

(1950) 12 AP CK 0004
In the Andhra Pradesh High Court
Case No : Criminal Ref. No. 9 of 1358 F

The State of Hyderabad

APPELLANT

Vs

Sidlingappa and others

RESPONDENT

Date of Decision : 18-12-1950

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 281, 350

Citation : AIR 1950 AP 39

Hon'ble Judges : Naik, C.J; Sripat Rao, J; Srinivasa Chari, J; Siadat Ali Khan, J; Manohar Pershad, J; M.A. Ansari, J; Khaliluzzaman Siddiqi, J

Bench : Full Bench

Advocate : Mohd. Mirza, for the Appellant; Laxmanrao Ganu and Abdul Muqtadar Khan, for the Respondent

Judgement

Srinivasa Chari, J. (Naik, C.J. and Shripatrao, J., Concurring)

1. It is a fundamental principle of Criminal Law that no judicial officer should ordinarily convict an offender on the evidence which he had no opportunity to record and to hear. The underlying principle is that only the Judge who has had the opportunity of watching the conduct, expression and demeanour of the witnesses is in a better position to judge about the guilt or innocence of an offender. But Section 281 of the Hyderabad Criminal Procedure Code corresponding to Section 350 of the Indian Criminal Procedure Code provides a carefully limited exception to this salutary principle of natural justice that "he alone may decide who has heard the evidence." This exception was introduced for the first time in the Code of 1898. Section 281 gives the discretion to a Magistrate to act upon the evidence recorded by his predecessor, but this discretion is curtailed and circumscribed so that if the accused demands that the witnesses whose statements were recorded previously by a Magistrate who has been transferred should be recalled and re-examined, the Magistrate shall summon them and examine them over again and in such a case the evidence recorded by his predecessor would be of no use. A Magistrate cannot act upon

the evidence and it will have to be ignored. This discretion to act upon the evidence recorded by the predecessor and decide the case has not been given to a Sessions Judge and the trend of decisions in the Indian Union is that where a Sessions Judge acts upon evidence recorded by his predecessor his decision is vitiated regardless of the fact whether the accused is prejudiced thereby or not. Evidently an exception was created in the cases before Magistrates at the instance of the Government on the ground of expediency and convenience because the Magistrates were transferred frequently after they had recorded evidence partially and in consequence of the transfer the trial had to be started "DE NOVO". This led to delay in criminal proceedings and sometimes owing to the long delay proper justice could not be meted out. Somehow or other the Sessions Judge is not given the power to decide upon the evidence recorded by his predecessor. Evidently the necessity was not felt because Sessions Judges were not as frequently transferred as the Magistrates. This would show that the object of the legislature is to adhere as far as possible to the principle that "he alone should decide who has heard the evidence". The legislature did not want to depart from this salutary principle of justice, as far as it could be followed.

2. The question often arises where a discretion has been given to the Magistrate under S. 281 of Criminal Procedure Code to act upon the evidence recorded by his predecessor, whether if such a discretion were given to the Sessions Judge, it would infringe any accepted principle of law. This discretion has been given only on grounds of expediency. Would it amount to want of jurisdiction if the Sessions Judge acted upon the evidence of his predecessor? With regard to this question some of the High Courts of the Indian Union have held that it goes to the root of the matter and the Sessions Judge has no jurisdiction. The Rangoon High Court has held in the case of "Nga San Tin v. Emperor", AIR 1930 Rang 354, that the Sessions Judge has no jurisdiction to pass a sentence on the evidence recorded wholly or partly by his predecessor and the consent of the accused cannot give him jurisdiction. But if we go through the decisions under S. 350 of the Indian Criminal Procedure Code which corresponds to S. 281 of the Hyderabad Criminal Procedure Code, it would appear that although the accused has the right to demand that there should be a "DE NOVO", trial where the Magistrate has not recorded the whole of the evidence, but still where previous depositions have been treated as part of the record at the request of the accused, such a trial has been held to be not illegal. In this connection the decision of the Nagpur High Court, reported in AIR 1934 209 (Nagpur) would be in point. Again the Calcutta High Court in the case of "Kudratulla v. Emperor", 39 Cal 781, held that the judgment by a Magistrate on evidence not wholly recorded by himself is liable to be set aside "only where the accused has been actually prejudiced". Again the Punjab Chief Court & the Upper Burma Judicial Commissioner's Court have held that where there has been only an omission on the part of the Magistrate to enquire from the accused whether he wished to exercise the right by proviso A to S. 350, it could not be said that there was a failure of justice occasioned by the omission and where the accused had a perfectly fair trial the omission to enquire

from the accused of his right provided by proviso. A to S. 350, at the most would amount to an error which was curable u/s 537 of the Criminal Procedure Code vide in this connection "Amir Khan v. Emperor", 3 Pun Re Cr 1903 & 191 A 175 (sic). This view receives support from an old ruling reported in "Thakurdas Manghi v. Namdur Mundul", 24 W. R. Cr 12, where it has been held that where the irregularity has not prejudiced the accused the case was covered by Section 537 and the Magistrate was competent to pronounce the judgment on the evidence taken by his predecessor.

3. The trend of these decisions would show that the judgment of a Magistrate who has based his conclusion upon the evidence recorded by his predecessor would ordinarily be set aside when it appears that it has prejudiced the accused or has resulted in miscarriage of justice, otherwise not.

4. The question that falls to be decided is whether where the accused has been acquitted it would be open to the prosecution to get the order of acquittal set aside on the ground that the Magistrate acted upon the evidence recorded by his predecessor. In the eye of the law both are the same whether it is the accused or the prosecution. Although the accused stands in a peculiar position and ordinarily every provision of law would be construed liberally in his favour, the Courts are there to punish a wrong-doer and vindicate justice, therefore the appellate Court would be justified in setting aside an order of acquittal where it finds that the circumstances of the case are such that the Magistrate would not have acquitted the accused if he had the opportunity to watch the demeanour of the witnesses and the trend of the evidence. It is primarily a matter for the appellate Court, viz., the High Court, to determine whether by such a trial there has resulted a miscarriage of justice. As regards the question as to how far a Sessions Judge could act upon the evidence recorded by his predecessor, I would like to say that there is no express prohibition in the statute. It only violates a salutary principle of natural justice. Therefore it would be desirable and in the interests of justice that in cases where the Sessions Judge has acted upon the evidence recorded by his predecessor the appellate Court or the revision Court should have the power to quash the proceedings if it is of opinion that by the procedure of the Sessions Judge there has been a palpable miscarriage of justice. Where the Government thought it necessary that the Magistrate should be allowed to have a discretion under certain circumstances to act upon the evidence of his predecessor on the ground of expediency and convenience, there can be no reason why the Sessions Judge also should not be given the same power subject to the principle stated above. It has been always held that acting upon the evidence of a predecessor in office is not a matter of jurisdiction but only a matter of irregularity which could be cured by Section 537. In the result we hold that the minority judgment in the case of "Laxman v. Sircar ALP, 11 Deccan L.R. 123, deserves our approval and the majority judgment is set aside.

5. Therefore as regards question No. 1 referred to us, where there has been an acquittal based on the evidence recorded by a prior Sessions Judge, the

judgment is not necessarily liable to be set aside, as it does not affect the jurisdiction of the Sessions Judge passing the judgment.

6. As regards the Second question that has been referred, I am of opinion that this principle would apply even to a case where there has been an acquittal and it would be open to the prosecution to contend that there has been a miscarriage of justice by reason of the fact that the Judge acted upon the evidence recorded by his predecessor and it would be open to the appellate Court to set aside the judgment of acquittal if it comes to the conclusion that by reason of the Judge acting on the evidence recorded by his predecessor it has resulted in failure of justice.

7. The third question namely as to where, the prosecution does not object to the admission of the evidence recorded by a Judge who ceased to be a Judge presiding over that Court and raises the question in appeal and asks for the setting aside of the judgment on this ground, he could be allowed to do so, I am of opinion that it would be open to the prosecution as much as to the accused to raise the question but it would be left to the appellate Court to exercise its discretion and the appellate Court would interfere only if it comes to the conclusion that the lower Court Judge by acting upon the evidence recorded by his predecessor has fallen into a palpable error which has resulted in failure of justice.

8. So in all these cases the criterion would be whether the appellate Court thinks that there has been a palpable miscarriage of justice.

9. SIDDIQI, J.: I agree.

10. M.A. ANSARI, J.: I agree.

11. MANOHAR PERSHAD J.: I have read the judgment prepared by my learned brother Srinivasa Chari, J. and I agree with the reasoning and the result, but in view of the importance of the questions I wish to add a few lines.

12. The Additional Sessions Judge, Gulbarga acquitted the accused Sidlingappa, Hanumanthappa and Chand Saheb, and against the judgment of acquittal, the State has filed an appeal which initially came up for hearing before the Division Bench of this Court from where the case was referred to the Full Bench owing to the important questions of law involved. The Full Bench after hearing the arguments of the parties referred the questions of law to a higher Bench consisting of five Judges, and that Bench in turn has referred the following questions of law to a Bench of seven Judges and is before us now. The following are the questions of law referred to this Bench.

1. Having regard to the amendment to S. 281, Hyderabad Criminal Procedure Code, and the divergent decisions of this Court (Full Bench of five Judges) whether the case reported in "Laxman v. Sircar ALT, 11 Deccan L.R. 123, could be deemed good law;

2. Whether the general principle that only the Judge who has recorded the evidence in the case is competent to deliver judgment in it. applies to a judgment by which an order of acquittal is recorded;

3. Whether the complainant who has not objected to the use of evidence at the time of judgment could object to it in appeal and on that ground get the order of acquittal set aside.

13. As far as the first question is concerned, it may be pointed out that it is a general principle of law that only a person who has heard and recorded the evidence in the case is competent to decide whether the accused is innocent or guilty, as he gets an opportunity of watching the conduct, expression and demeanour of the witnesses. Section 281 (corresponding to S. 350 of the Indian Criminal Procedure Code) is an exception to that rule and has been introduced purely for administrative convenience. It is obviously intended to meet the case of transfers of Magistrates from one district to another and to prevent the necessity of trying from the beginning all cases which may be partly heard at the time of such transfer. It applies as such to cases in which a Magistrate ceases to exercise jurisdiction by reason of the transfer of a case to another Court as to cases in which the Magistrate ceases to exercise jurisdiction by reason of his own death or transfer to another post. Before the amendment, S. 281 of the Hyderabad Criminal Procedure Code contained provision that on the change of the Magistracy, the accused could apply to the renewal of evidence and it was held in "Taukreddy v. Narsimha Reddy", 15 Deccan L.R. 162, "Santhu v. Charka", 17 Deccan L.R. 136 and "Shaik Rahim v. State", 22 Deccan L.R. 236, that the accused could make an application for the evidence to be taken "de novo". By the amendment of 1344 F., the renewal of evidence is now the discretion of the Magistrate. But it is also provided in the amending Section that the High Court or the District Magistrate may set aside a judgment which is based upon the evidence wholly recorded by the predecessor and who has delivered the judgment provided that the accused is prejudiced by such judgment. Thus, the order of renewal of evidence is more or less obligatory in cases cognisable by the Magistrate only, and the Hyderabad Criminal Procedure Code does not contain any provision of renewal of evidence before the Sessions Judge. In S. 281, the word "Magistrate" is used. According to Sub-section 14 of S. 2, General Clauses Act No. 3 of 1908 F. the definition of "Magistrate" does not include in its connotation a Sessions Judge or a Judge of the High Court. This shows that the object of the legislature is to adhere as far as possible to the principle that he alone should decide who has recorded and heard the evidence. In other words the legislature did not wish to depart from this salutary principle of justice as far as the cases before the Sessions Judge were concerned. A Division Bench of this Court in 6 Deccan L.R. 252 has held that the Judge who decides the case must be a Judge who has recorded the whole of the evidence in the case. In another case, "Laxman v. The State", 11 Deccan L.R. 123 a Full Bench (consisting of five Judges) of this Court has held that S. 281 is not applicable to the Sessions Judge and the Sessions Judge should decide the case

on the evidence recorded by him alone and the use of the evidence of his predecessor is not valid. The trend of decisions in the Indian Union is that its application is however, limited to Magistrates and not to Sessions Judges, so that a Sessions Judge is not empowered to try a case partly on evidence not recorded by himself. In this respect I agree with the trend of the decisions in the Indian Union and the decision of this Court in the case, "Laxman v. The State".

14. The question often arises where a discretion has been given to a Magistrate under S. 281, Hyderabad Criminal Procedure Code, to act upon the evidence recorded by his predecessor, and whether, if a Sessions Judge bases his judgment on the evidence not recorded by him but recorded by his predecessor, it would infringe any such section or principle of law, or whether it would amount to want of jurisdiction. With regard to this question, there is a difference of opinion in the Indian High Courts. In "Thakurdas Manji v. Namdar Mundal", 24 W.R.Cr. 12 it has been laid down that the judgment by a Magistrate on evidence not recorded by himself is liable to vitiate only where the accused has been prejudiced. In the case of "Nga San Tin v. Emperor", AIR 1930 Rang 354, it has been held that the Sessions Judge has no jurisdiction to pass a sentence on the evidence recorded wholly or partly by his predecessor and the consent of the accused cannot give him jurisdiction in a criminal trial; hence it is a nullity. In AIR 1934 209 (Nagpur) , it has been laid down that the object of S. 350 is that an accused person, if he so wishes, is entitled to obtain the decision of the Magistrate trying on the evidence heard by that Magistrate alone. However, if the accused in any trial has demanded that the witnesses be recalled, they are at liberty in respect of particular witnesses, if it suits their purpose, to waive their examination or part of it. Therefore, there is nothing illegal if it is treated as part of the record on the expressed desire of the accused and after due consideration of the Court where no prejudice would arise against the accused by such an action. In "Kudrutulla v. Emperor", 39 Cal 781, it was held that the words "succeeded by another Magistrate" under S. 350 of the Indian Criminal Procedure Code should not be construed in a narrow sense but should be interpreted to mean that it ceases to exercise the jurisdiction in a particular enquiry or trial and not in a particular post. The Punjab Chief Court and the Upper Burma Judicial Court have held that where there has been an only omission on the part of the Magistrate to enquire from the accused whether he wishes to exercise the right by proviso (A) of S. 350, it cannot be said that there was a failure of justice by omission and where the accused had a perfectly fair trial the omission to enquire from the accused of his right provided by proviso (A) to S. 350 would, at the most, amount to an error which was curable under S. 537 of the Criminal Procedure Code "vide 3 Weir 1903 (Cr) (Sic) and 191 A 175 (Sic)". The trend of these decisions excepting the view expressed by the Rangoon High Court would show that the judgment of a Magistrate who has based his conclusion upon the evidence recorded by his predecessor would ordinarily be set aside when it appears that it has prejudiced the accused or has resulted in miscarriage of justice, otherwise not. The majority judgment in the case, "Laxman v. The

State", 11 Deccan L R 123 is to the effect that the judgment of a Magistrate, based on the evidence not recorded by him but recorded by his predecessor, is not an irregularity which could be cured, but is a nullity.

15. For the reasons given above, I am of the opinion that as far as the question of the renewal of the evidence is concerned, I agree with the view expressed in "Laxman v. The State". 11 Deccan L R 123 to the extent that S. 281 of the Hyderabad Criminal Procedure Code does not apply to the cases before the Sessions Judge, but I do not agree with the majority view in this respect that in cases where the Sessions Judge bases his conclusion upon the evidence recorded by his predecessor it would amount to a nullity. In my opinion, such a judgment is not necessarily liable to be set aside as it does not affect the jurisdiction but could be set aside if it has prejudiced the accused or has resulted in the miscarriage of justice, and in this respect I agree with the minority judgment in the case of "Laxman v. The State", 11 Deccan L.R. 123.

16. The second question referred to us is whether the general principle that only the Judge who has recorded the evidence is competent to deliver judgment in it, applies to judgment by which an order of acquittal is recorded. I am of the opinion that this principle would apply even to a case where there has been an acquittal, for, in a case of acquittal also the question that remains to be decided is whether it would be open to the Prosecution to get the order of acquittal set aside on the ground that the Magistrate acted upon the evidence recorded by his predecessor. In the eye of the law, whether it is the accused or the Prosecution both are the same. Although the accused stands in a peculiar position, and ordinarily every provision of law would be construed liberally in his favour, the Courts are there to punish a wrong-doer and vindicate justice; therefore, the Appellate Court is justified in setting aside an order of acquittal where it finds that the circumstances of the case are such that the Magistrate would not have acquitted the accused if he had the opportunity of watching the demeanour of the witnesses and the trend of the evidence. It is primarily a matter for the Appellate Court to determine whether by such a trial there has resulted a miscarriage of justice.

17. The last question referred to us is whether the complainant who has not objected to the use of evidence at the time of judgment could object to it in appeal and on that ground get an order of acquittal set aside. I am of the opinion that it would be open to the Prosecution as much as to the accused to raise the question, but it would be left to the Appellate Court to exercise its discretion and the Appellate Court would interfere only if it comes to the conclusion that the lower Court Judge by acting upon the evidence recorded by his predecessor has fallen into a palpable error which has resulted in failure of justice. Thus in all these cases, the criterion would be whether the Appellate Court thinks that there has been a palpable miscarriage of justice.

18. The following replies may be given to the questions referred to us:

1. The Full Bench case reported in "Laxman v. The State", 11 Deccan L.R. 123 is regarded as good law in so far it relates to S. 281 of the Criminal Procedure Code that its provisions are not applicable to a case before the Sessions Judge, but is not regarded as good law to the extent that if the Magistrate bases his judgment on the evidence recorded by his predecessor is a nullity;

2. The principle of renewal of evidence applies to the order of acquittal also; and

3. The complainant can object to the use of evidence in appeal but it would be left to the Appellate Court to exercise its discretion and the Appellate Court would interfere only if it comes to the conclusion that the lower Court Judge by acting upon the evidence recorded by his predecessor has fallen into a palpable error which has resulted in failure of justice.

19. SIADAT ALI KHAN J.: In this case the learned Additional Sessions Judge, Gulbarga, by judgment dated 11th Aban 1356 Fasli, corresponding to 16th September 1947 A.D. acquitted the accused Siddalingappa, Hanmanthappa and Chanda Saheb. The State filed an appeal and the Division Bench hearing the appeal directed that the question of law involved in the case should be referred to a Full Bench under S. 7 of the High Court Act. Accordingly a Full Bench heard the arguments and held on 17th Aban 1358 Fasli corresponding to 17th September 1949 A.D. that the case should be referred to a Full Bench consisting of five Judges. The Full Bench consisting of five Judges directed on 16th Dai 1359 Fasli corresponding to 16th November 1949 A.D. that the case should be referred to a Full Bench consisting of seven Judges. The case is thus now before us and we have heard the arguments of the learned Counsel of both the parties.

20. The questions of law referred to this Bench comprise the following three questions:

(i) Having regard to the amendment of S. 281, Hyderabad Criminal Procedure Code, and the divergent decisions of this Court, should the Full Bench (five Judges) case reported in "Laxman v. The State", 11 Deccan L.R. 123 be deemed good law?

(ii) Whether the general principle that only the Judge who has recorded the evidence in the case is competent to deliver Judgment in it applies to a Judgment by which an order of acquittal is recorded?

(iii) Whether the complainant who has not objected to the use of evidence at the time of Judgment could object to it in appeal and on that ground get the order of acquittal set aside?

21. Evidently on the subject of renewal of evidence there is only one S. 281 in the Hyderabad Criminal Procedure Code and it does not apply to the Sessions Court; for, in S. 281 only Magistrates are required to renew evidence. A reference to Sub-sec. 14, of S. 2, General Clauses Act (No. 3) of 1308 Fasli will show that the definition of a Magistrate does not include in its connotation a Sessions Judge or a Judge of the High Court. Till the amendment of 1344 Fasli,

S. 281 of the Hyderabad Criminal Procedure Code contained the provision that on a change of the Magistracy the accused could apply for the renewal of evidence and it was held in the cases cited in the Margin "*Totreddy v. Narsingreddy*", 15 Deccan L.R. 162, "*Santu v. Cherka*", 17 Deccan L.R. 136, "*Shaik Rahim v. Govt.*", 22 Deccan L.R. 236 that if the accused were to make such an application, evidence should be taken "de novo". By the amendment of 1344 Fasli the renewal of evidence is now in the discretion of the Magistrate but it is also provided in the amending section itself that the High Court or the District Magistrate may set aside a judgment which is based upon evidence wholly recorded by the predecessor of the Magistrate who has delivered judgment in the case, provided that the accused is prejudiced by such judgment. Thus renewal of evidence is more or less obligatory in cases cognizable by the Magistrates only, and the Hyderabad Criminal Procedure Code does not contain any provision for renewal of evidence before the Sessions Judges. "Prima facie" absence of any provision in this regard indicates that renewal of evidence in cases before Sessions Judges is not necessary. In the reference reported in 6 Deccan L.R. 252 though the learned Judges observed that so far as the provisions of the Criminal P.C. & "the universal practice of the Magistrates of this State" are concerned, renewal of evidence in Sessions cases on a change in the Bench is not necessary, yet on the authority of the two decisions of the Indian High Courts cited in the margin (1) "*Emperor v. Sakharan Pandurang*," 26 BOM 50. (2) "*Queen v. Raghunathdas*," 23 W.R. Cr. 59) they held that the Judge who decides the case must be the Judge who has recorded the whole of the evidence in the case. Similarly in the Full Bench case of "*Lachman v. Government*", 11 Deccan L.R. 123, in the judgment referring the case to the Full Bench it was expressly observed that:- The principle that every Judge should base his judgment on the evidence which he has himself recorded is not recognised in the Criminal P.C. except in S. 281; hence if S. 281 is not applicable to Sessions Judges, it means that the law has not considered it desirable to apply this principle to Sessions Courts and to other Higher Courts.

But the learned Judges who referred the case to the Full Bench comprising of five Judges changed their opinion there and held that the renewal of evidence before the Sessions Judges also is necessary on the "well-known principle of English Criminal Law" that every Judge should base his judgment on the evidence recorded by himself. It is evident, therefore, that the learned Judges of the Hyderabad High Court were fully conversant with the principle that law permits everything except what it prohibits and hence when the law has not made renewal of evidence necessary for the Sessions Courts, probably because of their being higher Courts with competent Judicial officers, use of evidence recorded by out-going Sessions Judges was lawful and renewal of evidence before them should not be necessary; but they discarded this principle because of the above mentioned principle of English Criminal Law notwithstanding that they were aware of the fact that the practice followed by all the Sessions Courts at that time was that renewal of evidence was not necessary on a change of the Bench.

22. Though the Indian Criminal P.C. of 1861 did not contain any Section corresponding to S. 350 of the present Indian Criminal P.C., still in the marginally noted cases (1) "Begarayi Krishna v. Emp. 1 Weir 469. (2) "Queen v. Kullian Singh", 2 Agra N.W.P. H.C.R. 468 at p. 470 (3) "Queen v. Poornoo Chunder Doss", 8 W.R. Cr 59 decided under that Code it was held that renewal of evidence was necessary on a change of the Bench, i.e. the personnel of the Magistrate; and when in the Criminal P.C. of 1872 A.D. S. 328 corresponding to the present S. 350 was enacted and made the renewal of evidence discretionary it was considered that this was an exception to the above mentioned principle of the Common Law. For instance, it was held in *Ladya v. Emperor*, 2 Cri L.J. 820 (Nag), that S. 328 was an exception to the Common Law principle, as such it should be interpreted strictly, and should not be deemed to be applicable to Sessions Courts; and that in the Sessions Court if there were a change in the Bench, renewal of evidence would be necessary. In *"Queen v. Rughoonathdas"*, 23 W.R. Cr 59 (2), following 2 Cri L.J. 820 (Nag), it was held further that a Sessions Judge has no power to deliver judgment on the evidence recorded by his predecessor even with the consent of the accused; and in *"Hardiwar Singh v. Khega Ojha"*, 20 Cal 870 and *"Emperor v. Sakharam"*, 26 Bom 50 also similar findings were recorded. I may observe that following these old decisions the Indian High Courts have down to the present day expressed similar views and delivered similar judgments, and the marginally cited cases ((1) *"Tarada Baladu v. Queen"*, 2 Weir 430. (2) *"Empress v. Kalu Ram"*, 7 C.P.L.R. (Cr) 1. (3) *"Queen v. Gopi"* 21 W.R. Cr 47. (4) *"Buta Singh v. Empress"*, 1 Pun Re Cr 1890. (5) *"Badri Pershad v. Emperor"*, 17 Ind Cas 797 (All). (6) *Emperor v. Rasool Baksh*", AIR 1942 Sind 122. (7) *"Durga Charan v. King Emperor"*, 8 Cal L.J. 59. (8) *"Nga San Tin v. Emperor"*, AIR 1930 Rang. 354. (9) *Emperor Vs. Dorabji Pestonji Gora*, are only a few instances of such cases.

23. It is thus abundantly clear that not only the decisions of this High Court but the Indian Cases also proceeded on the English Criminal Law principle that a Judge should base his judgment upon evidence which he has himself recorded, so that in coming to a conclusion about the guilt or innocence of the accused he should have before him not only the statements of witnesses but also his observations of their demeanour. This was regarded as a fundamental right of the accused also. I have, however, perused all the cases "cited in para 22 of this Judgment and also all the cases to which reference was given in them. In addition, I have studied the marginally cited decisions ((1) *"Govt. V. Dhansing"*, 4 Deccan L R 210. (2) 5 Deccan L.R. 1. (3) *"Govt. v. Syed Hameed"*, 7 Deccan L.R. 290. (4) *"Narayan v. Sabku"*, 19 Aiene Deccan 219. (5) *"Mollikchand v. Pahalwan"*, 9 Deccan L.R. 302. (6) *"Baswantrao v. Govt."*, 23 Deccan L.R. 326 (F B). (7) *"Gurunath v. Govt."*, 25 Deccan L R 9. (8) *"Govt. v. Syed Hyder All"* 20 Deccan L.R. 268. (9) *"Ali v. Govt."*, 21 Deccan L.R. 44. (10) *"State v. Rajaram"*, 21 Deccan L.R. 142. (11) *"Erayya v. Govt."*, 21 Deccan L.R. 199 of this Court with the object that I may find in them or from reference given therein to some well-known test-books not a mere reference to this English principle, but a

detailed exposition of it I, however, did not succeed in my attempt. In all these cases this principle has been referred to as "the principle of English Criminal Law" but in none of these cases a reference to any text-book or precedent from which it has been taken is given. I myself referred to various English text-books cited in the margin (1) Stephen's Commentaries on the Laws of England (17th Edn.); (2) Stephen's History of Criminal Law; (3) Archbold's Criminal Pleadings; (4) Archbold's Quarter Sessions; (5) Wholdsworth's History of English Law; (6) Carter's "History of English Legal Institutions"; (7) "The Machinery of Justice in England" by A.W. Jackson (1942 Edn.); (8) Short & Mullar "Practices of the Crown's Offices"; (9) Russet's "Crimes and Misdemeanour". But to my chagrin, I did not find any exposition of this principle in them; hence the question arises how in all these cases reference to this well-known principle of English Criminal Law has appeared, and it requires careful and serious consideration. In my opinion this principle is an inference from certain characteristics of the trial of criminal cases in England and very probably it has nowhere been stated or formulated expressly. It is well known that in English Law all felonies and other heinous offences are heard at Assizes by the Court of Assizes; and that these Courts go on tour and hear the cases with the aid of a Jury. The following are some of the characteristics of the trials at these Courts of Assizes:

1. Questions of facts are decided by the Jury on the evidence adduced before it. If any member of the Jury falls seriously ill or dies after beginning of the hearing, "the usual procedure is that a new member of the Jury is sworn in the place of the member so incapacitated and in case of felony the accused has the right to object to all the members of the Jury" "King v. Edwards". 3 Com Rep 207

In the hearing of the case begins "de novo" The witnesses are sworn in and examined afresh and it is not considered enough if merely the notes of the evidence taken down by the Judge before renewal were read over to the witnesses "King v. Betrand", 1 Pleas of Crown 520 at p. 524. Until recently this was the procedure at Common Law. It has now been slightly modified by Statute. S. 15 of the Criminal Justice Act 1925 has prescribed that:

Where in the course of a criminal trial any member of the jury dies or is discharged by the Court as being through illness incapable of continuing to act or for any other reason, the Jury shall nevertheless, subject to assent being given in writing by or on behalf of both the Prosecutor and the accused and so long as the number of its members is not reduced below ten, be considered as remaining for all the purposes of that trial properly constituted, and the trial shall proceed and a verdict may be given accordingly.

It is evident, therefore, that at Common Law on the death or incapacity through illness or otherwise of any member of the Jury the hearing was bound to start "de novo" and the witnesses were examined afresh; that the Statute Law modified the Common Law to the extent that if ten persons of the Jury remain after the aforesaid eventualities the case could go on with them provided that both the complainant and the accused consent to it. It follows naturally that,

where the complainant or the accused do not consent the Common Law principle will be adhered to and the case will be tried "de novo".

2. Another characteristic of trial in English Assizes is that the hearing is "de die in diem". After swearing in the jury and beginning to record evidence the hearing is not adjourned except to the next day. Reference may be made to cases of "King v. Tempest". 1 F & F 381 and "King v. Robson", (1864) 4 F & F 360 where it has been held that if the hearing is not concluded on the day on which it was begun the Court could adjourn the hearing only for the next day:

If the charge consists of a misdemeanour, Common Law allowed the Jury to separate and to go home for the night but with the warning that until the trial is over they should not speak to anybody about the case; but in, offences of waging war against the King or of felonies or murder, Common Law did not allow the Jury to separate even for the night, and kept the members thereof together in the precincts of the Court under the supervision of an official of the Court; later on they were allowed the amenities of a fire and their own meals though in early times even these amenities were denied to them.

All this makes it quite clear that the trial was conducted as expeditiously as possible and it may also be mentioned that even where the hearings were postponed from day to day because of the number of witnesses, etc., all the hearings were by a fiction of law considered to have taken place in one day only; and the day of delivering Judgment was the day on which the hearing began. "King v. O'Brien", 26 Ir R 481.

3. I may refer also to one more feature of the trial by Jury, which is due to a principle implanted in the minds of Englishmen from times immemorial, is inborn and instinct with them, the principle that a man should only be condemned when at least twelve persons of his class consider him guilty. That is why trial by grand jury is several hundred years old, and! it dates from a time when very few Englishmen were literate; naturally the proceedings were all oral. In the trial by Jury or the petty Jury also, the Jury could not and did not record any evidence, only the presiding Judge took notes of the evidence largely for the purpose of summing up the case to the Jury; this practice persisted down to recent times and the English Parliament had to provide by Statute that in appealable cases record of evidence and other proceedings of the Court should be kept in Shorthand for use in the Appellate Court. Thus the Jury did not record the evidence of any witness either in bygone days or even now, nor do they read or refer to the evidence after hearing the arguments for the purpose of forming an opinion about the guilt or innocence of the accused; their opinion is formed while they hear the witnesses giving evidence and noting their demeanour and by hearing to the summing up by the Judge. All these go to show that every member of the Jury forms an opinion and decides questions of fact after personally hearing the witnesses. It was for this reason that if any member of the Jury took ill or died or for any other reason, for e.g. misconduct, his services were terminated, the case had to begin again and the witnesses had to be

examined afresh as the rule was that the trial should be by twelve of his peers or equals. It was because of this rule of trial by 12 peers or equals a]so that we find provisions for a retrial if a change in the members of the Jury takes place and we do not find any reference to what should be done if a change occurs in the personnel of the presiding Judge. In almost all the textbooks cited by me in the foregoing paragraph of this Judgment I have found the heading "Death of a member of the Jury or his illness" but I searched in vain for the heading "Illness or death of the Judge." After a long & patient search I could put my hand to one case only namely "King v. Platt", (1921) 3 KB 167, where it has been held that if after holding the accused guilty and before the Judge could sentence him, the Judge dies, his successor in office could sentence the accused. This shows that as the decision on questions of facts is with the Jury, a change in the Bench does not come in the way of pronouncing sentence on the accused.

24. I need not dwell any longer on the procedure followed at the Assizes Courts. The above mentioned characteristics of that procedure indicate that very probably the Indian cases inferred from them the principle that every Judge should deliver Judgment upon evidence recorded by himself. Hence the point that requires consideration is whether this principle should be confined to hearing with the aid of Jury or should have general application. In my opinion the principle that every Judge should deliver Judgment upon the evidence which he has himself recorded is inseparably bound with and should be confined to the trial by Jury, for the reason that in English Law the decision of questions of fact pertained to the Jury who decided them after personally hearing the evidence in a trial conducted from day to day and in cases of felonies even without separating and by a verdict deemed by the English Law as delivered in one single day; and for the reason also that it is a characteristic of the English people that if they would condemn a person, they would do so only when 12 persons could pronounce him guilty after hearing the charges brought against him. This is a sound principle and from the point of view of natural justice much can be said in its favour; it fulfils the dictum of their Lordships of the Privy Council that it is essential that not only justice should be done but what is more, justice should appear to be done and the accused has every reason to believe that justice has been done to him. But this cannot be the only rational or scientific principle of trial. The Juries can be prejudiced and swayed by passions of the moment and even today the opinion regarding trial by Jury is not wholly in favour of it; an eminent English lawyer like Mr. Stephen, with his unusual insight, admits that arguments for and against Juries are of equal weight though he himself is in favour of retaining the trial by Jury. Jeremy Bentham whose legal knowledge, criticism and tenacity caused hundreds of reforms in English Law discussed this question in Book 3 chapter 7 of his book "Rationale of Judicial evidence especially applied to English practice" and has come to the conclusion that emphasis on this principle causes so much delay, expense and inconvenience that these evils far outweigh the disadvantages that may be feared from the opposite principle that a Judge can pronounce judgment upon evidence recorded wholly or partly by his

predecessor. For fear of making this judgment an inordinately lengthy one I cannot reproduce here all the various arguments advanced by Bentham. Suffice it to say that his conclusion that adherence to the principle under consideration causes undue delay, inconvenience and expense is such that probably nobody can differ from it. It is on this ground that the same Legislature which enacted the Indian Criminal Procedure Code permitted the use of evidence recorded by the predecessor of a Judge in the Indian CPC and did not prescribe renewal of evidence on a change of the Bench in civil matters. It is evident that in the compilation of both these codes principles of English Law were kept in view; in the Criminal Procedure Code the legislature allowed renewal in certain circumstances but in the CPC they expressly prescribe that renewal of evidence on a change of the Bench is not necessary. The learned Chief Justice of the Bombay High Court, Couch,, in an old case "Naranbhai Virajbhukandas v. Naroshankar", 4 Bom H C A C 98, has gone so far as to hold that it is not a principle of jurisprudence that the same Judge should deliver judgment as has recorded evidence of the case and that it is not the practice of most of the Courts also. Moreover, the Evidence Act does not contain any provisions, making the evidence recorded by the predecessor of a Judge inadmissible for his successor; or making evidence admitted at one stage of the case inadmissible at a subsequent stage, that is, if the change in the Bench is considered as a different stage of the suit. In brief, my opinion is that if the principle of English Criminal Law that every Judge should deliver judgment upon the evidence he has himself recorded is; not considered as peculiar to trial by Jury and is given a general application, certain other & equally important principles will be overlooked and many difficulties will arise, for instance, much inconvenience, delay and expense will be caused to the litigants and evidence which is in every other respect admissible will become inadmissible without sufficient reasons; and we will have one principle for criminal cases and quite another principle for civil cases and this too without sufficient reasons.

25. So far I have discussed the case from the theoretical point of view. Now I will consider the question "What is the intention of the Legislature as expressed in the Criminal Procedure Code", that is, as the Legislature has expressly provided for the renewal of evidence in the case of the Magistrates only subject to prejudice to the accused and abstained from legislating about Sessions Judges what intention should be attributed to the Legislature? "Prima facie", on the principle that what is not prohibited, is allowed, it may be assumed that renewal of evidence before Sessions Judges is not necessary and that Sessions Judges can act upon, the evidence recorded by their predecessors. Similarly, it may also be assumed that as the Magistrates are less experienced officers than the Sessions Judges, Legislature prescribed renewal of evidence in their case and did not do so in the case of the Sessions Judges. But here I will have to consider whether this conclusion will not be against the historical background. I have stated at length in the foregoing paragraphs what the back-ground is and" in a word it is covered and splashed all over by the characteristic features of trial by

Jury. This suggests that as owing to these features of trials by Jury witnesses have to be examined afresh, the Legislature did not consider it necessary to provide expressly for renewal of evidence on a change of the Bench in Sessions. Evidently this is what all the Indian High Courts have assumed and following them our High Court also has held the same. All this weight of authority seems overwhelming and it cannot lightly be assumed that it is erroneous or is based on one-sided or incomplete view of the matter. It may, however, be stated with all respect that as the assumption is very probably based on the characteristic features of trial by Jury and the trial by Jury is by no means the only mode of trial, the assumption necessarily becomes one-sided and incomplete and therefore to that extent erroneous. The Indian Legislature does not prescribe that all Sessions trials should be by Jury. The Hyderabad Legislature in S. 414 of Hyderabad Criminal Procedure Code has reserved the right of directing the trial to be with the aid of Jury to the Government and as a matter of fact trial by Jury is in this State limited to three classes of offences and to the High Court only; and it may be that even in the High Court it may not be allowed to continue for long. The point I want to make is that as even in England to-day trial by Jury does not hold the field and only 55 per cent of the criminal trials are conducted by Jury, and in the Indian Republic probably a very much less percentage of cases has ever been conducted with the aid of Jury, the assumption as to the intention of the Legislature from its reticence in the Criminal Procedure Code that it intended all trials by Sessions Judges should be "de novo" on a change of the Bench cannot be considered to be correct. Whether there is sufficient justification for extending an incident of trial by Jury to trials without the aid of Jury and whether it will be advisable to overlook the conclusion of Bentham that the insistence on "de novo" trial in the case under consideration causes much inconvenience, delay and expense has to lie carefully considered and answered. In my opinion for all these reasons the provisions of Criminal Procedure Code do not show that the Legislature intended that renewal of evidence should be necessary on a change of Bench in Sessions trials, and I hold accordingly.

26. Among the questions referred to this Bench one is in respect of an order of acquittal passed by a Sessions Judge on evidence wholly or partly recorded by his predecessor. I think, we have a pointer to the intention of the Legislature in this case for in S. 281, Hyderabad Criminal P.C. corresponding to S. 350 of Indian Criminal P.C. the Legislature has taken into consideration the prejudice that might result to the accused by refusal to renew evidence on a change of Bench and it has not spoken of the prejudice to the prosecution in such an event, Hence, it seems clear that there is no warrant for setting aside an order of acquittal on the ground that the Sessions Judge based his order of acquittal on the evidence recorded by his predecessor. No doubt S. 281 deals with trials "before Magistrates, but by analogy the same principle would apply to trials before Sessions Judges; and the generalization that a trial which in any manner results in prejudice to the accused is vitiated applies equally to trials before the Sessions Judges and before the Magistrates. Hence prejudice to the accused

being the criterion, evidently an order of acquittal does not come under it and such an order cannot be set aside even if the judgment of a Sessions Judge directing an acquittal was "based on evidence wholly or partly recorded by his predecessor. Thus the precedent of his Court cited in margin, "Government v. Syed hyderali", 27 Deccan L.R. 170; Government v. Raja Ram". 21 Deccan L.R. 142; Government v. Buchappa", 18 Deccan L R 184, and other similar precedents which lay down that an order of acquittal, based on evidence not wholly recorded by the Judge delivering the judgment, is to be set aside, are, in my opinion not binding. The question under consideration may be viewed at from a slightly different point of view. Supposing a Sessions Judge has acquitted an accused on evidence wholly or partly recorded by his predecessor; and on appeal the appellate Court finds that barring this fact, the record is wholly insufficient to sustain a conviction, will it not be in a way trying the accused twice if the order of acquittal is set aside. Again, on what legitimate ground should the order of acquittal be challenged and set aside? Surely, the said Sessions Judge had jurisdiction and was fully seized of the case. He and his predecessor have observed all the procedural and substantive safeguards provided in the Criminal P.C. and other laws. Would it not be an unnecessary and unwarranted interference with the jurisdiction of the Sessions Judge to set aside his order of acquittal merely because of the principle of renewal of evidence on a change of the Bench - a principle which we have seen to be inseparably bound with the trial by Jury. In my opinion it would be so and therefore orders of acquittal should not be set aside on the ground that they were based wholly or partly or evidence recorded by predecessors of the Judges delivering them.

27. The last question referred to us is whether the prosecution or the complainant who has not objected to the use of evidence recorded by the predecessor of the Sessions Judge delivering the judgment, can object to it in appeal and on that ground get the order of acquittal set aside. Our answer will be in the negative. For consent will be presumed. An accused cannot by consent bind himself but prosecution has always been recorded to be in a better position and can in a way agree to many things. This has been held in so many cases, for example "Gurunath v. Government", 25 Deccan L.R. 9 may be referred to.

28. To sum up the following replies may be given to the Full Bench which has referred the questions to us:

1. "Laxman v. The State" 11 Deccan L R 123 is not binding. That is on a change of Bench renewal of evidence will not be compulsory but when a Sessions Judge is transferred and the accused prays for renewal of evidence and the Court also is of opinion that the prayer is not vexatious and its rejection would result in prejudice to the accused the evidence may be renewed. Otherwise no renewal of evidence should be necessary;
2. This principle of renewal of evidence does not apply to orders of acquittal; and
3. If the complainant had not objected to the use of evidence recorded by the

predecessor of a Sessions Judge, it will be considered as acquiescence and he will not be allowed to go back upon it.