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[SAIYID FAZL ALI, MEHR CHAND MAHAJAN, MUKHERJEA, DAS and CHANDRASEKHARA AIYAR JJ.]

Constitution of India, Art. 32—Special Tribunals Regulation (Hyderabad), ss. 2, 7—Conviction and death sentence by Special Tribunal—Confirmation by High Court before 26th January, 1950—Application under Art. 32 for writs of prohibition, certiorari and habeas corpus—Maintainability—Detention under conviction by criminal court—Application for habeas corpus—Jurisdiction of convicting court, whether can be gone into—Effect of confirmation of conviction on appeal—Misjoinder of charges—Omission to provide counsel for accused—Validity of conviction—Interference under Art. 32.

There is a basic difference between want of jurisdiction and an illegal or irregular exercise of jurisdiction, and mere non-compliance with rules of procedure (*e. g.*, misjoinder of charges) cannot be made a ground for granting a writ under Art. 32 of the Constitution. The defect, if any, can, according to the procedure established by law, be corrected only by a court of appeal or revision, and if the appellate court which was competent to deal with the matter has considered the matter and pronounced its judgment, it cannot be reopened in a proceeding under Art. 32 of the Constitution.

Where, some time after the pronouncement of a sentence of death by hanging by a Special Tribunal of the Hyderabad State and pending confirmation of the sentence by the High Court of Hyderabad, a Regulation was passed to the effect that notwithstanding anything contained in any law for the time being in force any sentence of death passed by a Special Tribunal shall be carried into execution by hanging : *Held*, that the Regulation

must be taken to have retrospective effect, as the mode of execution of a sentence cannot be regarded as a matter of substantive law, and the sentence for hanging cannot be held to be illegal even assuming that under the law which was in force in Hyderabad at the time the sentence was passed by the Special Tribunal, sentences to death could be carried out only by decapitation. In any event, as the High Court which upheld the conviction had the power to impose the sentence of death by hanging under the Regulation, no relief could be granted to the accused under Art. 32 of the Constitution.

Section 7(2) of the Special Tribunals Regulation passed by the Military Governor of Hyderabad covered all those cases where *manzuri* and *tashih* were contemplated under the old law and sentences of death passed by a Special Tribunal could therefore be executed without the assent or approval of H.E.H. the Nizam.

The result of s. 271 of the Hyderabad Criminal Procedure Code, (which corresponds to s.340 of the Indian Criminal Procedure Code) read along with the Rules and Circular Orders issued by the Hyderabad High Court is: (i) that it cannot be laid down as a rule of law that in every capital sentence where the accused is unrepresented the trial should be held to be vitiated; and (ii) that a court of appeal or revision is not powerless to interfere if it is found that the accused was so handicapped for want of legal aid that the proceedings against him may be said to amount to negation of a fair trial.

The writs referred to in Art. 32 must obviously be correlated to one or more of the fundamental rights conferred by Part III of the Constitution and can be made only for the enforcement of such rights.

The petitioners who were convicted by a Special Tribunal of Hyderabad of murder and other offences and sentenced to death by hanging and whose convictions and sentences had been confirmed by the Hyderabad High Court before the 26th January, 1950, applied to the Supreme Court under Art. 32 of the new Constitution for the following reliefs: (i) a writ in the nature of certiorari calling upon the Government of Hyderabad and the Special Judge to produce the records of the case and show cause why the convictions and sentences should not be quashed, (ii) for a writ of prohibition directing the Government and Special Judge not to execute the petitioners, and (iii) for a writ of habeas corpus:

Held, (i) that the writs of certiorari and prohibition could not be granted as at the date when the High Court dealt with the case and confirmed the conviction and sentences of the petitioners, the Supreme Court was not in existence and the Hyderabad Court could not by any stretch of reasoning be said to have been subordinate to the Supreme Court;

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(ii) the writ of habeas corpus could not be granted inasmuch as a return that the person is in detention in execution of a sentence on indictment on a criminal charge is a sufficient answer to an application for such a writ;

(iii) assuming that it is open even in such cases to investigate the jurisdiction of the court which convicted the petitioners, the mere fact that the trial court had acted without jurisdiction would not justify interference, if the conviction and sentence had been upheld on appeal by a court of competent jurisdiction; for, the appellate court in a case which properly comes before it on appeal, is fully competent to decide whether the trial was with or without jurisdiction and it has jurisdiction to decide the matter rightly as well as wrongly; and as the High Court at Hyderabad had jurisdiction to hear and decide the appeal, the detention of the petitioners could not be held to be invalid;

(iv) as the judgment of the High Court was pronounced before the 26th January, 1950, and it had acquired a finality in the fullest sense of the term before that date, the Supreme Court had no power to re-open that judgment under the provisions of the new Constitution;

(v) the fact that the petitioners had lost their right of appeal to the Judicial Committee of Hyderabad by a sudden change in the law and by the delay on the part of the High Court in the disposal of their application for leave to appeal to the said Committee was a matter for the executive authorities to consider; it could not widen the scope of the existing remedial laws beyond legitimate bounds.

Quaere: Whether an application under Art. 32 is maintainable after a similar application under Art. 226 has been dismissed by the High Court.

In re Authers [(1889) 22 Q.B.D. 345], *In re Bailey* (3 E. & B. 607) and *In re Bakers* (2 H. & N. 219) not followed. *In re Newton* (139 E. R. 692), *In re Bonomally Gupta* (44 Cal. 723), *Greene* v. *Secretary of State for Home Affairs* ([1942] A.C. 284), *Ex parte Lees* [(1868) E.B. & E. 828], *R.* v. *Suddis* [(1801) 1 East 306], *Carus Wilson's case* [(1845) 7 Q.B. 984] referred to.

ORIGINAL JURISDICTION: These were two sets of petitions by three groups of persons, one under Art. 32 of the Constitution (Petitions Nos. 12, 13 and 14, of 1951) and the other under Art. 136(1) of the Constitution (Criminal Miscellaneous Petitions Nos. 14, 15 and 16) against the judgment and order dated 19th December, 1950, of the High Court of Judicature at Hyderabad (M. Khaliluzzaman Siddiqi J.) in Miscellaneous Petitions Nos. 2297, 2298 and 2299 of 1950. The facts are set out in detail in the judgment.

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D. N. Pritt (*Danial Latifi* and *Gopal Singh*, with him) for the petitioners.

M.C. Setalvad, Attorney-General for India, and *Rajaram Aiyar, Advocate-General of Hyderabad*, (*G.N. Joshi*, with them) for the respondents.

1951. March 16. The judgment of the Court was delivered by

FAZL ALI J.—These are six petitions which have been presented to this Court on behalf of three groups of persons in the following circumstances.

On the 30th October, 1948, the Military Governor of Hyderabad by virtue of the powers delegated to him by H. E. H. the Nizam enacted the Special Tribunals Regulation (No. 5 of 1358 F), which was amended by several later Regulations issued on the 22nd May, 1949, 10th July, 1949, 23rd July and 30th October, 1949. The Regulation provided among other things that the Military Governor may constitute a Special Tribunal or Tribunals, each consisting of three members appointed by him, and that he may by general or special order direct that these Tribunals shall try any offence, whether committed before or after the commencement of the Regulation, or any class of offences. Section 8 of the Regulation empowered the Military Governor to direct, by order, that in such circumstances and under such conditions, if any, as may be specified in the direction, any power or duty conferred or imposed upon him by the Regulation may be exercised or discharged by any other authority. In accordance with the Regulation, certain Tribunals were constituted, and one of the Tribunals—Tribunal A for Nalgonda district—proceeded to try certain cases made over to it by the Civil Administrator of Nalgonda under the powers vested in him by the Military Governor. Among the cases tried by this Tribunal were also three cases in which the petitioners were concerned, these being registered as Criminal Cases Nos. 14, 17 and 18 of 1949. These cases were based on three charge sheets submitted by one Mr. Hanumantha

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Naidu, a senior police officer of Nalgonda district, one of which was No. 14 dated the 7th April, 1949, and the other two were Nos. 14 and 15 dated the 20th July, 1949. In these chargesheets, the accused were generally referred to as "Communists wedded to the policy of overthrowing the Government by violence and setting up in its place Communist Raj," and the specific cases made out against them were briefly as follows. In the first case (Criminal Case No. 14 of 1949), the charge-sheet stated that the accused went to a certain village in Nalgonda district on 21st September, 1948 'in khaki uniform and holding unnotified firearms," caught hold of four persons as they had not paid the full subscription demanded of them, decoyed them to the outskirts of the village and then "killed them by cutting their throats." In the second case (Criminal Case No. 17), it was stated that on the 6th April, 1949, at about 9 A. M. two of the accused came to a certain village and began to fire their guns, but when "the public" approached them asking them to surrender they ran away and joined the other persons accused in the case. Later on, all the accused "marched on the villagers" and opened fire at them indiscriminately with the result that one of them received an injury in his right thigh which subsequently proved fatal, and another received a minor injury on his left hand. The version given at the trial in this case was slightly different and shows that the two accused who had visited the village were chased by 50 or 100 persons to a place called Madireddychelka where the other accused joined them, and after parleying with the chasers, accused No. 4 fired and hit one of the villagers on the thigh and the latter died. .Thereupon the accused chased the remaining villagers, firing their guns, and one of the bullets grazed the middle finger of one of the villagers and caused a slight injury to it. In the third case (Criminal Case No. 18), the facts were stated to be these:—On the 15th May, at about midnight, the accused visited Kasthala village, carrying firearms and dressed in khaki uniform. They got upon the terrace of one Kankayya where one Natala Rama Reddy was

sleeping, caught hold of him and took him forcibly to the outskirts of the village in spite of the protests of a number of villagers who had followed, and "killed him by firing gunshots at him."

Upon these facts, the trial of the petitioners proceeded, and they were ultimately convicted of murder and sentenced to death, and also convicted of certain other offences including the offence of carrying firearms without licences and sentenced to various terms of imprisonment. After their conviction, the petitioners appealed to the Hyderabad High Court, but their convictions and sentences were confirmed. Thereafter, they tried to obtain the leave of the High Court for appealing to the Judicial Committee of Hyderabad, but, while their applications were still pending, the Constitution of India came into force and since the Judicial Committee ceased to function under the new Constitution they amended their original application by asking for leave to appeal to this Court under article 134 (c) of the Constitution. This application being unsuccessful, they applied to this Court for special leave to appeal, but that application was dismissed on the ground that this Court had no jurisdiction under article 136 of the Constitution to hear an appeal from a judgment delivered by the High Court at Hyderabad before the 26th January, 1950, since that Court was not within the territory of India*. The petitioners then made applications to the High Court under article 226 of the Constitution, and those applications having been rejected, they filed two sets of petitions in this Court, one under article 32 of the Constitution, and the other for special leave to appeal against the order of the High Court refusing to grant them relief under article 226.

The main points urged by Mr. Pritt, who appeared before us on behalf of the petitioners, were as follows:—

(1) The trial of the petitioners by the Special Tribunal was without jurisdiction.

(2) In Criminal Cases Nos. 17 and 18 of 1949, there was no fair trial, inasmuch as the persons accused in

* Vide [1950] S.C.R. 940.

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those cases were not afforded any opportunity to instruct counsel and they had remained undefended throughout the trial.

(3) The trials in question were illegal by reason of misjoinder of charges.

(4) At the time of the passing of the sentence, the sentence of death could be lawfully executed by decapitation only and not by hanging, and hence the sentence of death by hanging passed upon the accused in the first case was illegal.

(5) The sentence of death could not be executed without the assent or the approval of H. E. H. the Nizam which had not yet been obtained.

The last three points seem to us to have very little substance and may be shortly disposed of.

It appears that in all the three cases, besides being charged with murder, rioting and certain other cognate offences, which on the face of the record appear to have been committed in the course of the same transaction, the petitioners were also charged with carrying unlicensed firearms. It was contended on behalf of the petitioners that the offence of carrying unlicensed firearms was wholly unconnected with the other offences and could not be said to have been committed in the course of the same transaction. It seems that this very point was raised in the High Court, but it was negatived, firstly on the ground that there was no misjoinder of charges and no violation of the provisions of the Criminal Procedure Code, and secondly, on the ground that no prejudice had been caused by the so-called misjoinder. The entire argument on behalf of the petitioners was based on the case of *Subramania Iyer* v. *King Emperor* (1). That case had somewhat peculiar features, because the accused was tried for no less than 41 separate offences in contravention of the provisions of section 234 of the Criminal Procedure Code, and in these circumstances it was observed by the Privy Council that the mischief sought to be avoided by the section having been

(1) L. R. 28 I.A. 257.

committed, "the effect of the multitude of charges before the jury had not been averted by dissecting the verdict afterwards and appropriating the finding of guilt only to such parts of the written accusation as ought to have been submitted to the jury." The case has been discussed, explained and distinguished in a number of cases, and it must be read with the subsequent decisions of the Privy Council in *Abdul Rahman* v. *King Emperor* (1) and in *Babu Lal* v. *Emperor*(2) which have been understood by some of the Indian courts to have greatly modified and restricted the very broad rule which at one time there was a tendency to deduce from certain general observations made by the Privy Council. It may be that on a more appropriate occasion we may have to review the case law on the subject and lay down the true scope of the pronouncements made by the Privy Council in the cases referred to above and the effect which in law the misjoinder of charges would have upon the trial. But, for the purpose of the present case, it is sufficient to point out that even if we assume that there was some defect in the procedure followed at the trial, it does not follow that the trial court acted without jurisdiction. There is a basic difference between want of jurisdiction and an illegal or irregular exercise of jurisdiction, and our attention has not been drawn to any authority in which mere non-compliance with the rules of procedure has been made a ground for granting one of the writs prayed for. In either case, the defect, if any, can according to the procedure established by law be corrected only by a court of appeal or revision. Here, the appellate court which was competent to deal with the matter has pronounced its judgment against the petitioners, and the matter having been finally decided is not one to be reopened in a proceeding under article 32 of the Constitution.

The fourth point raised on behalf of the petitioners is not only a highly technical one but is also entirely devoid of merit. A reference to the Hyderabad Penal Code shows that in section 243, which deals with the

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offence of murder, all that is stated is that death is one of the penalties. That section does not state how the sentence of death is to be executed. When we turn to the Hyderabad Criminal Procedure Code, we find that section 311, which is the relevant section, runs as follows :—

"When an order of death sentence or any other sentence has been submitted to the High Court for ratification (*tashih*) the Sessions Court shall, on receiving the order of ratification or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary or expedient."

In this section also, no mention is made as to how the sentence of death is to be executed, but in Schedule IV of the Code, in the form prescribed for the warrant of execution of a death sentence (Form No. 29) the concluding sentence runs as follows :—

".....you shall hand over the accused.....to the executioner so that the latter may separate the head from the body of the said prisoner in such a way that his life may be extinct and that the execution of this order may be reported to the High Court."

In the first case (Criminal Case No. 14 of 1949), the sentence was "death by hanging," but in the other two cases the accused were simply sentenced to death, without any indication as to how the sentence was to be executed. It has been argued that in view of the provisions of the Hyderabad Criminal Procedure Code, the sentence of death by hanging was not strictly appropriate. But, however that may be, we find that on the 30th October, 1949, *i. e.*, sometime after the pronouncement of the sentences by the Special Tribunal and before they were confirmed by the High Court, the Special Tribunals Regulation was amended and a specific provision was made to the following effect :—

"2-B. Notwithstanding anything contained in any law for the time being in force—

(i) any sentence of death passed by a Special Tribunal shall be carried into execution by causing

the person sentenced to be hanged by the neck until he is dead,

(ii) warrants of commitments under sentence of death, warrants of execution of a sentence of death and any other instruments issued by a Special Tribunal.....shall be issued in such form as the Special Tribunal thinks fit."

Apparently, these provisions applied to all sentences which had remained unexecuted or were to be executed at the date of the amending Regulation, and therefore they should govern the case of the petitioners also. In our opinion, they must be taken to have retrospective effect, because the mode of the execution of a sentence can hardly be regarded as a matter of substantive law or something which would affect any substantive rights. In any event, the High Court, which upheld the conviction, had the power to inflict the sentence of death by hanging under the amended Regulation, and therefore this point does not properly arise in a matter involving the question whether any relief under article 32 of the Constitution should be granted.

The fifth point also does not appear to us to have much merit. The determination of this point is said to rest upon the proper interpretation of the word "*manzuri*," which is used in sections 20, 302, 307 and 309 of the Hyderabad Criminal Procedure Code. Section 20, which is the most important section, runs as follows:—

"Every Sessions Judge may pass any sentence authorised by law but such sentence shall not be carried into effect until

(1) in the case of a sentence of ten years imprisonment or more the appropriate Bench of the High Court,

(2) in the case of life imprisonment the Government, and

(3) in the case of death sentence H. E. H. the Nizam shall have assented thereto (given *manzuri*)."

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Section 302 (1) states that in certain cases, execution of sentence shall be stayed until *manzuri* in accordance with section 20 is given. Section 307 deals with cases where the High Court affirms a death sentence or a sentence of life imprisonment and provides that after such confirmation, the opinion of the High Court together with the file of the case shall be forwarded for *tashih* (rectification or ratification) to the Government within one week and the sentence shall not be carried into effect until *manzuri* is obtained as provided in section 20. Section 308 runs as follows:—

"When the High Court thus forwards any file for ratification (*tashih*) H. E. H. the Nizam or the Government as the case may be shall be empowered

(a) to uphold the sentence of the High Court,

(b) to substitute any other penalty for the same,

(c) to set the prisoner at liberty,

(d) to make any other appropriate order."

Section 309 provides that after the *manzuri* is obtained in the manner already stated, the Registrar of the High Court shall send a copy of the order to the Sessions Court for carrying it into effect. It will be noticed that there are two different words used in these sections, viz., *manzuri* and *tashih*. *Manzuri* literally means approval or acceptance, but, in the context in which it occurs, confirmation would seem to convey adequately the sense underlying it. *Tashih* means rectification or correction, and conveys the sense that the superior authority named in section 308 may either uphold the sentence or revise it in the manner stated therein.

Now, the important point to be considered is in what way the provisions to which reference has been made, have been affected by the Regulations issued by the Military Governor. A reference to these Regulations will show that in section 7 of the original Regulation, the following words have been substituted:—

"7. (2).....no sentence of a Special Tribunal shall be subject to confirmation (*tausiq* is the vernacular expression used here.)

(3) The Military Governor may on such conditions, if any, as he thinks fit, suspend, remit, reduce, or alter the nature of, any sentence passed by a Special Tribunal, or any sentence substituted by the High Court on an appeal under sub-section (2) for any sentence so passed."

It was contended by the learned Attorney-General that these provisions cover all those cases where *manzuri* and *tashih* were contemplated under the old law. On the other hand, it was contended on behalf of the petitioners that *manzuri* was a peculiarly apt expression when used with reference to a ruler, and the primary sense conveyed by it was that no sentence was a good sentence without the approval or sanction of the monarch. A mere reference to section 20 will show that the word *manzuri* has not been used with reference only to H. E. H. the Nizam, but it has also been used with reference to the High Court and the Government, and therefore it is difficult to hold that the word bears the special meaning attributed to it on behalf of the petitioners. In the context in which it is used, it has no other meaning than the act of confirmation, and the new word, *tausiq*, which has been used in the Regulation, and which literally means confirmation, appears to convey the same sense as the word *manzuri*. It was also contended on behalf of the petitioners that the use of the word '*hakim*' in connection with confirmation in one of the amending Regulations could not have been intended to cover confirmation by H. E. H. the Nizam. But since '*hakim*' literally means a ruler or an authority, we are not inclined to attach much importance to the distinction sought to be drawn between *hakim* and ruler. It is quite plain that one of the objects of the Regulations was to simplify procedure and expedite trials, and the interpretation which is suggested by the learned Attorney-General seems to be in conformity with those objects.

Having dealt with these minor points, we shall now advert to the first and second points, which appear to us to be the only serious points urged in this case. In urging the second point, which arises only in Criminal

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Cases Nos. 17 and 18 (covered by Petitions Nos. 13 and 14 under article 32), it is contended on behalf of the petitioners that the whole trial in these cases was bad, because the accused were denied the right of being defended by a pleader. The petitions with which we are dealing, do not recite any facts to support this point. There are however the following allegations made in paragraphs 2 and 4 of the affidavits filed on behalf of the petitioners :—

"2. All this time I was not allowed to communicate with my relations and friends. Before I was brought before the Special Tribunal on 3-8-49, during the trial or afterwards I never saw any of my friends or relations, whether in the lock-up, the Court or in the jail due to circumstances best known to the police.

* * *

4. The Court never offered to facilitate my communication with my relations and friends or to adjourn the case or to appoint counsel at State expense for my defence. In fact they said they would not adjourn the case under any circumstances. Being ignorant I did not know that I had any right to ask for any of these things."

In arguing this part of the case, Mr. Pritt relied on certain American cases, especially on *Powell* v. *Alabama*(1), in which the Supreme Court of America is reported to have observed as follows :—

"In a capital case where the defendant is unable to employ counsel, and is incapable of adequately making his own defence because of ignorance, feeblemindedness, illiteracy or the like, it is the duty of the Court whether requested or not, to assign a counsel for him as a necessary requisite of due process of law."

That the assignment of a counsel in the circumstances mentioned in the passage is highly desirable, cannot be disputed. But the question raised before us is whether in law non-assignment of a counsel would vitiate the trial. It seems to us that in dealing with the point, we cannot rest our judgment wholly on

(1) 287 U.S. 45.

American precedents, wich are based on the doctrine of due process of law, which is peculiar to the American Constitution, and also on certain specific provisions bearing on the right of representation in a criminal proceeding. The provision which is material to the contention raised before us is section 271 of the Hyderabad Criminal Procedure Code which corresponds to section 340 of the Indian Criminal Procedure Code, which runs as follows :—

"Any person accused of an offence before a criminal court, or against whom proceedings are instituted under this Code in any such court, may of right be defended by a pleader."

This provision must undoubtedly be construed liberally in favour of the accused and must be read along with the rules made by the High Courts and the circular orders issued by them enjoining that where in capital cases the accused has no means to defend himself, a counsel should be provided to defend him. The proper view seems to us to be : (1) that it cannot be laid down as a rule of law that in every capital case where the accused is unrepresented, the trial should be held to be vitiated ; and (2) that a court of appeal or revision is not powerless to interfere, if it is found that the accused was so handicapped for want of legal aid that the proceedings against him may be said to amount to negation of a fair trial.

Passing now to the facts of the cases before us, it appears that in Criminal Case No. 14, the accused persons concerned were defended by a pleader, but those concerned in Cases Nos. 17 and 18 were not represented at all by any lawyer. Further a reference to the docket sheets in Case No. 17 shows that the accused in Case No. 17 were brought into court on the 3rd August, 1949, and they were informed on that day that the case would be heard on the 6th August, 1949, and that they must get ready with their defence lawyers and witnesses on that date. On the 6th August, the case was adjourned because none of the prosecution witnesses was present and the trial

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commenced on the 7th August, *i.e.*, next day. In Case No. 18, an order similar to the one passed in Case No. 17 was passed on the 3rd August, but the hearing was fixed for the 7th August. The docket sheets also show that the trial was concluded in Case No. 17 on the 14th August and in Case No. 18 on the 13th August. As to the circumstances under which the accused were not represented by a lawyer, we have been referred to a counter-affidavit filed by Mr. Hanumantha Naidu, who investigated the case, in which the following statement occurs :—

"4. Regarding the means of accused Hanumanthu enquiries were made by the Tribunal and it was found that he had enough means to engage a lawyer. He owned lands and house property. But he, however, did not want to engage a lawyer and this is noted in docket sheet of Criminal Case No. 14/49 by the President of the Tribunal. Facilities were given to the accused to engage lawyers for their defence. In cases in which the accused had no means to engage pleaders for their defence and applied to the Tribunal for appointment of pleaders at Government cost, this was done. In some cases, the accused declined to accept the pleaders appointed by the Tribunal for their defence. Some engaged pleaders of their choice at their cost.

5. The allegations in para 5 of the affidavit that lawyers were afraid to come forward and defend the accused, that they were afraid of incurring the displeasure of the police and the Administration and that they were unwilling to appear before the Special Tribunal, are not true. Lawyers were willing to appear and defend the accused if they were engaged, and in Criminal Case No. 14/49, Ramireddy, Pleader, appeared for A-4, A-7 and A-8 and conducted their defence. Mr. Ramireddy also offered to defend the other accused, but they declined to have him and stated that they did not want any lawyer to defend them. In Nalgonda, there are about 40 practising pleaders out of whom about half a dozen are B.A. LL.B.s well conversant with English and able to conduct cases in English."

It was contended on behalf of the petitioners that this affidavit concerns the petitioners in Case No. 14 of 1949 only, and this contention does receive some apparent support from the fact that in the earlier part of paragraph 4 reference is made to the means of one of the accused in Case No. 14, and there is also a direct reference to that case later. But, on a careful reading of the affidavit as a whole, it seems to us that the affidavit was intended to cover the allegations of the petitioners in all the three cases. We also find that the point raised before us was also urged before the High Court when the petitioners applied for leave to appeal against their conviction, and it was dealt with somewhat elaborately by two learned Judges in separate judgments, and they have expressed the view that the contention that the Tribunal did not give the accused an adequate opportunity to engage lawyers is not well-founded. Sripat Rao J., who delivered the leading judgment, after dealing with the various facts, observed as follows:—

"It was not contended before us in appeal that they were not afforded such an opportunity by the Special Tribunal. In fact, in Appeal No. 1385 of 1358 F., proceedings dated 29-2-58 F., show that the High Court also wanted them to be represented by lawyers for which time was allowed, but on the next hearing they stated that they do not wish to engage any lawyer on their behalf and that the High Court need not engage any lawyer for them. This shows that the accused for reasons best known to themselves did not avail of the opportunity of engaging lawyers. This was also the case regarding appeals Nos. 1379 to 1384 of 1358 F., in which High Court's proceedings dated 29-2-59 F. show that the accused neither wanted to engage any lawyer on their behalf nor did they wish the High Court should engage any one for them. In view of this, the plea that opportunity was not given to the accused to engage lawyers and therefore the trial was vitiated in our opinion fails."

It appears to us on the materials before us that we cannot altogether rule out the suggestion of the High

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Court that the curious attitude adopted by the accused, to whatever cause it may have been due, to some extent accounts for their not being represented by a lawyer. In the course of the arguments, our attention was drawn to the fact that some of the relations of the accused in the first case (Case No. 14) were present at the trial, and some of the accused in that case were in fact defended by a pleader, and it was contended that this fact lent support to the conclusion expressed by the High Court, because if the accused in the first case were not denied access to their relations and lawyers, there was no reason why the accused in the other cases should have been denied such access. Therefore, in the state of evidence before us, the position is hardly clear enough to justify the conclusion which the petitioners ask us to draw in these petitions. But we must state that throughout the arguments on this point, we could not help feeling that the Special Tribunal should have taken some positive steps to assign a lawyer to aid the accused in their defence.

We will now deal with the first point which relates to the jurisdiction of the Special Tribunal by which the accused have been tried and convicted. The general ground urged to make good this point is that the order made by the Civil Administrator purporting to confer jurisdiction on the Special Tribunal to try the petitioners did not indicate with sufficient certainty that the petitioners were the persons whose cases were to be tried by that Tribunal, and hence there was no proper order to enable the Tribunal to take cognizance of the petitioners' cases. It was contended that under the ordinary law, the cases of the petitioners would have been placed in the first instance before a Magistrate for holding an enquiry before commitment and thereafter they would have been tried by a Sessions Judge. This procedure, it is argued, could have been dispensed with only if a proper order had been made under the Regulation by the Civil Administrator, and, in the absence of such an order, the trial was null and void. This point was also raised by the petitioners in their application to the High Court for leave to

appeal to this Court, and the High Court in negativing it relied on the orders made by the Civil Administrator in two letters produced before it, *viz.*, (1) letter No. 3176/49-ST, dated 7th April, 1949, by which criminal cases covered by charge sheets Nos. 1 to 14 were ordered to be tried by the Special Tribunal at Nalgonda; and (2) letter No. 4234/49-ST, dated 23rd July, 1949, by which cases covered by charge sheets Nos. 15 to 40 were made over to the same Tribunal for trial. The statement made in the judgment of the High Court is confirmed by an affidavit filed before us on behalf of the respondents. It was contended on behalf of the petitioners that a mere reference to the number of the charge sheet is too vague a description to satisfy the requirements of law and that the Civil Administrator in making over the cases should have stated the names of the accused and other necessary particulars. We think however that the reference to the charge sheet numbers was in the circumstances of the case sufficient to particularize the cases which were being made over to the Special Tribunal, especially as the charge sheets contained the names of the accused as well as other details necessary to identify the cases made over to the Tribunal. The general argument therefore necessarily fails. But, on a careful scrutiny of the record as it stands before us, we are unable to find any specific order of the Civil Administrator making over the case covered by the charge sheet No. 14 dated the 20th July, 1949, to the Tribunal. It will be recalled that there were two charge sheets numbered 14, one of which was submitted by the Investigating Officer on the 7th April, 1949, and the other on the 20th July, 1949. The first letter of the Civil Administrator, which was written on the 7th April, 1949, covered one of the charge sheets numbered 14 (the earlier one), but it cannot be held to cover the second charge sheet bearing the same number (No. 14), which came into existence on the 20th July, 1949, *i.e.*, nearly 3 months after that letter was despatched. The second letter does not refer to any charge sheet numbered 14

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Therefore the charge sheet No. 14 of the 20th July, which we will for the sake of brevity describe as 14 (2), is not covered by any written order made by the Civil Administrator. *Prima facie*, therefore, there is room for the argument that Case No. 17, which is affected by this charge sheet [No. 14 (2)], was never properly made over to the Tribunal and the trial of the accused in that case was therefore without jurisdiction.

In the course of the arguments, the learned Attorney-General referred to the affidavit of Mr. Hanumantha Naidu, in which it is stated that that case also was transferred by the Civil Administrator to the Tribunal for trial, and he was also prepared to file an affidavit by the Civil Administrator himself to show that the case had been validly transferred to the Tribunal. It is unfortunate that this point was neither raised nor investigated in the appeal to the High Court, but has to be dealt with in this Court merely upon affidavits, many of which are not properly drafted or sworn. In these circumstances, we would have been inclined to pursue the matter by further investigation had we felt that such a course would serve any useful purpose, but we think it unnecessary to do so, as we find that there are certain insuperable obstacles in the way of our granting the petitioners any relief under article 32.

Article 32 (2) provides that "the Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part (Part III)." The power given to this Court under this provision is a large one, but it has to be exercised in accordance with well established principles. The writs to which reference has been made must obviously be correlated to one or more of the fundamental rights conferred by Part III of the Constitution and can be made only for the enforcement of such rights. In the petitions before us, the petitioners have made the following relevant prayers:—

"(1) that this Court may issue a writ in the nature of *certiorari* or a direction or order directed to respondents Nos. 1 and 3 (the Government of Hyderabad and the Special Judge, Nalgonda) calling upon them to produce the records before it and to show cause why the convictions and sentences of the petitioners should not be quashed;

(2) that this Court may issue a writ of prohibition or a direction or order directed to respondents Nos. 1 and 2 (the Government of Hyderabad and the Superintendent of the Jail) requiring them not to execute the petitioners."

At a late stage of the hearing of the case, an application was made on behalf of the petitioners to allow them to amend their petition so as to include a further prayer for a writ of *habeas corpus*, and this was done.

The question to be decided now is whether any of these prayers can be granted. The writs of *certiorari* and prohibition are hardly appropriate remedies in this case, because they are usually directed to an inferior court, but at the date when the High Court dealt with these cases and confirmed the convictions and sentences of the petitioners, this Court was not in existence, and at that point of time, by no stretch of reasoning, the High Court can be said to have been subordinate to this Court. The prayer for the issue of a writ of *habeas corpus* is however said to stand clear of this difficulty, on the ground that the detention of the petitioners would be illegal from day to day, if it is held to be based on an order made without jurisdiction which is therefore liable to be ignored as a nullity.

The matter is however not so simple as it may appear at the first sight. There is a long line of cases relating to the *habeas corpus* writs, in which it has been held that when the return states that the party who is alleged to be unlawfully detained, is detained in execution of a sentence on indictment on a criminal charge, the return cannot be controverted. [See *R. v. Suddis* (1), *Carus Wilson's* case (2), *Ex parte Lees* (3)] In some

(1) (1801) 1 East 306.
(2) (1815) 7 Q. B. 984.
(3) (1858) E. B. & E. 878.

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cases, however, the question arose as to whether affidavits would be admissible to show that there was no jurisdiction in the court by which the prisoner was convicted. On this point, there are three cases in which it was held that such an affidavit would be admissible. The most important of these cases is *In re Authers* (1), on which very great reliance has been placed by Mr. Pritt. In that case, the manager of a club was convicted under a certain statute of selling beer by retail without having an excise retail licence. Subsequently, he was convicted of selling intoxicating liquor, *viz.*, beer, without a licence under another statute. Upon the hearing of the latter charge, the magistrate treated it as a second offence, and imposed the full penalty authorized in the case of "the second offence" by the latter statute. His appeal to the Quarter Sessions having been dismissed, he applied for a writ of *habeas corpus*, and it was granted by the Queen's Bench Division on the ground that the Magistrate could not treat the later offence as a second offence, because it was not a second offence under the Act under which he was convicted for the second time. Hawkins J. in dealing with the case observed as follows:—

"I have had many doubts whether it was competent for us to go behind a conviction which had not been quashed upon *certiorari* or by any other process of law; but I have satisfied myself that we can go behind this conviction upon affidavits. There are two authorities, in the Queen's Bench and Exchequer respectively, which seem to be conclusive. They were two cases of prosecution of workmen for neglecting their duty to their employers, and in each of them there was a summary conviction; upon the argument of a rule for a writ of *habeas corpus* it was allowed to be proved by affidavits that the men were, as a fact, not in that particular employment, and, therefore, not subject to the jurisdiction of the justices, the ground of admission of the affidavits being that there was no evidence before the justices to justify a conviction. So, in the present case, the Court is at liberty to go behind the

(1) (1899) 22 Q. B. D. 345 at 350.

conviction and to receive affidavits, it not being a case of conflicting testimony, but one in which the magistrate had found a previous conviction, when, in point of fact, there was none. For these reasons, I think that the prisoner is entitled to be discharged."

Referring to the appeal of the prisoner to the Quarter Sessions, the learned Judge observed:—

"This is true as a fact, but it puts the prosecution in no better position, for if the magistrate had no power to give himself jurisdiction by finding that there had been a first offence where there had been none, the justices could not give it to him."

In his judgment, the learned Judge did not refer to the previous precedents on which he relied, but it has been generally assumed that he intended to refer to *In re Bailey* (1), and *In re Baker* (2).

As against these cases, there are a number of cases in which a different view has been taken and which cannot be easily reconciled with them. The leading case on the other side of the line is *In re Newton* (3), where it was held that "the Queen's Bench Division had no power to grant a *habeas corpus* to bring up a prisoner who had been convicted at the Central Criminal Court, on the ground that the offence charged was committed at a place out of the jurisdiction of that court." In dealing with the case, Jervis C. J. observed as follows:—

"The question raised in this case is undoubtedly one of very great importance. No authority has been found to warrant it. The point, it would seem, therefore, has never before been raised,—it may be because it is so plain that there is nothing in it. The state of things is this: Mr. Newton has been tried and convicted on an indictment alleging that the offence charged was committed within the jurisdiction of the Central Criminal Court. Either that was traversed, or the jurisdiction was admitted by pleading over. If it were traversed, the finding of the jury is that the prisoner committed the offence within the jurisdiction of the

(1) 3 E & B. 607. (2) 2 H. & N. 219. (3) 139 R. R. 692.

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court, as alleged. He now seeks to impeach that finding, on the ground that the place where the offence was actually committed is more than one thousand yards distant from the boundary of the parish in which the record alleges it to have been committed. That is not to be governed by the inquiry whether the fact be indisputable or otherwise. If we could entertain the application because the boundary is clearly ascertained, we should be equally bound to entertain disputes of the most refined and minute character. The inconvenience of this is manifest. The truth is that the remedy is not by an application of this sort."

Another learned Judge agreeing with the view of the Chief Justice, observed as follows:—

"Ordinarily upon criminal trials, the jurisdiction of the court over the place where the offence is alleged to have been committed is assumed. And here, no doubt, the trial proceeded upon the assumption that Beulah Spa was within the jurisdiction of the Central Criminal Court. Whether it was so or not was as much a matter of fact to be proved (or admitted) as any other fact alleged in the indictment, in order to establish the conviction."

The view expressed in this case has been taken in several other cases also, and in *Greene* v. *Secretary of State for Home Affairs* (1), Viscount Maugham seems to have thrown the weight of his authority in favour of that view. A Bench of the Calcutta High Court has also supported that view in *In re Bonomally Gupta* (2).

The trend of decisions thus seems to be in favour of the view that if it should appear on the face of the return that a person is in detention in execution of a sentence on indictment on a criminal charge, that would be a sufficient answer to an application for a writ of *habeas corpus*. Assuming, however, that it is open even in such cases to investigate the question of jurisdiction, as was held in *In re Authers* (3) it appears to us that the learned judges who

(1) [1942] A. C. 284. (2) I.L.R. 44 Cal. 723. (3) (1889) 22 Q. B. D. 345.

decided that case went too far in holding that notwithstanding the fact that the conviction and sentence had been upheld on appeal by a court of competent jurisdiction, the mere fact that the trial court had acted without jurisdiction would justify interference, treating the appellate order also as a nullity. Evidently, the appellate court in a case which properly comes before it on appeal, is fully competent to decide whether the trial was with or without jurisdiction, and it has jurisdiction to decide the matter rightly as well as wrongly. If it affirms the conviction and thereby decides wrongly that the trial court had the jurisdiction to try and convict, it cannot be said to have acted without jurisdiction, and its order cannot be treated as a nullity. It is true that there is no such thing as the principle of constructive *res judicata* in a criminal case, but there is such a principle as finality of judgments, which applies to criminal as well as civil cases and is implicit in every system, wherein provisions are to be found for correcting errors in appeal or in revision. Section 430, Criminal Procedure Code, and section 355 of the Hyderabad Criminal Procedure Code, have given express recognition to this principle of finality by providing that " Judgments and orders passed by an Appellate Court upon appeal shall be final, except in cases provided for in section 417 and Chapter XXXII."

It is well settled that if a court acts without jurisdiction, its decision can be challenged in the same way as it would have been challenged if it had acted with jurisdiction, *i. e.*, an appeal would lie to the court to which it would lie if its order was with jurisdiction. [See *Ranjit Misser* v. *Ramudar Singh* (1); *Bandiram Mookerjee* v. *Purna Chandra Roy* (2); *Wajuddi Pramanik* v. *Md. Balaki Moral* (3); and *Kalipada Karmorkar* v. *Sekher Bashini Dasya*(4)]. Therefore, the High Court at Hyderabad had jurisdiction to hear and decide the appeal in this case. In view of this fact, the deprivation of life or liberty, upon which the case of the

(1) (1912) 16 C. L.J. 77.
(2) I. L. R. 45 Cal. 926 of 929.
(3) 30 C. W. N. 63 at 64.
(4) 24 C. L. J. 233.

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petitioners is founded, has been brought about in accordance with a procedure established by law, and their present detention cannot be held to be invalid.

There is also another difficulty in the way of the petitioners which may be briefly stated. From the facts already narrated, it should be clear that the judgment of the High Court affirming the convictions and sentences of the petitioners had acquired finality in the fullest sense of the term before the 26th January, 1950, and by reason of this finality, no one could question the validity of the convictions at the date when the Constitution came into force. Can then a new law or a change in the old law entitle us to reopen a transaction which has become closed and final? It is common ground that the provisions of the Constitution which are invoked here, were not intended to operate retrospectively, and therefore something which was legally good on the 25th January, 1950, cannot be held to have become bad on the 26th January, 1950. If we had no jurisdiction to sit in appeal over the judgment of the Hyderabad High Court, can we now reinvestigate the cases and pass orders which cannot be passed without virtually setting aside the judgments of the High Court which have become final. Can we, in other words, do indirectly what we refused to do directly? It is argued that we are asked not to reopen a past transaction but to deal with the present detention of the petitioners, *i. e.*, their detention at this moment. But, how can we hold the present detention to be invalid, unless we reopen what could not be reopened prior to the 26th January, 1950. This is, in our opinion, one of the greatest difficulties which the petitioners have to face, and it rests not merely on technical grounds but on sound legal principles which have always been, and should be, respected.

The learned counsel for the petitioners tried to make much of the fact that the petitioners had lost their right to appeal by a sudden change in the law and by the delay on the part of the High Court in the disposal of their application for leave to appeal to the Judicial Committee of Hyderabad. That may be unfortunate,

but there can be no justification for widening the scope of the existing remedial laws beyond legitimate bounds. A similar argument was addressed in *Ex parte Lees*(1), and Lord Campbell C. J. met it with these observations :—

" It is alleged, on the part of the prisoner, that the proceedings were upon a repealed statute, and that there were errors in the judgment and hardships and irregularities in the proceedings. If such allegations are well-founded, and obstacles are found to prevent any remedy by appeal to the Privy Council, or by writ of error to this Court, we apprehend that the advisers of the Crown will take the matter into their consideration, and form their judgment with respect to any alleged error, wrong or hardship which may be brought before them ; and, if any such be established to their satisfaction, will advise the Crown to give the relief to which they may think the applicant entitled, by pardon or mitigation of punishment. We have no authority to interfere."

All that we can say is that the petitioners accused in Criminal Case No. 17 of 1949 have made out a *prima facie* case that there was no specific order of the Civil Administrator directing the case to be tried by a Special Tribunal and they have shown that in that case one of the three members of the Tribunal gave a dissenting judgment which is more favourable to the accused than the majority judgment. While the facts were being analysed before us, it was brought to our notice that there were altogether six accused in Case No. 17, out of which five have been convicted and sentenced to death in Case No. 18 also. The remaining accused, Kallur Gowndla Elladu, is thus the only person to be affected by the arguments relating to the trial being without jurisdiction, and a further point in his favour is that the fatal blow on which the charge of murder is based, is not attributed to him but to another person and no definite overt acts are ascribed to him. We have no doubt that these facts will receive

(1) (1858) E. B. & E. 828.

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due consideration at the hands of the executive authorities.

As the points involved in the petitions for special leave to appeal to this Court against the order of the High Court refusing to grant relief under article 226 of the Constitution are the same as those involved in the petitions under article 32, all the six petitions are dismissed. It may however be observed that in this case we have not considered it necessary to decide whether an application under article 32 is maintainable after a similar application under article 226 is dismissed by the High Court, and we reserve our opinion on that question.

Petitions dismissed.

Agent for the petitioners: *I. N. Shroff.*

Agent for the respondents: *P. A. Mehta.*