dealt with by Clauses (a) and (b) of Section 8 of Ordinance 2 of 1942 stand on a special footing. The two clauses provide for review of the Special Judge's judgment by one of the Judges of the High Court nominated by the Provincial Government. The word "review" does not appear to have been used in any technical sense there, but it obviously differs both from a review as understood in the Civil Procedure Code as well as an appeal, because these proceedings are ordinarily initiated by the party concerned. The scheme of Section 8 of Ordinance 2 of 1942 is that in the more serious classes of crimes therein referred to, the sentence of the Special Judge should, apart from any initiative of the accused, be considered by the reviewing Judge. There is of course a difference between Clauses (a) and (b) to this extent that in cases falling under Clause (a) the review follows compulsorily and automatically, whereas in cases falling under Clause (b) the review procedure becomes available only if the Special Judge thinks it necessary to submit the case to the reviewing Judge. But once the case has been so submitted, there is no difference in the legal position between cases falling under Clause (a) and cases falling under Clause (b) of Section 8. It may perhaps be putting the position too high to describe the sentence of the Special Judge in these cases as only provisional or tentative; but the scheme of the section undoubtedly is that the proceeding against the accused in such cases is not to be regarded as complete till after the review is over. In this view, we are of the opinion that in all cases falling under Section 8 (a) and

in all cases where references had been made by the Special Judge under Section 8 (b) the accused will have to be tried under Section 4 of Ordinance 19 of 1943, unless the reviewing Judge, acting under the Special Criminal Courts Ordinance, had given his decision before the new Ordinance 19 of 1943 came into operation. The words "whether or not the proceedings in which the sentence was passed were submitted for review under Section 8" in Clause (2) of Section 3 must be taken to have been used only to indicate that even the adverse termination of the review proceedings would not exclude the right of appeal and revision given by the clause. The possibility that the High Court as a Court of appeal or acting as a confirming Court under chap. 27, Criminal P.C. may consider or confirm the sentence will not in our opinion suffice to bring this special class of cases under Section 3 (1) of the new Ordinance, or take them out of the operation of Section 4.

20. A further contention was advanced with reference to cases in which the accused had been sentenced to death by the special Courts. It was argued that as under Sections. 31 and 374, Criminal P.C. a sentence of death passed by a Sessions Judge was subject to confirmation by the High Court and as no such confirmation by the High Court as such had been provided for in the Ordinance, one of two consequences must follow: either the unconfirmed sentences must be treated as incapable of execution on the ground that there was no one who could properly refer them for confirmation, or the cases should be treated as pending cases within the meaning of Section 4 of the Ordinance. Whilst we agree that such sentences cannot be executed until confirmed by the High Court, we can see nothing to prevent the judicial officer who passed the sentences or the Sessions Judge for the time being referring them for confirmation to the High Court. We are also unable to accede to the contention that such cases can be treated as falling under Section 4 even after they had been dealt with by a Review Judge under Section 8 of Ordinance 2 of 1942. Section 4 of Ordinance 19 can be invoked only in cases where the trial before the special Courts had not concluded. The High Court acting as such under the Criminal Procedure Code cannot be spoken of as a "special Court" within the meaning of the above provision. We now turn to the individual cases before us.

21. Cases Nos. 39 and 54.-In these two cases the convicted persons have come up in appeal against judgments of the Patna and Allahabad High Courts respectively dismissing their appeals from sentences passed by Special Judges. In both cases the sentences were sub-ject to review under Section 8 (a) of Ordinance 2 of 1942. On the date of the commencement of Ordinance 19 of 1943 the review had not been completed. These cases therefore fall within the purview of Section 4 of that Ordinance, with the result that the proceedings had in respect of them before the Special Judges must be held to be void and the cases must be deemed to have been transferred to the appropriate Court under that section for inquiry and trial in accordance with the provisions of the Criminal Procedure Code. The appeals in these two cases are allowed and further proceedings will be taken in accordance with the provisions of Section 4 of Ordinance 19.

22. Cases Nos. 35, 36, 43, 44, 45, 46 and 49.-Cases Nos. 35 and 36 are appeals from orders of the Patna High Court refusing writs of habeas corpus, while ease No. 49 is an appeal from an order of the Madras High Court refusing writ of certiorari. Cases Nos. 43, 44, 45 and 46 are appeals from a preliminary judgment of the High Court at Nagpur upholding the validity of Section 3 (1) of Ordinance 19 of 1943. The conclusions at which we have arrived concerning the validity and effect of Section 3 of the Ordinance must result in the dismissal of all these appeals and we order accordingly.

23. Cases Nos. 40, 41 and 42.-These are appeals from judgments of the Patna High Court dismissing in each case the appeal of the convict from a sentence of death and confirming the sentence passed by a Special Judge for the offence of murder in the first two cases and for the offence of waging war against His Majesty the King in the third case. In these and in other cases where the High Courts had dismissed the appeals of the convicts on the merits, we granted leave on applications made to us for grounds on the merits of the cases to be raised before us. In some of these cases counsel made attempts to persuade us to assess the weight of evidence for ourselves in order to determine whether the conviction was or was not justified in each case on the evidence. This we declined to do as we hold the view that in cases of this description we should ordinarily accept as final the conclusions of fact at which the High Court has arrived unless it can be shown that the High Court has either misread any part of the evidence or has overlooked any material portion of it. In these three cases we have not been shown sufficient grounds for disturbing the conclusions at which the High Court has arrived concerning the guilt of the appellants.

24. As regards the sentence it was urged that the death sentence imposed in these cases should be reduced to transportation for life on account of the time that has elapsed since the sentences were first pronounced: *Autar Singh v Emperor* [26]It is true that death sentences were imposed in these cases several months ago, that the appellants have been lying ever since under threat of execution, and that the long delay has been caused very largely by the time taken in proceedings over legal points in respect of the constitution of the Courts before which they were tried and of the validity of the sentences themselves. We do not doubt that this Court has power, where there has been inordinate delay in executing death sentences in cases which come before it to allow the appeal in so far as the death sentence is concerned and substitute a sentence of transportation for life on account of the time factor alone, however right the death sentence was at the time when it was originally imposed. But this is a jurisdiction which very closely entrenches on the powers and duties of the executive in regard to sentences imposed by Courts. It is a jurisdiction which any Court should be slow to exercise. We do not propose ourselves to exercise it in these cases. Except in case No. 47 (in which we are commuting the sentence largely for other reasons as hereafter appears), the circumstances of the crimes were such that if the death sentence which was the only sentence that could have been properly imposed originally, is to be commuted, we feel that it is for the executive to do so. We do not doubt that in each case the executive will give the fullest consideration to the period that has elapsed since the original imposition of the sentence and to the consequent mental suffering undergone by the convict. It has been further suggested that in England when cases in which a death sentence has been imposed are allowed to be taken to the House of Lords on account of some important legal point, the consequential delay in finally disposing of the case is treated as a ground for the commutation of the death sentence, and that if such a practice is recognized in eases which go with the Attorney-General's authority to the House of Lords because they "involve some point of law of exceptional public importance" [Criminal. Appeal Act, 1907, Section 1 (6)] a similar course might well be taken in this country in these cases in connexion with which "substantial questions of law as to the interpretation of the Constitution Act" have twice had to be considered by this Court in view of the granting by High Courts of certificates under Section 205, Constitution Act. We consider however that these matters are primarily for the consideration of the Executive and do not in the circumstances of these cases justify us in commuting the death sentences by orders of this Court. With these observations we dismiss these appeals.

25. Case No. 47-The appellant in this case was convicted by a Special Judge of the offence of murder and was sentenced to death on 30th September 1942. His appeal to the Allahabad High Court was dismissed and the sentence of death was confirmed. The appellant is a young man of 25 who has been twice widowed. His victim was his aunt, 30 years of age, whose husband (Kanchan) had about six years previously murdered his own brother, appellant's father. Kanchan was sentenced to death for the murder, but lost his reason while awaiting the execution of the death sentence, and is now detained as a lunatic. The evidence in this case leaves no room for doubt that the appellant was rightly convicted of murder. There is some confusion as to the exact motive for the undoubtedly brutal assault of which the appellant made his aunt the victim. The prosecution alleged that the appellant being a widower was chagrined by the refusal of his aunt to become his mistress. In his statement before, the Special Judge he said that another uncle (p. w. 7) who according to the appellant was behind the prosecution was on terms of improper intimacy with the deceased and resented even small acts of kindness on the part of the deceased towards the appellant. In the appeal preferred by him through the jail authorities to the High Court, the appellant stated that his aunt was a woman of loose character and was pursuing him with unwelcome attentions. The previous history of this family indicates that the appellant probably suffers from an unbalanced mind. The nature and ferocity of the assault upon his aunt appear to confirm this. In committing the offence the appellant must have been actuated by jealousy or by indignation either of which would tend further to disturb the balance of his mind. He has besides been awaiting the execution of his death sentence for over a year. We think that in this case a sentence of transportation for life would be more appropriate than the sentence of death. We accordingly reduce the sentence of death to one of transportation for life and subject to this modification dismiss the appeal.

26. Case No. 38.-The appellants in this case,. Jagan Nath Sahu and Eamanand Sahu were convicted by a Special Judge of the offence of rioting and mischief by fire and were sentenced to three years' rigorous imprisonment and a fine of L 300, in the case of Jagan Nath, and four years' rigorous imprisonment and a fine of L 300, in the case of Ramanand. Their appeal was dismissed by the Patna High Court. The appellants are alleged to have been members of an unlawful assembly consisting of about two thousand people who raided a police beat house on 21th August 1942, and destroyed various items of Government property, and also looted a post office and a liquor shop close by. The question on which we feel considerable doubt is whether the complicity of the two appellants before us in these events has been satisfactorily established. On the evening of 21st August an entry (Ex. 1) was made in the station diary kept at the beat house, by the Assistant Sub-Inspector in charge of the beat house, recording a brief summary of the incidents that took place in the course of the riot but omitting all mention of the names of any accused persons in connexion therewith. On 26th August, Bansi Lall Chaudhury (P.W. 4), the liquor vendor, and Umapat Labh (P.W. 6), the branch postmaster, handed to the police reports in respect of the incidents relating to the liquor shop and the post office respectively. These reports are Ex. 3 and Ex. 5. Exhibit 3 contains the names of eleven persons including those of the appellants, while Ex. 5 refers to a mob consisting of Ramanand Sahu and others. The formal first information report was not drawn up till 3rd September 1942. It contains the names of the appellants and several others. The evidence in the case consists of the testimony of Siva Chandar Tewari (P.W. 1), Assistant Sub-Inspector in charge of the beat house; Ramanand Singh (P.W. 2), constable, and Abbas Mian (P.W. 3), dafadar, both attached to the beat house; Bansi Lall Chaudhury (P.W. 4); Nagina Prasad (P.W.5), Sub-Inspector of Police, who carried out the investigation; and Umapat Labh (P.W. 6). These witnesses were examined in Court on 2lst and

22nd December.

27. The investigation had been supervised by Babu Rameshwar Prasad Singh, Divisional Inspector. On the morning of 23rd December a petition was put in on behalf of Ramanand Sahu asking that Babu Rameshwar Prasad Singh should be summoned as a witness, as it was the case of Ramanand Sahu that none of the prosecution witnesses had during the investigation mentioned his name to this officer as an accused person. This application was rejected by the Special Judge on the grounds, first, that the witness had been transferred to a neighbouring district and that undue delay would be occasioned to the trial if he were to be summoned to give evidence, secondly, that the application ought to have been made earlier and that there was no explanation for the delay in making it, and thirdly, that the evidence of the witness was not material. We are unable to appreciate the reasons given by the Special Judge for declining to summon this witness. In our opinion, he was a material witness and should have been examined as a prosecution witness or at least offered for cross-examination. His transfer to a neighbouring district should have made no difference as it should have been possible for the Crown to procure his attendance with the minimum of delay. The necessity for procuring the attendance of this witness for examination became apparent to the particular accused and his advisers only on 22nd December during the examination of Nagina Prasad (P.W. 5). We fail to see how the accused could be charged with undue delay in making the application. On this ground alone we would have been disposed to hold that serious prejudice had been occasioned to Ramanand Sahu, appellant, by the failure of the Judge to direct the attendance of this witness.

28. There are other unsatisfactory features in the case and, on the evidence, we do not think the conviction in this case can be sustained. To continue with the case of Ramanand Sahu, his name is found in the first information report both in the list of accused persons as well as among the witnesses. He was examined by the police during the course of the investigation as a witness, though the investigating officer made an attempt to explain this away by saying that he was examined as an accused person. As no other accused person was examined during the course of the investigation it is difficult to accept this explanation as correct. Further in the first information report of 3rd September 1942 the Assistant Sub-Inspector states, after describing the incidents, that he asked the accused "who was present in the mob to see to this occurrence but he replied that he was unable to do anything as the mob was out of control." This is not easily reconcilable with the view that the accused was himself one of the rioters. The Special Judge found that the investigating police were not able to make up their minds for some time whether Ramanand Sahu was present with the mob as a member of the unlawful assembly or as an innocent spectator. If that was so, it is not possible to maintain his conviction for the reason that the only evidence that can be taken into account against him on behalf of the prosecution is the testimony of P.W. 1 (Assistant Sub-Inspector) and P.W. 3 (Police dafadar). This testimony was available to the police at the earliest possible moment and if true should have put the matter of the complicity of Eamanand Sahu in the riot beyond doubt. If nevertheless the investigating police could not make up their minds with regard to the complicity of Eamanand Sahu, the only inference to be drawn therefrom is that they were not satisfied with the statements of these two witnesses made in the course of the investigation.

29. It is true that P.W. 2 (Ramanand Singh, constable) also mentioned Ramanand Sahu's name at the trial as one of the rioters, but it has been established that this witness had stated during the investigation that he was being so much mobbed during the riot that he was unable to identify

anyone. His subsequent statement in Court against Ramanand Sahu was therefore worthless. Both Ramanand Sahu and Jagan Nath Sahu were stated by P.W. 4. and P.W. 6 to have taken part in the riot, but the testimony of these two witnesses was rightly rejected by the High Court on the ground that they did not mention the names of these two accused persons before the Deputy Superintendent of Police during the investigation. The prosecution case is, however, open to challenge on a more serious ground. According to the investigating Sub-Inspector the names of certain rioters, including those of the two appellants, were definitely ascertained immediately after the riot; yet he gave instructions to the Assistant Sub-Inspector not to enter the names of the accused persons in the entry made in the station diary (Ex. 1) the same evening "as a matter of precaution." The explanation given was that as copies of the entries in the station diary had to be sent to head-quarters and the countryside round about was in a very disturbed state it was feared that a copy of the entry might fall into the hands of the rioters or their sympathizers and that this might attract reprisals against the police. We do not consider this explanation satisfactory. The apprehension of reprisals, if it was at all justified, would result just as much from the fact of the incident of the riot being entered in the diary as from the mention of the names of accused persons in it. As a matter of fact the diary does mention the name of Ramanand Sahu as a person near whose house the mob was when it was first observed by one of the police witnesses. The direction by the Sub-Inspector deliberately to keep the names of the accused persons out of the diary raises so strong a doubt with regard to the whole of the prosecution case that, taking it with the other features of the case that we have mentioned above, we are forced to the conclusion that it would not be safe to maintain the conviction of either of the appellants. We, therefore, accept their appeal and acquit them. They must be released forthwith and the fines, if recovered, should be refunded.

30. Case No. 53.-In this case the five appellants were sentenced to rigorous imprisonment for a period of seven years, a fine of L 200, and a whipping of ten stripes each for attacking a railway station and damaging the telephone and telegraph apparatus, machinery in a signal box and other Government property, about 1-30 P.M. on 15th August 1942. Their appeal to the Allahabad High Court was dismissed and the sentences were upheld. The Special Judge who tried the case found that the whole of the prosecution evidence was unsatisfactory but nevertheless convicted the appellants and some others who were acquitted by the reviewing Judge. The learned Judge of the High Court who dealt with the case on appeal took on some points a view of the evidence different from that taken by the Special Judge and upheld the conviction and sentences as he found that some of the prosecution evidence was less open to objection than the trial Judge thought was the case. We are unable to agree with this view. The first information report was alleged to have been drawn up at 3 P.M. on 15th August, almost immediately after the occurrence. The Special Judge found that the report was not made at 3 P.M. but after 7 P.M. and that it was deliberately "ante-timed." The learned Judge of the High Court did not reject this finding. This finding alone would be sufficient to cast serious doubt on the prosecution case with regard to the participation of particular individuals in the incidents that occurred at or near the railway station. Again, the prosecution case was that as the mob was damaging the telephone and telegraph apparatus the appellants along with others were arrested at or near the railway premises after a chase and were brought to the railway station where they were identified by the railway staff. This version was flatly contradicted by the railway staff, and the trial Judge found that the prosecution case on this point could not be accepted. With regard to the evidence of the station staff, the only observation made by the learned Judge of the High Court was that the matter was not of any very great importance and that the failure of the station staff to support the prosecution

case on this point was immaterial. The learned Judge went on to find that the appellants were arrested in the manner alleged by the prosecution, but this was based more upon the improbability of the defence version on the point rather than upon the reliability of the prosecution evidence. This is unsatisfactory. We think that the finding of the trial Judge that the arrests were not made at or near the railway station was fully justified. "We must point out that at the very least these two findings, namely, with regard to the time of the recording of the first information report and the time and place of the arrest, establish the complete unreliability of the police witnesses who were examined in the case.

31. The rest of the evidence consisted of the testimony of three headmen, three boys of the local vernacular school aged 11,12 and 13, and two witnesses named Dip Singh and Kanhai. As regards the last named two witnesses, the trial Judge held that it was impossible to place any reliance upon their statements. The learned Judge of the High Court also ignored their evidence as he found that they had clearly been unwilling to give evidence against any of the accused. With regard to the headmen, the finding of the trial Judge was that the witnesses were not present during the occurrence at all, nor did they take part in the arrests, and he consequently altogether ignored their testimony. The learned Judge of the High Court, on the other hand, held these witnesses to be witnesses of truth. We have gone carefully through the detailed reasons given by the trial Judge for rejecting the testimony of these witnesses and we agree with him that their evidence cannot be accepted as true. The learned Judge of the High Court did not consider all the reasons given by the trial Judge for disbelieving these witnesses. He dealt with only one point in this connexion, namely, whether the witnesses had given good reasons for being present in the town where the riot took place on the day and at the time of the riot. He appeared to think that apart from any reasons given by these witnesses for being present in the town, it was quite natural that they should be in the town especially when there was some excitement going on about that period. He found the stories related by them quite natural and convincing. We regret we are unable to agree. In our opinion, it was the reverse of natural for these headmen who belong to neighbouring villages, to leave their villages where their duties lay, at a time of excitement. The trial Judge having given convincing reasons for rejecting the testimony of these three witnesses, the learned Judge of the High Court was not, in our opinion, justified in overriding the finding of the trial Judge merely because he had himself a feeling that this testimony should have been accepted. He should have tried to meet the detailed reasons given by the trial Judge in support of his finding before overriding it. We are ourselves unable to accept the evidence of these witnesses as true.

32. This leaves us with the evidence given by the three school boys. The position with regard to this is little better. It appears that these boys were taken into custody on the day of the riot and were only released on certain persons standing surety for them. At the time of giving evidence at the trial, they were living with the sureties and not with their parents. One of them stated that he had been told that he could go home only after giving evidence. They made completely contradictory statements in their examination-in-chief and cross-examination. The trial Judge observed with regard to two of them that they had probably been won over by the defence and with regard to the third that he was making a tutored statement. The learned Judge of the High Court was of the opinion that these boys had been influenced against the prosecution and that they were not willing witnesses. He concluded from this, however, that anything that they had stated against the appellants was worth a good deal more than it would have been if they had been friendly to the prosecution. We do not consider this a correct or fair approach. Once a

witness has been found to be wholly unreliable it is unsafe to place any reliance upon any part of his testimony. It should not be open to the prosecution to pick out a bit here and a bit there from the evidence of a witness whom they themselves are not willing to accept as a witness of truth, and to use these salvaged bits, from testimony which is otherwise contaminated, to bolster up their case against particular accused persons.

33. The gist of the learned High Court Judge's finding on the whole case is contained in the observation that there was really no explanation why anybody should have invented a false case against the appellants. This is not in our opinion a justifiable point of view to adopt in a case like the present where the prosecution evidence was found to be largely false and riddled with defects and contradictions. The prosecution having failed completely to establish the guilt of the appellants by good and reliable evidence, it was not for the appellants to explain why their names had been mentioned by the prosecution witnesses as persons who had participated in the riot. We have already stated why it is in our opinion unsafe to rely upon the testimony of the police witnesses in this case. As the trial Judge did, however, rely upon the testimony of Chhahnath Singh, constable, and based his finding with regard to the guilt of at least two of the appellants solely upon that evidence, we consider that an observation or two are called for in that connexion. The trial Judge stated that there was no reason to disbelieve this witness though he had undoubtedly made untrue statements on certain points. He then went on to observe that this witness had certainly falsely accused one of the persons whom the trial Judge acquitted on a positive finding that he was not present among the crowd that committed the riot. The trial Judge having found that this witness had told lies with regard to the time at which the first information report was recorded, with regard to the time and place of the arrests and with regard to the participation of Soney Lal accused in the riot, we fail to see how any reliance could be placed upon his testimony with regard to the alleged participation of other accused persons in the riot.

34. The view that we take of the case is that the trial Judge gave good and convincing reasons for rejecting the testimony of the prosecution witnesses and wrote what in effect amounted to a judgment of aqquittal. For some reason, however, he thought it the better part of wisdom to convict some at least of the accused persons who had been put on their trial before him. The learned Judge of the High Court should have treated the judgment as one of acquittal and should have addressed himself to the question whether in case of an appeal by Government he would have been justified in upsetting the judgment if it had been given the form, as it already possessed the substance of a judgment of acquittal. If the learned Judge of the High Court had approached the question from that point of view, we feel sure, he would have declined to reverse the trial Court's findings with regard to the value to be attached to the prosecution evidence and would have given effect to them by himself passing an order of acquittal. We are clearly of the opinion that on the record as it stands there is nothing to support the appellants' conviction, which must be set aside. We therefore accept the appeal, acquit the appellants and direct that they should be released forthwith, and that the fines, if recovered, should be refunded.

35. Cases Nos. 37, 50, 51 and 52.-In these cases the appellants were convicted by Special Judges of serious offences committed during the disturbances of last year and were sentenced to various terms of imprisonment. Their appeals to the Patna High Court were dismissed. Nothing was urged before us which served to raise any doubt in our minds with regard to the propriety of the convictions and sentences. Our attention was however drawn to what we cannot but regard, as a very serious irregularity committed by the Special Judge in Case No. 37 in recording the

evidence of some of the prosecution witnesses, e.g., P.Ws. 3, 4, 5 and 7. The memorandum of the substance of the evidence of P.Ws. 1 and 2 having been recorded, the Judge contented himself in the case of several other witnesses with summarizing their examination-in-chief relating to the main incidents to which they were deposing by recording merely that they corroborated or supported the statement of P.W. 2, or gave the same story as P.W. 2. Under the provisions of Section6 of Ordinance 2 of 1942, the Special Judge was not bound to record the evidence of any witness verbatim, but he was bound to record a memorandum of the substance of the evidence of each witness examined. The record of the evidence of P.W. 2 no doubt represents the substance of the evidence given by that witness. The statement that other witnesses corroborated or supported the statement of P.W. 2 or gave the same story as P.W. 2 with respect to certain incidents surely does not constitute a memorandum of the substance of the evidence given by those witnesses. We have no doubt that the failure on the part of the Judge to comply with the provisions of Section 6 of ordinance 2 of 1942 put the accused at a certain disadvantage and occasioned a certain amount of prejudice to them in the conduct of their defence. We are however satisfied on an examination of the whole record that the irregularity did not in fact occasion a failure of justice. We dismiss these appeals.

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