1953

Jan. 19.

SYED QASIM RAZVI

v.

THE STATE OF HYDERABAD AND OTHERS

(and other cases)

[PATANJALI SASTRI C.J., MUKHERJEA, CHANDRASEKHARA AIYAR, VIVIAN BOSE and GHULAM HASAN JJ.]

Constitution of India, 1950, arts. 13, 14, 21—Special Tribunal Regulation (V of 1358-F, Hyderabad)—Trial under Regulation commenced before 26th January, 1950—Trial continued after that date—Validity of conviction—Regulation, whether discriminatory and void—Question whether discriminatory provisions were applied in fact after 26th January, whether relevant.

The Military Governor of the Hyderabad State promulgated on October 30, 1948, a Regulation called the Special Tribunal Regulation, V of 1358 Fasli, under which a Special Tribunal was constituted consisting of three members appointed by the Military Governor. The Regulation provided that the Military Governor may, by general or special order, direct that any offence or class of offences should be tried by such Tribunal, and the procedure for trial laid down in the Regulation differed from the provisions of the Hyderabad Criminal Procedure Code in the following material particulars among others, *viz.*, the Tribunal had power to take cognisance of offences without committal, there was no provision for trial with jury or assessors, the language of the Tribunal was to be English, only a memorandum of the evidence need be taken, there was no provision for *de novo* trial on change of personnel, and there was no provision for transfer, revision or confirmation of sentences. The cases against the petitioners, who were charged with rioting, dacoity, arson and other offences, were directed to be tried by the Special Tribunal on October 6, 1949. The accused were convicted in September, 1950, and the conviction on some of the charges was upheld by the High Court on appeal in April, 1951. The accused appealed to the Supreme Court and also applied under art. 32 of the Constitution of India for quashing the orders of the High Court and the Special Tribunal on the ground that the Special Tribunal Regulation became void on the 26th January, 1950, as its provisions contravened articles 14 and 21 of the Constitution which came into force on that date, and the continuation of the trial and conviction of the petitioners after that date was illegal:

Held, per PATANJALI SASTRI C.J., MUKHERJEA and CHANDRASEKHARA AIYAR JJ. (BOSE and GHULAM HASAN JJ. dissenting). (i) Article 13 of the Constitution had no retrospective effect and, even

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though some of the provisions of the impugned Regulation contravened art. 14, the Regulation must be held to be valid for all past transactions and for enforcing rights and liabilities accrued before the advent of the Constitution, and on this principle the order made by the Military Governor referring the cases to the Special Tribunal cannot be impeached, and the Special Tribunal must be deemed to have taken cognisance of the cases properly and its proceedings up to the date of the coming in of the Constitution must be regarded as valid.

(ii) In a case like this where part of the trial could not be challenged as bad, it is incumbent on the court to consider, *first*, whether the discriminatory provisions of law could be separated from the rest and even without them a fair measure of equality in the matter of procedure could be secured to the accused and *secondly*, whether the procedure actually followed did or did not proceed upon the discriminatory provisions. A mere threat or possibility of unequal treatment is not sufficient to invalidate the subsequent proceedings.

(iii) On the facts the accused had substantially the benefit of a normal trial, though there were deviations in certain particulars and the conviction of the petitioners could not be set aside merely because the Constitution of India came into force before the completion of their trial.

BOSE J.—(i) Under Art. 13 (1) of the Constitution a trial cannot be legally continued after the Constitution on the basis of a law which offends the fundamental provisions of the Constitution and therefore which, though good when made, would have been bad if it had been passed after the Constitution, because the most vital part of a trial is its conclusion and therefore a conviction after the Constitution based on matter, or as a result of procedure, which is abhorrent to the Constitution would be bad. This is not giving retrospective effect to the Constitution because the conviction in such a case is after the Constitution and would be based on matter which offends its fundamental guarantees.

(ii) In testing the validity of a law it is irrelevant to consider what has been done under it, for a law is either constitutional or not and its validity or otherwise cannot depend on what has been accomplished under its provisions.

(iii) The provisions of the Special Tribunal Regulation which confer an unfettered discretion on the Military Governor to direct any case or cases to the Tribunal without laying down any basis for classification of the cases, the absence of committal proceedings, the deprivation of the rights of revision and transfer and of the right to a *de novo* trial, the right of the Tribunal to adopt a summary procedure, and in particular the elimination of the Urudu language which is the Court language of Hyderabad and of the right to have sentences confirmed, are all discriminatory provisions; most of these provisions cannot be separated from the

good portions of the Regulation. The whole Regulation therefore became void on the 26th of January, 1950, and the trial of the petitioners after that date was under a void law; there was also discrimination in fact after the 26th January as the proceedings were conducted in English even after that date. The conviction of the petitioners was consequently illegal.

GHULAM HASAN J.—The discriminatory provisions of the Regulation stood in the way of the petitioners even after the 26th January, 1950, and prevented them from exercising their right to apply for bail, for transfer or for revision and this was quite sufficient for holding that the Regulation violated art. 14 and was therefore void under art. 13. The question whether the discriminatory provisions were in fact applied to the petitioners' cases after the 26th January, 1950, was irrelevant. The discriminatory provisions are not severable from the rest of the Regulation and the trial held under the Regulation was therefore void under art. 13 read with arts. 14 and 21 and the conviction of the petitioners was illegal.

Anwar Ali Sarkar v. *The State of West Bengal* ([1952] S.C.R. 284), *Lachmandas Kewalram Ahuja* v. *The State of Bombay* ([1952] S.C.R. 710) *explained* and *distinguished.*

ORIGINAL JURISDICTION. Petitions Nos. 172 and 368 of 1952 under Art. 32 of the Constitution. Cases Nos. 276, 277, 278, 279 and 280 of 1951, being appeals under Arts. 132 (1) and 134 of the Constitution from the Judgment and Order of the 13th April, 1951, of the Hyderabad High Court in Criminal Appeals Nos. 1449 and 1453 of 1950 were also heard along with these petitions.

A. A. Peerbhoy and *J. B. Dadachanji* for the petitioners—appellants.

V. Rajaram Iyer, Advocate-General of Hyderabad (*K.S.R. Chari,* with him) for the respondent (State of Hyderabad).

1953. January 19. The Judgment of Patanjali Sastri C. J. and Mukherjea and Chandrasekhara Aiyar JJ. was delivered by Mukherjea J. Vivian Bose and Ghulam Hasan JJ. delivered separate judgments.

(*Petition No. 172 of 1952 and Case No. 276 of 1951*).

MUKHERJEA J.—Syed Qasim Razvi, the appellant in this appeal, was one of the accused in what is

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known as the Bibinagar dacoity case which took place within the State of Hyderabad and in which, according to the prosecution, a serious raid was committed by a party of armed Razakars in village Bibinagar, about 21 miles from the city of Hyderabad, attended with robbery, looting, arson, assault and other violent acts on the afternoon of 10th January, 1948. The First Information Report was lodged on the day following, but the police administration of the State of Hyderabad was at that time under the complete control of the Razakars and they tried to minimise the gravity of the occurrence as far as possible and there was neither any proper police investigation nor any serious attempt to arrest the culprits or bring them to trial. It was on the 28th of August, 1949, that is to say, after a lapse of 19 months after the occurrence, that a charge-sheet was presented before the Special Tribunal No. 4 at Trimulgherry, Secunderabad, against the appellant and six other persons. The Tribunal was constituted in accordance with the provisions of the Special Tribunal Regulation (Regulation V of 1358F) and as provided for in section 2 of the Regulation, it consisted of three members appointed by the Military Governor. Under section 3 of the Regulation, it was competent to the Military Governor by general or special order to direct that any offence or class of offences should be tried by such tribunal and the procedure to be followed by such tribunal was laid down in section 4 of the Regulation. The case against the appellant and his co-accused was formally referred to the Special Tribunal by an order of the Military Governor dated the 6th of October, 1949; but as the charge-sheet had been submitted on a previous date, another order was passed on 8th of October, 1949, validating the presentation of the charge-sheet. The trial commenced before the Special Tribunal on 24th October, 1949, and on that day the Special Public Prosecutor opened the case on behalf of the prosecution. The procedure followed in the case was the warrant procedure and the prosecution examined 40 witnesses in

all before closing its case. The examination-in-chief of all these witnesses was finished on the 21st November, 1949, and the appellant, at that stage, chose to cross-examine only one witness, namely, the fortieth or the last one and this was done on the 22nd November, 1949. On 29th November, 1949, the accused was examined under section 273 of the Hyderabad Criminal Procedure Code which corresponds to section 342 of the Indian Criminal Procedure Code, and on the 5th of December following, charges were framed against him under sections 123, 124, 330 and 177 read with section 66 of the Hyderabad Penal Code. The cross-examination of 18 prosecution witnesses was finished before the 26th of January, 1950, and the rest of the witnesses were cross-examined after that date. The accused was examined again on 26th February, 1950.

By their judgment dated the 11th September, 1950, the Special Tribunal convicted the appellant on all the charges mentioned above and sentenced him to 2 years' rigorous imprisonment under each of the sections 123, 124 and 177 read with section 66 and to 7 years' rigorous imprisonment under section 330, the sentences to run concurrently. There was an appeal taken by the appellant against this decision to the High Court of Hyderabad. The High Court by its judgment dated the 13th of April, 1951, allowed the appeal to this extent only, namely, that it acquitted the accused of the charge under section 123 of the Hyderabad Code, but otherwise dismissed the appeal and affirmed the conviction and sentence passed by the Special Tribunal. On 6th of August, 1951, the High Court gave leave to the accused to appeal to this court under articles 132 and 134 of the Constitution; and an appeal has been filed in pursuance of this certificate. The records of the appeal have not been printed as yet, but in the mean time the appellant presented an application under article 32 of the Constitution praying for a writ in the nature of *certiorari* for quashing the orders of the High Court as well as of the Special Tribunal

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referred to above and for releasing him on the ground that the proceedings before the Special Tribunal became void after 26th of January, 1950, as they conflicted with the provisions of articles 14 and 21 of the Constitution. As the trial became bad in law after 26th January, 1950, the resulting conviction and sentence were, it is said, illegal also, and the appellant is entitled to be released from his imprisonment.

When this petition came up for hearing, a question was raised by the learned Advocate-General for the State of Hyderabad as to whether a petition under article 32 would be the proper remedy in a case like this having regard to the fact that the High Court, which was a properly constituted court and was competent to go into the question of jurisdiction of the Special Tribunal, had already dealt with this matter. Without expressing any opinion on this point, we decided to hear arguments on the questions raised treating them as preliminary points in the appeal itself. Whether the appeal will be heard further on its merits will depend upon the decision we arrive at in the present hearing.

The contention of Mr. Peerbhoy, who appeared in support of the appeal, mainly is that the procedure laid down in the Special Tribunal Regulation for trial of offences departs, in material particulars, from that under the ordinary law obtaining in Hyderabad and these differences do abridge the rights of the accused and deprive them of benefits to which otherwise they would have been entitled under the general law. *Prima facie*, therefore, the procedure for trial under the Special Tribunal Regulation is discriminatory. It is urged that this discrimination could not be justified on any reasonable principle of classification. No attempt was made in the Regulation to classify the offences either with regard to their nature or the area in which they were committed. An unfettered discretion was left to the Military Governor to refer any and every case as he liked to be tried by the Special Tribunal without any rule or principle to

guide his discretion. The whole procedure, therefore, was void according to the principles laid down by this court in the case of *Anwar Ali Sarkar* v. *The State of West Bengal*(1). It is true that in this case the Constitution had not come into force when the trial was commenced and a portion of the trial had already been gone through prior to the 26th of January, 1950; but it is urged that as the continuance of the procedure became void on and from the date of the Constitution, the conviction and sentence resulting from the adoption of such procedure could not be upheld. In this connection, reliance has been placed upon the case of *Lachmandas Kewalram Ahuja* v. *The State of Bombay*(2) decided by this court which the learned counsel contends exactly covers the present point.

The questions raised are undoubtedly important and they involve an examination of some of the earlier pronouncements of this court.

The first question that requires consideration is as to whether the procedure for trial of criminal offences laid down in the Special Tribunal Regulation is discriminatory in its character and offends against the provision of article 14 of the Constitution? If it is found that some of the provisions at least are discriminatory, the question would then arise as to what exactly is the legal position in a case like this where admittedly a considerable portion of the trial was gone through prior to the coming into force of the Constitution and that portion is immune from challenge on the ground of discrimination, as the rights guaranteed under the Constitution are not retrospective in their operation. If the procedure subsequently followed was also discriminatory, it is not disputed that the conviction of the accused could not stand. But if it is found that there was no occasion after the 26th of January, 1950, to apply any of the provisions of the Regulation which are discriminatory in their character and if as a matter of fact the procedure that was actually followed was substantially

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the same as obtains under the ordinary law, could it be said that the whole trial is vitiated and the resulting conviction and sentence must necessarily be set aside?

Looking first of all to the provisions of the Special Tribunal Regulation, it is to be noticed that the preamble to the Regulation does not specify the object of the enactment or the legislative policy behind it. Apparently an unfettered discretion has been vested in the Military Governor and he can send any offence or class of offences to be tried by the Special Tribunal in any way he likes and there is no objective expressly stated in the statute itself in relation to which his discretion is to be guided or controlled. It is indeed a matter of common knowledge that this Regulation was promulgated just after the termination of the police action in Hyderabad when a most alarming and unsettled state of affairs prevailed in the State. There was undoubtedly ample justification for a special measure like this; but the question still arises whether there are provisions in the Regulation, which being repugnant to the fundamental rights enunciated in the Constitution, could not be enforced after the Constitution came into force? The provisions in the Regulation were undoubtedly intended to shorten criminal trials and constitute special courts which would be left in entire charge of the cases referred to them, leaving the ordinary courts to do their normal work. Under section 6 of the Regulation, a Special Tribunal has been given all the powers which are conferred on a court of session by the Hyderabad Criminal Procedure Code. Section 4(1) provides that it can take cognizance of offences without the accused being committed to it for trial; and under sub-section (7) of this section, the tribunal is enjoined to follow the procedure prescribed for summary trials by Magistrates, though it may, when it considers proper, follow the warrant procedure. It is open to the Special Tribunal to direct that the proceedings before it should be conducted in the English language. The Tribunal is not bound to

take down evidence at length in writing and it need only cause a memorandum of the substance of what each witness deposes to be taken down in English. But here again if it considers proper, it can direct that the entire evidence should be taken down. Among other changes, the Regulation provides that the tribunal would not be bound to adjourn any trial for any purpose, there would be no *de novo* trial if there is a change in its personnel, it can try any accused person in his absence if it is satisfied that the absence has been brought about by the accused himself with a view to impede the course of justice, and if it considers proper, it can exclude the public from any proceeding. Section 7 provides that the tribunal can pass any sentence authorised by law and an appeal would lie against its orders to the High Court in the same way as orders of the Sessions Court would be appealable under the provisions of the Hyderabad Criminal Procedure Code. The powers of revision and transfer are wholly taken away and so also are the provisions relating to confirmation of sentences. These, in brief, are the features of the procedure laid down for trial before the Special Tribunal.

It is admitted that at present no system of jury trial obtains in the State of Hyderabad; there is no doubt the provision for trial with the aid of assessors in the city of Hyderabad itself, but there is no such provision for areas outside the city. Under the ordinary procedure, the present case could not have been tried with the aid of assessors and the appellant cannot complain of inequality in this respect. The committal proceedings are undoubtedly eliminated but it has been brought to our notice by the learned Advocate-General appearing for the State of Hyderabad that the preliminary enquiry before committal is not compulsory under the Hyderabad Criminal Procedure Code; and under section 267-A of the Code, a Magistrate is competent without recording any evidence, or after recording some portion of the evidence, to commit an accused for trial by the

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Sessions Court if he is satisfied that there are sufficient grounds for such committal. It appears therefore that the elimination of the committal proceeding is not by itself a substantial departure from the normal procedure.

Mr. Peerbhoy laid much stress upon the provision of the Regulation which authorises the tribunal to direct that the proceedings before it shall be conducted in the English language. This again cannot be held to be discriminatory as the Hyderabad Code nowhere prescribes any particular language to be the language of the court. There is no doubt that ordinary court proceedings in Hyderabad are conducted in Urdu, but Urdu is certainly not the spoken language of even the majority of the people within the Hyderabad State. If the accused in a particular case is not acquainted with the English language and if by reason of the absence of adequate arrangements to have the proceedings interpreted to him in the language he understands, he is prejudiced in his trial, obviously it might be a ground which may be raised on his behalf in an appeal against his conviction. But in our opinion it cannot be said that the provision in the Regulation relating to proceeding being conducted in English if the tribunal so desires *per se* violates the equal protection clause in the Constitution.

The power of granting adjournment rests, even under ordinary law, in the exercise of a sound discretion by the court and is not a matter of much consequence. The court can also under the ordinary law exclude members of the public or particular persons from the court room in such circumstances as it considers proper (vide section 283 of the Hyderabad Code). As regards *denovo* trial, when there is a change in the personnel of the court, the provision of section 350 of the Indian Criminal Procedure Code is to the effect that when a case after being heard in part goes for disposal before another Magistrate, the accused has the right to demand, before the second Magistrate commences the proceedings, that the witnesses

already examined should be re-examined and reheard. Under the corresponding section (section 281) of the Hyderabad Code, however, though the accused can demand re-examination of the witnesses, the Magistrate can disallow such prayer if he considers proper, although the disallowing of such prayer may be a ground for ordering a retrial by the High Court. Obviously, the provision in the Special Regulation deviates only to this extent from the ordinary procedure. The continuance of a trial in the absence of the accused when the court is satisfied that the absence has been brought about by the accused himself to impede the course of justice, is another special feature of the trial before the Special Tribunal. The two material departures from the normal procedure are to be found in the provisions contained in sub-sections (2) and (7) of section 4 of the Regulation. Sub-section (2) authorises the tribunal to dispense with recording the evidence *in extenso* and provides that a record of the memorandum of the substance of the deposition of each witness would be sufficient. There is a proviso introduced by sub-section (2) (a) which says that the above provision shall not preclude a special Tribunal from directing in respect of any trial that the evidence should be taken down at length. Sub-section (7) lays down that unless something to the contrary has been provided for in the Regulation, the tribunal should follow the procedure of summary trial, though even here it can adopt the warrant procedure for reasons which it has got to record in writing.

The provision relating to summary trial irrespective of the nature of the offence and also that relating to recording of evidence in a summary manner may be considered prejudicial to the accused and may normally deprive him of benefits which are enjoyed by other persons similarly situated who are tried under the ordinary law. One thing noticeable in the Special Regulation with regard to these provisions is that an option has been given to the Special Tribunal to adopt the warrant procedure in such cases as

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it considers necessary and it can also direct that the evidence should be taken down *in extenso*. In the case before us it is admitted that evidence was recorded in full and the procedure followed was the warrant and not the summary procedure. Mr. Peerbhoy argues that a law, which allows the summary procedure to be followed or the recording of evidence to be dispensed with at the discretion of the court without any attempt to specify the class of cases where such exceptional provisions should be applied, is *prima facie* discriminatory and is invalid under article 14 of the Constitution irrespective of the fact as to whether or not such provisions were actually applied in a particular case. Whatever may be the position where provisions of this character are laid down in a statute enacted after the Constitution came into force, in a case like the present, where the proceedings prior to 26th January, 1950, would have to be assumed to be valid, the question as to what procedure was actually followed after that date may be relevant for the purpose of determining whether the trial could be regarded as vitiated on the ground of infringement of the equal protection rule. We will have to deal with this matter more fully later on.

Mr. Peerbhoy argues that even the substitution of warrant procedure for sessions procedure constitutes a substantial difference. We cannot accept this contention as sound. If we leave out the committal proceeding, which is not compulsory under the Hyderabad law, the accused could not be in a really worse position by reason of the warrant procedure being followed instead of the sessions procedure. In the case before us it appears that the prosecution had examined all their witnesses before the framing of the charge and the accused was given an opportunity to cross-examine them at that stage. He chose to cross-examine only one of these witnesses and after the framing of the charge all the prosecution witnesses were cross-examined by him. Our attention has been drawn to the provision of section 267-A (2) (b) of the Hyderabad Criminal Procedure Code which

speaks of recross-examination by the accused in a sessions case. It appears that under the provisions of the Hyderabad Code, in a sessions trial the prosecution witnesses are first examined and as soon as the examination-in-chief of each one of them is finished they could be cross-examined on behalf of the accused. After the prosecution has closed its case and before the accused produces his defence witnesses, he is allowed to recross-examine, if he so desires, any of the prosecution witnesses, though such recross-examination is limited to matters which were not put to the witnesses in the previous cross-examination. Neither side could enlighten us on the point as to whether this is allowed only when the committing Magistrate does not examine any witness before the commitment order or it is applicable also when the prosecution witnesses are examined and cross-examined at the committal stage. We do not think, however, that it is correct to say that during the sessions trial itself there are three rights of cross-exmination given to the accused as Mr. Peerbhoy contends. The accused can cross-examine the prosecution witnesses as and when they are examined by the prosecution and he has a right of second cross-examination at the end of the prosecution case and before he calls his own witnesses, though the latter right is a thin and attenuated one, being confined to such matters as were omitted during the first cross-examination. In the warrant procedure which has been followed in the present case, the accused also got two rights of cross-examination, one before the framing of the charge and the second after the charge was framed. In our opinion, this cannot be said to be a substantial difference in the procedure resulting in prejudice to the accused.

Mr. Peerbhoy further argued that the provision for appeal contained in the Regulation deprived him of the right of second appeal which is allowed under the Hyderabad Code. This argument, in our opinion, is based upon a misconception. It appears from section 355 of the Hyderabad Criminal Procedure Code that there are second appeals allowed under the

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Hyderabad law even in criminal cases; and when it is said that an appeal lies to the High Court from the order of a Sessions Judge, it contemplates that the order of the Sessions Judge may be passed by him either as an original court or in appeal from the decision of a District Magistrate or Assistant Sessions Judge. But in the present case the original trial was by the Special Tribunal which was invested with the powers of a sessions court and consequently only one appeal would lie to the High Court. It is said that the case could have been tried by the District Magistrate and in that case the accused could have one appeal to the Sessions Judge and a second one to the High Court under the Hyderabad law. This contention rests on a pure speculation and is hardly tenable. One of the charges against the accused was a charge of dacoity under section 330 of the Hyderabad Penal Code. On a conviction under this section the court is empowered to sentence the accused to a term of rigorous imprisonment which may extend up to 10 years. Unless, therefore, the District Magistrate was of the opinion that the case did not merit a sentence beyond 4 years of rigorous imprisonment, he was bound to refer the case to be tried by a court of session. This is not a matter of which really any grievance could be made.

The other departure noticeable in the Special Regulation is the withdrawal of the provisions relating to revision and transfer. Another thing that has been omitted from the Special Tribunal Regulation is the provision relating to the confirmation of certain sentences which under the ordinary law have to be confirmed by higher authorities. According to the Hyderabad Code, the High Court has not only to confirm death sentences, but also sentences of transportation for life and of imprisonment for a period exceeding 10 years. The death sentences have got to be further confirmed by the Nizam.

It would appear from what has been stated above that there are a few provisions in the procedure for trial by a Special Tribunal appointed under the

Regulation mentioned above, which differ from ordinary procedure, and they are *prima facie* prejudicial to the accused. Under article 13 (1) of the Constitution, all laws in force in the territory of India immediately before the commencement of the Constitution in so far as they are inconsistent with the fundamental rights under Part III of the Constitution shall, to the extent of such inconsistency, be void. The argument of Mr. Peerbhoy seems to be that it may be that all the provisions relating to trial by a Special Tribunal are not bad, but as some of them undoubtedly are, the whole law on the face of it is discriminatory and must be held to be void as conflicting with the equal protection clause, and the question as to how it was actually worked out in a particular case is not a material fact for consideration at all. In support of this contention the learned counsel relies upon the view accepted by the majority of this court in the case of *State of West Bengal* v. *Anwar Ali Sarkar* (1). In our opinion, the position here is materially different from that in *Anwar Ali Sarkar's* case (1). In *Anwar Ali Sarkar's* case (1) the opinion expressed by the majority of this court was that section 5 (1) of the West Bengal Special Courts Act was *ultra vires* the Constitution in so far as it authorised the State Government to direct any case to be tried by the Special Court. The clause was held to be invalid, as the Act, which was passed after the coming into force of the Constitution, did not mention in what cases or offences such directions could be given, nor did it purport to lay down the criterion or the basis upon which the classification was to be made. As this portion of section 5 (1) of the statute was on the face of it discriminatory, the question as to how it was applied on the facts of a particular case could not and did not arise.

In the case before us, the impugned Regulation was in operation from long before the date of the Constitution. Section 3 of the Regulation, which is similar to section 5 (1) of the West Bengal Special

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Courts Act, might be in conflict with the provision of article 14 of the Constitution, but as has been held by this court in *Keshavan Madhava Menon's* case (1), the effect of article 13 (1) of the Constitution is not to obliterate the entire operation of the inconsistent laws or to wipe them out altogether from the statute book; for to do so will be to give them retrospective effect which they do not possess. Such laws must be held to be valid for all past transactions and for enforcing rights and liabilities accrued before the advent of the Constitution. On this principle, the order made by the Military Governor, referring this case to the Special Tribunal, cannot be impeached and consequently the Special Tribunal must be deemed to have taken cognizance of the case quite properly, and its proceedings up to the date of the coming in of the Constitution would also have to be regarded as valid. To quote the observation of our brother Das J. in *Lachmandas Kewalram Ahuja* v. *The State of Bombay* (2), "as the Act was valid in its entirety before the date of the Constitution that part of the proceeding before the Special Judge which up to that date had been regulated by the special procedure cannot be questioned." The question now arises, how is the validity of the proceedings subsequent to the date of the Constitution to be determined?

It is not disputed that under article 13 (1) of the Constitution those provisions of the Special Tribunal Regulation which are in conflict with article 14 of the Constitution, became void as soon as the Constitution came into force; but article 13 (1) does not make the whole statute invalid, it invalidates only those provisions which are inconsistent with the fundamental rights guaranteed under Part III of the Constitution and simply because the trial was continued even after 26th January, 1950, under the same Regulation, would not necessarily render the subsequent proceedings invalid. All that the accused could claim is that what remained of the trial must not deviate

(1) [1951] S.C.R. 228. (2) [1952] S.C.R. 710.

from the normal standard in material respects so as to amount to a denial of the equal protection of laws within the meaning of article 14 of the Constitution. For the purpose of determining whether the accused was deprived of such protection, we have got to see first of all whether after eliminating the discriminatory provisions in the Regulation it was still possible to secure to the accused substantially the benefits of a trial under the ordinary law; and if so, whether that was actually done in the present case?

Mr. Peerbhoy argues that once it is held that there are in the Special Tribunal Regulation provisions which are obnoxious to the equal protection clause, any proceeding under the Regulation after the 26th of January, 1950, must be held to be totally invalid under article 13 (1) of the Constitution, and it is not material to enquire whether the trial could go on without the discriminating provisions or whether as a matter of fact these provisions were at all applied. It is the possibility of unequal application of law or the threat to equality that makes the Regulation invalid after the Constitution comes into force and consequently the question of actual prejudice to the accused is not a relevant matter for consideration. In support of this contention the learned counsel relies strongly upon the decision of this court in *Lachmandas Kewalram Ahuja* v. *The State of Bombay* (1). We are not convinced that this line of reasoning is correct. In *Lachmandas's* case(1) the trial was held before a Special Tribunal constituted under section 10 of the Bombay Public Safety Measures Act, 1947, and in accordance with the procedure laid down in that Act. The procedure was pronounced to be discriminatory in material particulars and though that part of the trial, which was held prior to 26th January, 1950, could not be assailed, the continued application of the discriminatory procedure after that date was held to be illegal; and the result was that the conviction of the accused

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was set aside and a retrial ordered. It appears to us that in *Lachmandas's* case(1) the present question was neither raised nor considered, namely, as to whether after eliminating the discriminatory provisions in the statute it was still possible to go on with the trial and secure to the accused substantially the benefits of a trial under the normal procedure. On the other hand, it was assumed throughout that it was not possible to proceed with the trial without following the discriminatory procedure and as that procedure became void on the coming into force of the Constitution, the jurisdiction of the Special Judge practically came to an end. Das J. who delivered the majority judgment of this Court in *Lachmandas's* case(2) expressly observed as follows:

"Indeed in a sense the Special Judge's jurisdiction came to an end, for he was enjoined to proceed only according to the special procedure and that procedure having become void as stated above, he could not proceed at all as a Judge of a Special Court constituted under the impugned Act."

Whether this assumption was well-founded or not it is not profitable for us to discuss at the present stage; but it is clear that this aspect of the case was not presented to the court at all by the learned counsel on either side and so was not considered by the court. The decision in *Lachmandas's* case(1) cannot, therefore, be put forward as an authority against the view which we have indicated above. In cases of the type which we have before us where part of the trial could not be challenged as bad and the validity of the other part depends on the question as to whether the accused has been deprived of equal protection in matters of procedure, it is incumbent upon the court to consider, firstly, whether the discriminatory or unequal provisions of law could be separated from the rest and even without them a fair measure of equality in the matter of procedure could be secured to the accused. In the second place, it has got to consider whether the procedure actually

(1) [1952] S.C.R. 710. (2) [1952] S.C.R. 710, 735.

followed did or did not proceed upon the basis of the discriminatory provisions. In our opinion, a mere threat or possibility of unequal treatment is not sufficient. If actually the accused has been discriminated against, then and then only he can complain, not otherwise.

We may mention here that the impossibility of giving the accused the substance of a trial according to normal procedure at the subsequent stage may arise not only from the fact that the discriminatory provisions were not severable from the rest of the Act and the court consequently had no option to continue any other than the discriminatory procedure; or it may arise from something done at the previous stage which though not invalid at that time precludes the adoption of a different procedure subsequently. Thus if the normal procedure is trial by jury or with the aid of assessors, and as a matter of fact there was no jury or assessor trial at the beginning, it would not be possible to introduce it at any subsequent stage. Similarly having once adopted the summary procedure, it is not possible to pass on to a different procedure on a later date. In such cases the whole trial would have to be condemned as bad. As has been said above, the case of *Lachmandas Kewalram Ahuja* v. *The State of Bombay* (1) proceeded on the assumption that it was not possible for the Special Court to avoid the discriminatory procedure even after 26th January, 1950. The matter was not investigated but that was the assumption upon which this court proceeded. One reason why this assumption was not combated might have been that the ordinary trial in that case should have been with the aid of assessors and as there was no assessor trial at the beginning, it was not possible to adopt it afterwards.

We will now proceed to examine the facts of this case in the light of the principles enunciated above. It may be mentioned here that after the learned counsel on both sides had finished their arguments

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on questions of law, we gave the appellant an opportunity to place materials before us for the purpose of showing to what extent he had been actually discriminated against and prejudiced in the trial that was held after the coming into force of the Constitution. He has filed a long affidavit setting out in an elaborate manner his alleged grievances and we gave the parties a further hearing upon it.

As we have already stated, no exception could be taken to the Special Tribunal's taking cognizance of the case under an order of the Military Governor as all this happened long before the advent of the Constitution; and it cannot be urged that the creation of a Special Court by itself was an inequality in the eye of law. Apart from other circumstances, the present case was undoubtedly a big one and the trial was expected to take a considerable period of time before it could be completed. To allow it to go before the ordinary court would mean nothing else but blocking the hearing of all other cases for an indefinite length of time. There was nothing *per se* unreasonable in appointing a Special Court and section 13 of the Hyderabad Criminal Procedure Code expressly empowers the Government to confer the powers of a court on any Government servant in any local area or with respect to a particular case or cases and such person is denominated a special judge. As regards the procedure to be followed by the Special Tribunal, the Regulation undoubtedly prescribes the procedure for summary trial by a Magistrate. If the tribunal had adopted that procedure, we would have no other alternative but to declare the whole trial as invalid for although the summary procedure could not have been challenged as illegal prior to the coming in of the Constitution, it could not possibly have been changed to a different procedure after 26th January, 1950. The entire procedure would then have to be held as invalid as conflicting with the equal protection clause. The tribunal however adopted the warrant procedure which it was entitled to do under the Regulation itself; and as we have

indicated already, the committal proceeding not being compulsory under the Hyderabad Code, the difference between a warrant procedure and a sessions procedure is not material. The recording of a memorandum of evidence in a summary manner is another discriminatory feature in the Regulation, but here again the Regulation gave an option to the tribunal to direct the recording of evidence *in extenso* and the tribunal actually did give that direction in the present case. There can be no doubt that if the option had been exercised in the other way, it would have been impossible to give the accused the substance of an ordinary trial after the passing of the Constitution. The use of the English language during the trial is not at all discriminatory as we have already said and so far as the present appellant is concerned, he could not possibly make any grievance of it. No complaint has been made by the appellant that the Special Tribunal refused to grant any adjournment that he prayed for and as there was no change in the personnel of the tribunal during the whole period of the trial, no question of *de novo* trial could at all arise. There was also no occasion for holding the trial in the absence of the accused; the appellant however in his affidavit has made a grievance of the fact that when the second local inspection was held by the court, neither he nor his lawyer was present and he merely gave a note of certain places and things for information of the tribunal. In reply to this it is stated in the affidavit filed on behalf of the State that the appellant did not want to be present and he gave a note to the tribunal stating therein all that he wanted to state. Whatever the actual facts might have been, it seems to us that this is not a matter which is connected in any way with the provision of the Regulation which enables the tribunal to proceed with the trial in the absence of the accused. The Regulation authorises the tribunal to go on with a trial in the absence of the accused only when it is satisfied that the absence has been brought about by the accused himself to impede

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the course of justice. Obviously it was not under this provision that the tribunal went to inspect the spot of occurrence in the absence of the accused. In fact, the Regulation does not say anything at all about local inspection. The provision for local inspection is contained in section 528 of the Hyderabad Code which corresponds to section 539A of the Indian Code. It is important to note that the Hyderabad Code does not say anything about giving notice to the parties before holding any local inspection, though that is necessary under the Indian law. It may be said that it is eminently desirable that the court should make the local inspection in the presence of both parties. But if there was any irregularity in this respect, that is a point which could be raised on the merits of the appeal; it has nothing to do with any provision of the Regulation in regard to which a question of conflict with the equal protection clause can arise.

The omission of the provisions relating to revision and transfer in the Regulation apparently seem to be discriminatory, but even on this point the grievance of the appellant appears to be more imaginary than real. When a Special Court is validly set up to try a particular case, a transfer of that case to some other court cannot normally be contemplated. The absence of the right of transfer in such cases is an incident of the establishment of the Special Court. Under the Regulation there is plenary power of transfer given to the Military Governor and he can exercise such power in any way he likes without any restriction or limitation. It may be that this provision was deemed sufficient to meet any exceptional circumstance that might arise. As regards the right of revision, it appears that there was only one application for revision filed by the appellant sometime before 26th of January, 1950. The allegations were want of jurisdiction of the Special Court and also irregularity of the trial by reason of misjoinder of charges. That application was dismissed on 27th February, 1950, and the order

shows that it was not rejected on the ground that the Regulation does not allow any revision to the accused, but that it was not proper to interfere with the proceeding at that stage. The questions which the appellant wanted to raise were all raised by him in the appeal from the final judgment and they have been considered by the High Court. If there is any error committed by the High Court in this respect, the appellant would be at liberty to raise that point when the appeal is heard on its merits. Considering all these facts, we have no hesitation in holding that although there were deviations in certain particulars, the accused had substantially the benefit of a normal trial in this case. The question of confirmation of sentence, we may say, is not at all relevant, for the sentences, which have been passed upon the accused, do not require any confirmation under the Hyderabad Criminal Procedure Code.

In cataloguing his grievances the appellant has stated *inter alia* in his affidavit that he was kept in military custody and also in a solitary cell, that he was separated from his fellow prisoners, that the tribunal was completely dominated by the Executive and that a stenographer was kept sitting behind him all the time that the trial was going on who took down every word that passed between him and his counsel. It is not at all necessary for us to inquire into the truth or falsity of these allegations, for even if they are true, they are irrelevant to the present enquiry. These are matters not related in any way to the question of inequality in connection with the provisions of the Special Tribunal Regulation.

Finally Mr. Peerbhoy raised an objection based on article 21 of the Constitution and contended that the appellant was not tried in accordance with the procedure established by law. What he said is, that the Military Governor had no authority under section 3 of the Regulation to refer an individual case to the Special Tribunal for trial, for it authorised him to direct the Special Tribunal to try "any offence

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whether committed before or after the commencement of this Regulation or any classes of offences", but not any individual case. A distinction is made between an "offence" and a "case", and the learned counsel points out that an offence could be described as a case only when it is connected with a particular person who is alleged to have committed it. The direction to try "any offence" must, therefore, mean a direction to try an offence described as such in the Hyderabad Penal Code, no matter by whom it is committed and not an offence committed by any particular person which is a case. We see no force in this argument. Whatever interpretation may be put upon the words "offence" and "case" in a context where both are used in the same provision, as for instance, in section 5 of the West Bengal Special Courts Act, which was under consideration in *Anwar Ali Sarkar's* case(1) we are of opinion that section 3 of the Regulation contemplates no such distinction and that it empowers the Military Governor to direct a Special Tribunal to try an offence committed by a particular person, in other words, to try an individual case. This view derives support from the language employed in the Hyderabad Special Tribunals (Termination) and Special Judges (Appointment) Regulation, 1359 F., whereby it was provided that a Special Judge appointed under that Regulation shall try "such" offences of which the trial was pending before a Special Tribunal immediately before its dissolution as were "made over" to him for trial by specified authorities [section 5(1)]. This is clearly a provision for transfer of the cases pending trial before the Special Tribunals dissolved under that Regulation to Special Judges appointed in their place. As both the Regulations must be read together dealing as they do with the constitution and termination of the same bodies and, as the later Regulation clearly uses the word "offences" in the sense of cases, it must receive the same meaning in the earlier Regulation V of 1358 F.

(1) [1952] S.C.R. 284.

The result, therefore, is that the preliminary point raised by the appellant cannot succeed. The petition under article 32 shall stand dismissed and the appeal will be posted for hearing on its merits in the usual course.

(*Petition No.* 368 *of* 1952 *and Cases Nos.* 277 *to* 280 *of* 1951).

MUKHERJEA J.—The above order in Criminal Appeal No. 276 of 1951 will govern connected Appeals Nos. 277, 278, 279 and 280 of 1951, which have been preferred respectively by Khadar Ali Khan, Mohd. Hazi Khan, Mahbat Khan and Syed Nazir Ali, the four co-accused of Qasim Razvi in the Bibinagar dacoity case, who were tried along with him by the Special Tribunal No. IV at Trimulgherry. They were sentenced to various terms of imprisonment on charges of dacoity, rioting, etc. by the Special Tribunal and the convictions and sentences were affirmed with slight modification by the High Court of Hyderabad in appeal. They have now come up to this court on the strength of a certificate granted by the Hyderabad High Court under articles 132 and 134 of the Constitution.

The appeals are not yet ready for hearing, but as in Qasim Razvi's case, the appellants have filed a petition under article 32 of the Constitution—being Petition No. 368 of 1952—attacking the validity of the trial by the Special Tribunal on the same constitutional grounds as have been urged by Qasim Razvi in his petition. We heard arguments on these questions treating them as preliminary points in the appeals. The points are identically the same as in Qasim Razvi's case; only in the affidavits, which have been filed by the petitioners at the conclusion of the hearing on questions of law, each one of them has attempted to state in his own way how he was actually prejudiced at the trial by reason of the procedure adopted by the Special Tribunal. We have been taken through these affidavits and we find nothing in

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them which would justify us in taking a view different from that taken in Qasim Razvi's case.

It has been conceded by Mr. Peerbhoy that the cases of Khadar Ali Khan and Mahbat Khan stand exactly on the same footing as that of Qasim Razvi. With regard to Syed Nazir Ali and Hazi Khan the special facts alleged are that both of them were undefended during the trial by the Special Tribunal and no lawyer was engaged on their behalf. It is said further that they were both ignorant of the English language in which the proceedings were conducted, that the presiding Judge Mr. Pinto did not understand Urdu and consequently they had no opportunity of making themselves heard. Without entering into the truth or otherwise of these allegations, it would be enough to state for our present purpose that they do not involve any constitutional point, and as we have said in the main case, the direction to conduct proceedings in English does not *per se* offend against the provision of article 14 of the Constitution. If as a matter of fact the accused did not get a fair trial or were prejudiced in their defence, these matters can very well be raised when the appeals are heard on their merits. These, however, are not questions which arise at the present stage when we are concerned only with infraction, if any, of the fundamental rights guaranteed under Part III of the Constitution. The result, therefore, is that the preliminary points raised in these appeals are overruled and the appeals would be posted for hearing on their merits in the usual course. The application under article 32 will stand dismissed.

(*Petitions Nos.* 172 *and* 368 *of* 1952 *and Cases Nos.* 276 *to* 280 *of* 1951.)

BOSE J.—I am unable to distinguish these cases in principle from *The State of West Bengal* v. *Anwar Ali Sarkar*(1), *Kathi Raning Rawat* v. *The State of Saurashtra*(2) and *Lachmandas Kewalram Ahuja and Another* v. *The State of Bombay*(3) and in particular

(1) [1952] S.C.R. 284. (2) [1952] S.C.R. 435. (3) [1952] S.C.R. 710.

from the last which is more akin to these in that there also there was a trial under a special law which held good until the Constitution of India came into force, but which was held to be bad after that date because it offended article 14 (1).

Before the Constitution the State of Hyderabad was not part of the Dominion of India. Its ruler, the Nizam, was sovereign in all material respects and had absolute powers over his subjects, including the power to legislate as he wished at his will and even at his caprice, if he so chose.

Soon after the partition of India, and in particular in the year 1948, there occurred grievous disturbances in the State which led to what is popularly known as "police action" on the part of India. In the course of these disturbances many grievous crimes were committed, and in particular, complaints were laid before the authorities of a series of grave offences said to have been committed on the 10th of January, 1948. Those are the offences with which we are concerned. The first information report relating to them was lodged the following day.

Some eight months later, namely on 13th September, 1948, there came the police action. It lasted for three days and swift on its conclusion a Military Governor was appointed for the State of Hyderabad. The Governor was immediately invested by the Nizam, who was still in law the absolute ruler of the State, with authority to legislate for the State by way of Regulation. In exercise of those powers the Military Governor promulgated the Regulation, which is now impugned, on 31st October, 1948.

Sections 2 and 3 of the Regulation empowered the Military Governor to constitute Special Tribunals by general or special order, to direct them to try any offences or classes of offences he chose to name and, further, to transfer the trial of any particular case he liked from the ordinary courts of the State to one or other of these Special Tribunals. The Regulation also prescribed a special procedure which differed from the procedure of the ordinary courts.

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In pursuance of these powers the Military Governor made an order on 26th June, 1949, constituting certain Special Tribunals, among them the one with which we are concerned. Later, on 6th October, 1949, he made another order in which he selected the offences which the present appellants and their co-accused were suspected to have committed, namely, dacoity, grievous hurt, wrongful confinement, arson, riot and destruction of evidence, he furnished particulars of time and place and gave a general description of the victims included, he named the appellants and others as accused in relation to these specific occurrences and directed that they be tried by the Special Tribunal for these offences.

I am not able to regard this as a general order directing that all offences of dacoity, grievous hurt, arson, riot, etc., by whomsoever committed, shall be tried by the Special Tribunal. The order, in my opinion, is a specific, and, what I might call "unclassified", selection of these special handpicked offences suspected to have been committed by these particular accused.

The trial proceeded. The charge was framed on 5th December, 1949, and up till 26th January, 1950, (the date of the Constitution) forty witnesses were examined for the prosecution. Of them, eighteen were cross-examined before 26th January, 1950, and twenty-two were cross-examined after. The appellants were convicted on 11th September, 1950, and their convictions were upheld on appeal by the High Court of Hyderabad on 13th April, 1951. It is conceded that the trial was valid and regular up to the 26th of January, 1950. The question is whether it could be validly continued by the same Tribunal and under the same procedure, after that date.

This, to my mind, involves consideration of three distinct things: (1) does the Regulation itself, or any part of it, contravene article 14 (1)? (2) does the Order made on the strength of the Regulation do so? and (3) does the procedure adopted by the Tribunal do so?

As to the first, namely the Regulation itself, article 13(1) falls to be considered. It runs:

"All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."

That, to my mind, raises this query: if this law had been passed after the Constitution and the present trial had commenced after it, would either have been valid? If not, I cannot see how a conviction can be based after the Constitution on a procedure and on matter which is abhorrent to its fundamental chapter howevermuch all that was done may have been good up to that date. This, to my mind, is not giving retrospective effect to the Constitution because the vital part of a trial is its conclusion. I am not prepared to construe these fundamental provisions in a narrow way. Paraphrasing them broadly, they breathe a message of hope to those who have not known equality of treatment before, and give a guarantee of security to those who have, a guarantee which came into effective being the moment the Constitution was born. Assuming this Regulation to be a law which offends the Constitution and therefore which could not have been upheld after it, we have the Constitution saying to every man who can claim its protection: "You shall not be convicted, nor will you be sent to jail, under laws which infringe the fundamental rights hereby guaranteed to you." In my judgment, it is a breach of this fundamental guarantee to convict on the basis of a law which cannot hold good after the Constitution. This, to my mind, is the decision in *Lachmandas's* case(1). I refer in particular to the following passages in the majority judgment:

"As the Act was valid in its entirety before the date of the Constitution, that part of the proceeding before the Special Judge, which, up to that date, had been regulated by this special procedure cannot be

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questioned, however discriminatory it may have been, *but if the discriminatory procedure is continued after the date of the Constitution*, surely the accused person may legitimately ask: 'Why am I today being treated differently from other persons accused of similar offences in respect of procedure?'

* * *

It is therefore clear.....that such continuation of the application of the discriminatory procedure to their cases after the date of the Constitution constituted a breach of their fundamental right guaranteed by article 14 and being inconsistent with the provisions of that article the special procedure became void under article 13.....Their complaint is not for something that had happened before 26th January, 1950, *but is for unconstitutional discrimination shown against them since that date.*

* * *

Therefore, the *continuation* of the trial after that date according to the discriminatory procedure *resulting in* their conviction and sentence cannot be supported. *Indeed in a sense the Special Judge's jurisdiction came to an end, for he was enjoined to proceed only according to the special procedure and that procedure having become void as stated above, he could not proceed at all as a Judge of a Special Court constituted under the impugned Act.*"

I now proceed to consider whether this Regulation could have been upheld as good law if it had been promulgated after the Constitution; and here it is necessary to emphasise that in testing the validity of a law it is irrelevant to consider what has been done under it, for a law is either constitutional or not and its validity or otherwise cannot depend upon what has been accomplished under its provisions. That, to my mind, is self-evident, but it also seems to follow from that portion of the majority decision in the *West Bengal* case(1) which is summarised in headnote (ii) at page 285 and head-note (v) at page 286.

(1) [1952] S.C.R. 284.

Now in *Lachmandas's* case(1) there is this important passage at page 733:

"Further, the supposed basis of the alleged classification, namely the fact of reference to the Special Court *before the Constitution came into effect*, has no reasonable relation to the objects sought to be achieved by the Act."

This, in my opinion, shows that the majority considered it relevant and important to determine the post-constitutional validity of an enactment which was valid up to the date of the Constitution by the application of post-constitutional standards and tests.

In the present case, the impugned Regulation does not set out any objects. I do not think that is fatal but I do think that when that is the case, the Courts are called upon to determine what the objects are from the Act itself and the surrounding circumstances, as best they may, and if the objects so determined cannot be reasonably related to the basis of the classification, the Regulation must, on the authority of *Lachmandas's* case(1), be considered post-constitutionally improper.

Now, looking to the surrounding circumstances, I can only conceive of two objects: (1) speedier trials, (2) more convenient disposal of certain unspecified cases. The first has been condemned as discriminatory in the *West Bengal* case(2) in the following words:

"Assuming that the preamble throws any light on the section, the necessity of speedier trial is too vague, uncertain and elusive a criterion to form a rational basis for discrimination."

By parity of reasoning the second is even more objectionable.

The next point on which the West Bengal Special Courts Act was considered objectionable by at least four of the seven Judges was that the Act did not lay down any basis for classification of the cases

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which could be sent to the Special Court for trial under a procedure which varied substantially from that of the Criminal Procedure Code and that it left the selection of the offences and the cases to the uncontrolled discretion of the State Government.

In the *Saurashtra* case(1) the majority of the Judges held that the mere fact that an Act authorises a State Government to direct that offences or classes of offences or classes of cases are to be tried by a special court does not offend article 14. Reading this with the earlier judgment, I conclude that the true principle is that it is not the setting up of special courts which matters, unless of course their composition is objectionable, but the procedure which they are directed to follow. If the special judges are selected from a class of judicially qualified and experienced men of recognised impartiality and they are enjoined to follow a procedure which does not differ substantially from that of the ordinary courts, there can be no reasonable objection, but if the procedure deprives the accused of substantial advantages which other accused similarly placed can demand, then article 14 comes into play.

The impugned Regulation in the present case suffers from the same defects. Under it the Military Governor is authorised to direct that any offence, whether committed before or after the commencement of the Regulation, or any class of offences, shall be tried by a Special Court, also to transfer any particular case from the ordinary criminal courts to a Special Tribunal. His discretion is unfettered and absolute.

So far as the special procedure is concerned, three of its features have been considered in one or other of the three earlier decisions and criticised as abhorrent to article 14. Those features are (1) an absence of committal proceedings, (2) deprivation of the right of (a) revision, (b) transfer and (c) of the right to demand a *de novo* trial in certain circumstances, and

(1) [1952] S.C.R. 435.

(3) the right of the Special Tribunal to adopt a summary procedure in cases where that would not ordinarily be permissible.

In the present case, the question of a *de novo* trial is not only linked up with the absence of a right of transfer but with the fact that even when the constitution of the Special Bench is changed by an alteration of its personnel there is no right to demand a *de novo* trial.

In addition to these, there are certain features of discrimination in the Regulation which are peculiar to Hyderabad, namely the elimination of the Urdu language, which in practice is the language of the Courts there, and the right to have certain sentences confirmed.

The Hyderabad High Court made an attempt to cut out those objectionable portions and re-write the Regulation without them in *Abdur Rahim & others* v. *Joseph A. Pinto & others* (1), but that can only be done if it is possible to sever the bad from the good in such a way as to leave the Act a workable whole so that on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all. That is the test accepted in *The State of Bombay* v. *F. N. Balsara*(2).

It is however difficult to see how this cutting out process could be made to work. Consider but one feature. The Regulation prescribes that the proceedings are to be summary, though for special reasons (to be recorded in writing) the warrant procedure may be followed. Which of these two is to be struck out as bad? Until an actual case arises and is sent to the Special Tribunal for trial it would be impossible to say. Further, if we strike out the portion relating to the summary procedure, then cases of simple hurt would have to be tried by the more cumbrous warrant procedure; on the other hand, if we strike out the clause which covers the warrant procedure then we will get serious offences which would

(1) A.I.R. 1951 Hyd. 11. (2) [1951] S.C.R. 682 at 727.

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normally be committed to sessions tried summarily. I cannot see how the good can be separated from the bad in this particular case and the Regulation still be left workable.

However, all that is based on the classification hypothesis of which I am not enamoured. I prefer to found on the narrower issue, namely, was there discrimination in fact and did it continue after the Constitution? The most glaring instance of this lies in the fact that the proceedings were conducted in the English language whereas Urdu is the language of the courts in Hyderabad, at any rate in practice. One of the appellants knows English but at least one does not and a third has only a smattering knowledge of it. That of course would not have mattered much had the court language in that area been English, for in that event there would have been no discrimination. It would only have been one of the accidents of fortune which befall many an accused who is tried in an area where the court language is one which he does not understand. But when the *de facto* language of the courts is his own mother tongue and all other Urdu knowing persons in that area are tried in the language which they and he understand and he alone is discriminated against by being sent for trial to a court whose proceedings are conducted in a language which he does not know, or, at best, understands but imperfectly, the matter assumes a very different hue.

In Hyderabad the court language in practice is Urdu and so great is the importance attached to it that neither judges nor counsel are permitted to function there unless they know that language. Indeed, the matter was carried to such lengths that one of the appellant was refused the services of an eminent King's Counsel from England on the ground that the latter did not know the court language Urdu. But at the same time the appellants were tried in a language which the gentleman in question did know and which was the language of the Special Tribunal. And an even greater anomaly, the President of the Tribunal himself did not know Urdu. I am unable to brush this

aside as a matter of no consequence. It is to my mind material and vital and cuts at the root of this trial. I find it impossible to say that this is not discrimination within the meaning of article 14 and it is patent that the discrimination continued after the Constitution.

I still prefer to base broadly on what I called, in an earlier case, the social conscience of a sovereign democratic republic as seen through Indian eyes and as reflected in the Constitution of India. The judges of the land are the keepers and interpreters of that conscience even as the Lord Chancellor was, and in theory still is, the keeper of the King's conscience in England. I can find no more difficulty in determining a case along these lines than do judges and juries who are called upon to apply the standards of a reasonable man to a given case where that is required. In my view, there is something fundamentally wrong in guaranteeing a man equality before the law with one hand and with the other permitting an arbitrary discrimination which could not have been supported after the Constitution to continue after it just because it had commenced at an earlier date. There is to my mind something grotesquely fantastic in insisting on Urdu knowing counsel in a tribunal whose proceedings are to be conducted in English and at the same time rigidly excluding counsel who do not know Urdu and who do know English. It may be that these are the rules of the Hyderabad Bar but that is based on the assumption that the language of the courts is Urdu. If the one rule can be waived or relaxed or altered, so also can the other. To apply both at the same time makes, in my judgment, for the type of discrimination which article 14 forbids, for either Urdu has special significance in this area or it is an unimportant fact. If it is material and important, then we have grave discrimination. If it is not, then again there is grave discrimination in not allowing the accused counsel of his choice which others similarly situated could claim, on the sole ground that the counsel chosen knows

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the language in which the proceedings are to be conducted and does not know another language which is not the court language for the purposes of this special trial.

I must not be understood to say that the appellants were treated unfairly by the Tribunal. As far as I can see, much was stretched in their favour, and in the matter of counsel to defend them funds were provided and spent by the State on a lavish scale. I have little doubt that the conduct of the appellants in discharging those counsel after they had been generously paid by the State evidences their bad faith and their desire to thwart a fair and proper trial, fair and proper that is to say before the Constitution. But the issue before us is not fairness but discrimination within the meaning of article 14. The money and time which would be wasted were my view to prevail would be unfortunate but all that is part of the price to be paid for the maintenance of the principles which our Constitution guarantees, part of the price of democracy.

As regards the question of revision and confirmation of sentences and transfer and bail, it is in my opinion no answer to say that the sentences imposed would not have been subject to confirmation even in an ordinary court and that there were no applications for transfer or revision or bail after the Constitution. The point is that the Regulation forbids all this and, therefore, in the words of the majority decision in *Lachmandas's* case(1), the Special Judge's jurisdiction came to an end. The discrimination lies in the trial itself, or the continuation of it, and the accused does not have to wait till its conclusion on the ground that he might after all be acquitted or granted a non-appealable sentence. His right is to complain of a trial, or a material portion of it, by a tribunal which, according to the decision in *Lachmandas's* case(1), ceases to have jurisdiction after the Constitution.

In my opinion, all these convictions should be set aside and a fresh trial in accordance with the

(1) [1952] S.C.R. 710.

normal procedure of the State in that area should be ordered.

GHULAM HASAN J.—The question which is canvassed before us on behalf of the petitioner Syed Qasim Razvi raises the constitutional point whether his trial and conviction by the Special Tribunal IV at Trimulgherry, Secunderabad, in respect of certain offences alleged to have been committed by him are void as being in contravention of articles 14 and 21, read with article 13 of the Constitution. The Special Tribunal consisting of a President and two members was constituted by the Military Governor of Hyderabad under section 3 of the Special Tribunal Regulation V of 1358-Fasli. It is common knowledge that the police action took place in Hyderabad on September 13, 1948. The Regulation in question was promulgated by the Military Governor on October 30, 1948.

An armed dacoity was committed on January 10, 1948, between 5 p.m. and 7-30 p.m., at Bibinagar village and its Railway Station, about 21 miles from Hyderabad, and Syed Qasim Razvi and his co-accused were charged with the offences of rioting, rioting with deadly weapons, dacoity, arson, causing grievous injuries to persons and destroying evidence of the crime. The First Information Report of the occurrence was made on the following day but the charge-sheet was not submitted to the Special Tribunal till August 28, 1949, as some of the accused were absconding and the investigation had to be carried out under difficult circumstances. On October 6, 1949, the Military Governor acting under section 3 of the Regulation directed that the Tribunal shall try the offences specified as Serial Nos. 1 & 2. Serial No. 1 mentioned the offence of murder of one Shoebulla Khan alleged to have been committed by Syed Qasim Razvi and his co-accused and Serial No. 2 referred to the offences in respect of the Bibinagar dacoity against Syed Qasim Razvi and 20 other persons. We are not concerned with the first incident

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and we understand that Razvi was acquitted of the charge of murder.

In the second case forty prosecution witnesses were examined-in-chief up to November 21, 1949, eighteen were cross-examined between this date and January 26, 1950, and 22 were cross-examined after that date. Razvi was examined on November 29, 1949, and again on February 26, 1950. The charges were framed on December 5, 1949. He was convicted on September 11, 1950, and was sentenced to 7 years' rigorous imprisonment under section 330 of the Hyderabad Penal Code, corresponding to section 395 of the Indian Penal Code, and 2 years' rigorous imprisonment under each of the following sections, section 124 corresponding to section 148, Indian Penal Code, section 177 corresponding to section 201, Indian Penal Code, and section 177/66 corresponding to section 109, Indian Penal Code, the sentences to run concurrently. Similar sentences were passed against the co-accused. Their convictions and sentences were upheld on appeal by the High Court at Hyderabad on April 13, 1951. In August, 1951, they obtained leave to appeal to this court under articles 132 and 134 of the Constitution.

While these appeals were pending and the record was in course of preparation, Razvi filed a petition under article 32 of the Constitution praying for the issue of a writ of *certiorari* calling for the record of the High Court and quashing the orders dated September 11, 1950, and April 13, 1951, and ordering his release. The petition challenges Regulation V of 1358-Fasli, as having become void after the 26th of January, 1950, as the procedure laid down by the Regulation is discriminatory against the petitioner and violates his fundamental right under article 14 of the Constitution. The petition also challenges the continuation of the trial of the petitioner under the provisions of the said Regulation after the 26th of January, 1950, as being an infringement of his rights under articles 14 and 21 of the Constitution. The conviction and sentence are sought to be set

aside as being illegal and without jurisdiction. This contention is also raised in the appeal but as the appeal is not ready, we were invited by Mr. Peerbhoy, counsel for the petitioner, to decide the question of the validity of the impugned Regulation without waiting for the printing of the record. Accordingly we decided to hear the question of jurisdiction as a preliminary point in the appeal.

Mr. Peerbhoy, counsel for the petitioner, before giving us a detailed list of the discriminatory features in the impugned Regulation attacked the Regulation as being without a preamble specifying the objects of the Regulation such as promotion of speedy trial, maintenance of public order, safety of the State etc. which form a common feature of Security Acts and Regulations. This defect need not be fatal, for it is possible to gather the object of the Regulation from its provisions considered in the light of the surrounding circumstances. There is little doubt that in view of the disturbed conditions prevailing in the State at the time, the commission of numerous offences and the threat to commit further acts of violence, the Military Governor may well have been advised to simplify and shorten the procedure for trial of offenders so as to bring them to speedy justice. The appointment of Special Judges or Special Tribunals was conceived in the same spirit, *i.e.*, to expedite the disposal of cases, so that justice may not be delayed.

By section 3 of the Regulation it was provided that the Military Governor "may by general or special order direct that the special Tribunal shall try any offence whether committed before or after the commencement of the Regulation, or any class of offences and may by any such order direct the transfer to a special Tribunal of any particular case from any other special Tribunal or any other Criminal Court or direct the transfer from a special Tribunal of any particular case to any other Criminal Court." It is contended not without force that no notification was issued in pursuance of section 3 as to what offence or

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class of offences shall be tried by the Tribunal. The petitioner, it is urged, would have had no grievance if a certain class of offences in the State or in any particular portion thereof, committed by all and sundry, were with a view to expeditious disposal tried by a Special Tribunal, but the particular case of the petitioner was alone singled out for trial by the Special Tribunal, while all offences, irrespective of their nature or gravity committed in Bibinagar village before or after the occurrence, were tried in the ordinary courts according to the normal procedure, laid down in the Hyderabad Criminal Procedure Code. There was no basis, much less any rational basis for the exceptional treatment. The trial of the petitioner by the Tribunal, according to a special procedure, was, it was contended, discriminatory, and took away his right of equality before the law. It is further objected that the Regulation prescribed no qualifications for the members of the Tribunal and their appointment was left to the unfettered discretion of the Military Governor. No procedure requiring any academic qualifications and legal training has been referred to and this point may be regarded as unsubstantial. The Tribunal constituted for the trial of the present case may not perhaps be open to the criticism that fit and proper persons were not appointed except the fact that the President was not acquainted with the language of the accused, but there was nothing to prevent the Military Governor from appointing any one who lacked proper qualifications. His power of appointment was not circumscribed by any restrictions and it would be no answer to say that he did not abuse this power.

Mr. Peerbhoy attacked the following provisions of the Regulation as discriminatory.

1. The right of the Special Tribunal to take cognizance of offences without the accused being committed to it for trial.

2. There is no provision that the trial shall be held with the aid of jury or with assessors.

3. English shall be the language of the Tribunal.

4. Evidence shall not be taken down at length, but only a memorandum of the substance of the evidence shall be prepared.

5. The Tribunal shall not be bound to adjourn the case.

6. There is no provision for a *de novo* trial by reason of change in personnel.

7. A Special Tribunal is entitled to follow summary procedure but it may follow the procedure prescribed for the trial of warrant cases.

8. Trial is permitted in the absence of the accused where such absence is due to his behaviour in or outside court for the purpose of impeding the course of justice.

9. Right to bail or *habeas corpus* is taken away.

10. There is no right to re-cross-examine the prosecution witnesses before the accused opens his defence.

11. The Special Tribunal is treated under the Regulation as a Court of Sessions exercising original jurisdiction, hence there is only one right of appeal to the High Court. If the case had been tried by a Magistrate of the 1st Class or a District Magistrate, a second appeal would have been competent where the sentence did not exceed four years.

12. There is no right of transfer.

13. There is no right of revision.

14. There is no right of confirmation of sentence which existed under the Hyderabad Code in favour of the High Court, the Government and the Nizam in certain cases.

Without minimizing the importance of the other provisions, I shall prefer to deal with the more substantial ones given as Nos. 1, 2, 3, 4, 6, 9, 12, 13 and 14.

1. The relevant provision of the Hyderabad Criminal Procedure Code hereinafter called the Code

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is section 267A, which unlike Chapter XVIII of the Indian Code does not make it obligatory that every case triable by a Court of Sessions should be committed to it by a Magistrate. Direct commitment to the Sessions without a preliminary inquiry is, however, permissible where the accused himself does not want such an inquiry, or where on being questioned, he admits facts which constitute an offence fit to be tried by a Sessions Court. Barring these two cases the Magistrate without recording any evidence or after recording some portion of the evidence may, if satisfied, that there are sufficient grounds for committing the case to the Sessions, commit the accused. Section 4 (1) of the Regulation definitely excludes the commitment proceedings.

2. Section 414 of the Code empowers the Government by a notification to direct that any particular class of cases shall be tried in the High Court by Jury and in any Court of Sessions either by Jury or with the aid of assessors. This power is absent in the Regulation. It is true that there is no general procedure of trial by Jury or with the aid of assessors in the State, but it is open to the Government to exercise its powers and direct that any particular class of cases shall be so tried.

3. By section 286 the evidence of witnesses is to be recorded in the language of the court and by sections 294 and 295 the judgment of the court shall be written and pronounced in the language of the court. Neither party referred to any provision of the Code showing what was the language of the court, but Mr. Peerbhoy stated that it is Urdu. He said that the State laws are enacted in Urdu, the arguments are addressed in Urdu, judgments are given in Urdu and the reports of decisions are also published in Urdu. The Code which was referred to us was in Urdu but the only section which specifically refers to Urdu is section 230 which requires that every charge which is framed shall be written in Urdu. It is not improbable that the court language is Urdu which was the language of the ruling class, though

it may not be spoken by the majority of the people in the State.

4. Section 286 of the Code requires that the evidence of each witness shall be taken down in the language of the court in the form of a continuous statement, whereas section 4, sub-section (2) of the Regulation states that the Special Tribunal need not take down the evidence at length but it shall take down the substance of what each witness deposes. Power is, however, given to the Tribunal to direct in respect of any trial that the evidence shall be taken down at length. It is obvious that while the Code lays down peremptorily that the evidence shall be recorded at length, the Regulation provides to the contrary and makes it directory in respect of certain trials only.

6. Section 281 of the Code corresponding to section 350 of the Indian Code provides for the right of a *de novo* trial at the instance of the accused, in cases where the Magistrate having heard and recorded the whole or any part of the evidence in any case ceases to exercise jurisdiction therein and is succeeded by another Magistrate. The Magistrate has, however, got the power to reject the accused's demand either wholly or partly but in that case he is bound to record reasons. It is true that the right to demand a *de novo* trial is subject to the Magistrate's power of refusal, coupled with the obligation to record reasons, but the language of the Code appears to suggest that such a refusal should be an exception rather than the rule. It is pointed out by the learned Advocate-General for the State that the question of a *de novo* trial did not arise in point of fact but the possibility of a vacancy arising by reason of circumstances beyond human control could not be eliminated.

9. Under section 468 of the Code any person accused of a non-bailable offence may be released on bail, unless there appears reasonable ground for believing that he has been guilty of an offence

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punishable with death or transportation for life. The right to ask for bail is excluded by section 6, sub-section (2) of the Regulation which clearly says that no court shall have any jurisdiction of any kind in respect of any proceedings before a Special Tribunal.

12. Chapter XXXVIII of the Code deals with the power of transfer and section 494 confers a wide power upon the High Court to transfer cases from one court to another, whereas under section 3 of the Regulation, the Military Governor alone has got the power of transfer. That power is apparently to be exercised *suo motu,* but an accused has no right to move for transfer.

13. Section 360 of the Code confers the power of revision upon the High Court, the Court of Sessions and the District Magistrate against the orders of the subordinate courts, but section 7, sub-section (2) of the Regulation excludes the right of revision.

14. Section 20 of the Code lays down that no sentence passed by a Sessions Judge shall be enforced, unless it is confirmed

(a) in the case of a sentence of imprisonment exceeding ten years, by the High Court;

(b) in the case of life imprisonment, by the Government and

(c) in the case of death by his Exalted Highness the Nizam.

Section 7, sub-section (2) of the Regulation, excludes the power of confirmation by any authority whatsoever.

Mr. Peerbhoy, counsel for the petitioner, strongly relies upon the case of *Lachmandas Kewalram Ahuja* v. *The State of Bombay* (1) in support of his contention that the impugned Regulation is void under article 14 and submits that the case should be decided in accordance with the principles laid down by the majority in that case. Fortunately for me it is not necessary to attempt an exposition of the principles which should regulate the decision of a case like the

(1) [1952] S.C.R. 710.

present, as the matter has been exhaustively dealt with in *The State of West Bengal* v. *Anwar Ali Sarkar* (1) where my Lord the Chief Justice and my other learned brothers in this Bench have expressed views separately and collectively on the exact meaning and scope of article 14. So far as I am concerned, the majority view expressed by Mr. Justice Das in the Bombay case with which Mukherjea, Chandrasekhara Aiyar and Bose JJ. concurred, my Lord the Chief Justice dissenting, is conclusive.

I shall take up *Lachmandas's* case(2) first. It appears that a broad daylight robbery took place at Ahmedabad in which a driver and a peon of the Central Bank were shot dead on May 26th, 1949, while they were carrying bank money in a motor-van. By section 12 of the Bombay Public Safety Measures Act, 1947, which was in the same terms as section 5 (1) of the West Bengal Act and section 11 of the Saurashtra Ordinance it was provided that "a Special Judge shall try such offences or class of offences or such cases or class of cases as the Provincial Government may by general or special order in writing direct." Section 10 empowered the Government by notification in the Official Gazette to constitute special courts of criminal jurisdiction for such areas as may be specified in the notification. Accordingly by a notification issued in August, 1949, the State of Bombay exercising its power under section 11 appointed the District and Sessions Judge of Ahmedabad as the Special Judge to try the accused. The charges against the accused were framed on January 13, 1950, without any committal by the Magistrate. Seventeen prosecution witnesses were examined before January 26, 1950, and 45 after that date. The accused were convicted on March 30, 1950, and sentenced to death. Their appeal was dismissed by the Bombay High Court, but they preferred appeals to this court after obtaining a certificate under article 132 (1) of the Constitution. The question which arose for consideration was whether

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the Bombay Act or that part of section 12 which authorises the State Government to direct specific cases to be tried by a Special Judge appointed under that Act offends against the equal protection of law guaranteed by article 14 of the Constitution, and is as such void under article 13 on the principles laid down by this court in two previous cases, *The State of West Bengal* v. *Anwar Ali Sarkar* (1) and *Kathi Raning Rawat* v. *The State of Saurashtra* (2). Mr. Justice Das who delivered the judgment of the majority in which Mahajan, Mukherjea and Chandrasekhara Aiyar JJ. concurred answered the question in the affirmative and held that the accused are entitled after the Constitution not to be discriminated against in the matter of procedure and are entitled to be tried according to the ordinary law. A retrial thereupon was ordered. Mr. Justice Das examined the provisions of the Act in detail, summarising the position at page 726 as follows:—

"Thus besides providing for enhanced punishment and whipping the Act eliminates the committal proceedings (section 13 (1)), permits the Special Judge to record only a memorandum of the evidence, confers on him a larger power to refuse to summon a defence witness than what is conferred on a court by section 257 (1) of the Code of Criminal Procedure and also deprives the accused of his right to apply for a transfer or for revision. That these departures from the ordinary law cause prejudice to persons subjected to the procedure prescribed by the Act cannot for a moment be denied. This court has, by its decisions in the *State of West Bengal* v. *Anwar Ali Sarkar*(1) and in *Kathi Raning Rawat* v. *The State of Saurashtra* (2), recognized that article 14 condemns discrimination not only by a substantive law but also by a law of procedure and that the procedure prescribed by the corresponding provisions in the West Bengal Special Courts Act and the Saurashtra Ordinance which introduced similar departures from the ordinary law of procedure constituted

(1) [1952] S.C.R. 284. (2) [1952] S.C.R. 435.

a discrimination against persons tried by the Special Judge according to procedure prescribed by those pieces of legislation and finally that, in any event, section 5 (1) of the West Bengal Act and section 11 of the Saurashtra Ordinance, both of which corresponded to section 12 of the Bombay Public Security Measures Act, in so far as they authorised the Government to direct specific and particular 'cases' to be tried by the Special Judge, was unconstitutional and void. In view of the departures from the ordinary law brought about by the Bombay Public Safety Measures Act, 1947, which are noted above, it cannot but be held, on a parity of reasoning, that at any rate section 12 of the Act, in so far as it authorises the Government to direct particular 'cases' to be tried by a Special Judge, is also unconstitutional."

Dealing with the argument that the special procedure prescribed by the impugned Act constitutes a departure from the ordinary law of procedure and is, in some important respects, detrimental to the interest of the persons subjected to it and as such is discriminatory he observed :—

"The discrimination does not end with the taking of cognizance of the case by the Special Judge without the case being committed to him but continues even in subsequent stages of the proceedings in that the person subjected to it cannot, even at those subsequent stages, have the benefit of having the evidence for or against him recorded *in extenso*, may not get summons for all witnesses he wishes to examine in defence only on the ground that the Special Judge does not consider that such evidence will be material and cannot exercise his right to apply to a superior court for transfer of the case even though the Special Judge has exhibited gross bias against him or to apply for revision of any order made by the Special Judge. As the Act was valid in its entirety before the date of the Constitution, that part of the proceeding before the Special Judge, which, up to that date, had been regulated by this special procedure cannot be questioned, however discriminatory it may

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have been, but if the discriminatory procedure is continued after the date of the Constitution, surely the accused person may legitimately ask: Why am I to-day being treated differently from other persons accused of similar offences in respect of procedure ?"

After holding that there was no nexus which connected the basis on which the supposed classification was founded with the objects of the Act he went on to observe :—

"In the absence of a rational basis of classification, as explained above, there can be no justification, after the advent of the Constitution, for depriving the appellants of the right to move the Court for transfer or for revision or to obtain process for the attendance of defence witnesses or of having the evidence of the witnesses recorded as in an ordinary trial which is available to other persons accused of similar offences and prosecuted according to the ordinary procedure laid down in the Code of Criminal Procedure. It is, therefore, clear that in this case the discrimination continued after the Constitution came into force and such continuation of the application of the discriminatory procedure to their cases after the date of the Constitution constituted a breach of their fundamental right guaranteed by article 14 and being inconsistent with the provisions of that article the special procedure became void under article 13 and as there is no vested right or liability in matters of procedure, the appellants are entitled to be tried according to the ordinary procedure after the date of the Constitution. Their complaint is not for something that had happened before 26th January, 1950, but is for unconstitutional discrimination shown against them since that date.

* * * *

Indeed in a sense the Special Judge's jurisdiction came to an end, for he was enjoined to proceed only according to the special procedure and that procedure having become void as stated above, he could not

proceed at all as a Judge of a Special Court constituted under the impugned Act.....The point for decision now is whether the continuation of the procedure by the Act after the Constitution came into force operates to the prejudice of the appellants and, as such, offends against their newly acquired fundamental right of equal protection of law guaranteed by article 14. The Constitution has no retrospective operation to invalidate that part of the proceedings that has already been gone through but the Constitution does not permit the special procedure to stand in the way of the exercise or enjoyment of post-constitutional rights and must, therefore, strike down the discriminatory procedure if it is sought to be adopted after the Constitution came into operation."

The view taken by my Lord the Chief Justice was that the provisions of the Constitution relating to fundamental rights have no retrospective operation and do not affect the criminal prosecution commenced before the Constitution came into force even though section 12 of the Bombay Act is held to be discriminatory and void.

I have given not without reluctance copious quotations from the majority judgment because its meaning has been the subject of much controversy before us. While on the one hand, Mr. Peerbhoy contends that the Act was condemned as bad by the majority because of the discriminatory provisions appearing on the face of it and the question whether such provisions were applied in fact to the accused of that case after the coming into force of the Constitution was considered entirely irrelevant the learned Advocate-General urges that the court did not apply its mind to the question whether the Act should be declared void even when the discriminatory provisions are not applied. The whole trend and the reasoning of the judgment to my mind point to the conclusion that the court did not consider it necessary to go into the question whether the discriminatory provisions were applied as that question was irrelevant in view of their finding that the Act became

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void after the coming into force of the Constitution on the simple ground that it contained discriminatory provisions on the face of it. There were four identical features which are common in the two cases, namely absence of committal proceedings, power to record only a memorandum of the evidence, absence of a right to apply for transfer or for revision. It is not easy to see how the right to apply for a transfer or for revision could be exercised under the Regulation after the 26th of January. During the course of cross-examination of 22 witnesses if the Tribunal overruled the objection of the accused or passed any adverse order, the accused could not challenge it by way of revision, nor if it showed any bias in the recording of the evidence, could the accused apply for transfer. Indeed there is evidence that an order of the Tribunal dated the 15th of December, 1949, was carried in revision to the High Court, but the revision was dismissed on February 27, 1950. The office, it appears, noted that under section 7, clause 2 of the Regulation there could not be any revision but the learned Chief Justice in rejecting the revision petition merely said that he saw no reason to interfere "at this stage". I do not think that the order of rejection meant that the stage of interference was not appropriate and that he would have the right to interfere at a later stage, say at the time of the appeal. The learned Chief Justice could not have been unaware of the fact that no revision was competent against an order of the Tribunal under the Regulation. It is significant that this order was passed after the coming into force of the Constitution. Similarly if the accused had asked for bail, and it had been refused, he could not have been able successfully to move the High Court in revision against the order of refusal. It is obvious therefore that just as in *Lachmandas's* case (1) the procedure under the Regulation could not be continued without eliminating the right to apply for transfer or for revision, in the same

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way the trial of the petitioner could not go on without these discriminatory provisions after the 26th of January. Again the right to confirmation of the sentences passed by the Tribunal could not be given effect to as the Regulation definitely negatived such a right. Whether in the events that happened the question of confirmation did not arise is besides the point. It could well have arisen if a sentence exceeding ten years had been passed by the Tribunal. I can see no real ground for any distinction between *Lachmandas's* case(1) and the present case. My learned brothers are certainly in a better position to interpret the decision in *Lachmandas's* case (1) and to say whether their intention was not to declare the Act bad, whether or not its discriminatory provisions were applied in fact. It is impossible for me to go behind the actual words used in the decision and my conclusion is based entirely upon the language and the reasoning adopted in that case.

The conclusion I have arrived at is fortified by the observations of Mr. Justice Mukherjea in *Anwar Ali Sarkar's* case(2), at page 331, "but when the statute itself makes a discrimination without any proper or reasonable basis, the statute would be invalidated for being in conflict with the equal protection clause, and the question as to how it is actually worked out may not necessarily be a material fact for consideration." My learned brother Mr. Justice Chandrasekhara Aiyar also emphasised in that case "that the question which falls to be considered under article 14 is whether the legislation is discriminatory in its nature and this has to be determined not so much by its purpose or objects but by its effects" (page 349).

It will be convenient to refer to the West Bengal case(2) at this stage. In this case the accused who were charged with various offences committed by them in the course of an armed raid on the Jessop Factory at Dum Dum were convicted by a Special Court appointed under section 5 (1) of the West Bengal

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Special Courts Act No. X of 1950. The Full Bench of the Calcutta High Court which was moved by the accused under article 226 for the issue of a writ of *certiorari* to quash the conviction and the sentence held that the Special Court had no jurisdiction to try the case, as section 5 (1) of the Act was void under article 32, as it denied to the accused the equal protection of the laws enjoined by article 14. On appeal by the State the majority of six learned Judges of this court upheld the view, my Lord the Chief Justice dissenting. The observations of the learned Judges constituting the majority deal effectively with the contentions raised in the present case and may best be reproduced in their own words:—

"Mahajan J.—That the Special Act lays down substantially different rules for trial of offences and cases than laid down in the general law of the land, *i.e.*, the Code of Criminal Procedure, cannot be seriously denied. It short-circuits that procedure in material particulars.....

Not only does the special law deprive them of the safeguard of the committal procedure and of the trial with the help of jury or assessors, but it also deprives them of the right of a *de novo* trial in case of transfer and makes them liable for conviction and punishment for major offences other than those for which they may have been charged or tried.....To a certain extent the remedies to which an accused person is entitled for redress in the higher courts have been cut down. Even if it be said that the statute on the face of it is not discriminatory, it is so in its effect and operation, inasmuch as it vests in the executive government unregulated official discretion, and therefore has to be adjudged unconstitutional."

"Mukherjea J.—I agree with the Attorney-General that if the differences are not material, there may not be any discrimination in the proper sense of the word and minor deviations from the general standard might not amount to denial of equal rights. I find

it difficult, however, to hold that the difference in the procedure that has been introduced by the West Bengal Special Courts Act is of a minor or unsubstantial character which has not prejudiced the interest of the accused.

The first difference is that made in section 6 of the Act which lays down that the Special Court may take cognizance of an offence without the accused being committed to it for trial, and that in trying the accused it has to follow the procedure for trial of warrant cases by Magistrates. It is urged by the Attorney-General that the elimination of the committal proceedings is a matter of no importance and that the warrant procedure, which the Special Court has got to follow, affords a scope for a preliminary examination of the evidence against the accused before a charge is framed.....

Under section 350 of the Criminal Procedure Code, when a case after being heard in part goes for disposal before another Magistrate, the accused has the right to demand, before the second Magistrate commences the proceedings, that the witnesses already examined should be re-examined and re-heard. This right has been taken away from the accused in cases where a case is transferred from one Special Court to another under the provision of section 7 of the Special Courts Act. Further the right of revision to the High Court does not exist at all under the new procedure, although the rights under the Constitution of India are retained. It has been pointed out and quite correctly by one of the learned counsel for respondents that an application for bail cannot be made before the High Court on behalf of an accused after the Special Court has refused bail. These and other provisions of the Act make it clear that the rights of the accused have been curtailed in a substantial manner by the impugned legislation; and if the rights are curtailed only in certain cases and not in others, even though the circumstances in the latter cases are the same, a question of discrimination may certainly arise.....As I have said already

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in the present case the discrimination arises on the terms of the Act itself. The fact that it gives unrestrained power to the State Government to select in any way it likes the particular cases or offences which should go to a Special Tribunal and withdraw in such cases the protection which the accused normally enjoy under the criminal law of the country, is on the face of it discriminatory."

"Das J.—The elimination of the committal proceedings and of trial by jury (section 6), the taking away of the right to a *de novo* trial on transfer (section 7), the vesting of discretion in the Special Court to refuse to summon a defence witness if it be satisfied that his evidence will not be material (section 8), the liability to be convicted of an offence higher than that for which the accused was sent up for trial under the Act (section 13), the exclusion of interference of other courts by way of revision or transfer or under section 491 of the Code (section 16) are some of the glaring instances of inequality brought about by the impugned Act."

"Chandrasekhara Aiyar J.—Preliminary inquiry before committal to the sessions, trial by jury or with the aid of assessors, the right of a *de novo* trial on transfer of a case from one court to another, have been taken away from the accused who are to be tried by a Special Court."

"Bose J.—We find men accused of heinous crimes called upon to answer for their lives and liberties. We find them picked out from their fellows, and however much the new procedure may give them a few crumbs of advantage, in the bulk they are deprived of substantial and valuable privileges of defence which, others similarly charged, are able to claim".

I do not propose to go into the question that discriminatory provisions were not as a matter of fact applied to the petitioner's case as contended for by the learned Advocate-General for the State. I have already observed that the discriminatory provisions

stood in the way of the petitioner even after the 26th of January and prevented him from exercising the right to apply for bail, for transfer or for revision and this in my opinion is quite sufficient for holding that the Regulation violates article 14 and is, therefore, void under article 13.

I do not think that the discriminatory provisions are severable from the rest of the Regulation. Indeed it is doubtful whether the Military Governor would have promulgated the Regulation in the truncated form if these provisions are taken out. For us to do so would be to assume the power to legislate and to frame a new Regulation in place of the one promulgated by the Military Governor. Having regard to the scheme and objects underlying the Regulation, a severance of the discriminatory provisions would affect the integrity of the Regulation itself. The object of expediting the trial will be defeated if the discriminatory provisions are eliminated. The Regulation stands as a whole and falls if those provisions are eliminated. In *Attorney-General for Alberta* v. *Attorney-General for Canada*(1) the Privy Council had to deal with two parts of the Act of the Alberta Bill of Rights Act, 1946, Part I of which declared certain existing rights of Alberta citizenship described therein and Part II provided a method of making effective the provisions of Part I by conferring certain powers on the province. It was held that Part II was *ultra vires* being beyond the powers of the provincial legislature to enact; that Part I of the Act was not severable, that the whole Act hung together and therefore the whole was invalid.

I hold that the trial held under the Regulation is void under article 13, read with articles 14 and 21 of the Constitution, and the conviction and sentence of the petitioner should be set aside. Following the view taken in *Lachmandas's* case(2) I direct that the petitioner shall be tried according to law.

This order will govern petition No. 368 relating to the other petitioners.

(1) [1947] A.C. 503. (2) [1952] S.C.R. 710.

1953

Syed Qasim Razvi
v.
The State of Hyderabad and Others.

ORDER.

BY THE COURT:—As the Constitutional issues raised in the petitions have also been raised in the appeals preferred by the petitioners they have been dealt with in the appeals by consent of parties, and the petitions are dismissed. The constitutional points in the appeals having been decided against the appellants by the majority the appeals will be heard on other points when the appeals are ready for hearing.

Petitions dismissed.

Agent for the petitioners/appellants: *Rajinder Narain.*

Agent for the respondent: *G. H. Rajadhyaksha.*