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## FEDERAL COURTS--RULE 33 OF RULES OF CRIMINAL PROCEDURE--POWER TO GRANT A NEW TRIAL AFTER AFFIRMANCE

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FEDERAL COURTS—RULE 33 OF RULES OF CRIMINAL PROCEDURE—POWER TO GRANT A NEW TRIAL AFTER AFFIRMANCE—One John Memolo was convicted of tax evasion in the District Court of the United States for the Middle District of Pennsylvania. The defendant's motion for a new trial, on the ground of prejudicial conduct of the trial judge, was denied. He then appealed assigning as error all of the grounds stated in his motion and also the denial of the motion for a new trial. The circuit court of appeals affirmed the conviction.<sup>1</sup> The sentence was executed and the defendant imprisoned in a federal penitentiary. Then the district judge reconsidered, and in the interest of justice directed that the judgment be vacated and a new trial granted. The United States petitioned the circuit court of appeals for a writ of mandamus directing the district judge to set aside his order vacating the judgment and for a writ of prohibition against further proceedings in the cause. The petition for the writs was denied.<sup>2</sup> The government appealed. *Held*, reversed. The granting of a new trial on the district court's own motion after an affirmance of the original judgment by the circuit court of appeals was improper. *United States v. Smith*, 331 U.S. 469, 67 S.Ct. 1330 (1947).

The Federal Rules of Criminal Procedure "are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."<sup>3</sup> In carrying out this expressed purpose the Court in the present case has interpreted Rule 33<sup>4</sup> to conform with the generally

<sup>1</sup> *United States v. Memolo*, (C.C.A. 3d, 1946) 152 F. (2d) 759, cert. denied, 327 U.S. 800, 66 S.Ct. 902 (1946).

<sup>2</sup> *United States v. Smith*, (C.C.A. 3d, 1946) 156 F. (2d) 642.

<sup>3</sup> Federal Rules of Criminal Procedure, 18 U.S.C. (1946) § 687, Rule 2. See, Desson, "The New Federal Rules of Criminal Procedure: I," 55 *YALE L. J.* 694 (1946).

<sup>4</sup> Federal Rules of Criminal Procedure, 1946, Rule 33: "New Trial. The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5 day period."

recognized rule that a trial court cannot entertain a motion for a new trial after a judgment has been affirmed or an appeal denied on its merits by the appellate court.<sup>5</sup> At common law a trial court was limited in its power to grant a new trial to the term in which the motion was made,<sup>6</sup> but this limitation was expressly removed by the present rules.<sup>7</sup> No time limit is set upon the power given in Rule 33 to grant a new trial if required "in the interests of justice." However, such a motion must be made within five days except a motion for a new trial based on newly discovered evidence which may be made "before or within two years after final judgment."<sup>8</sup> In the present case the new trial was ordered "in the interests of justice." But the Court felt that a reasonable limitation on this power was necessary for several reasons: appellate courts do not act in an advisory capacity and can only review final judgments;<sup>9</sup> the trial judge should not be able to act without petition and the making of a motion has a five-day limitation;<sup>10</sup> and the trial judge should have no continuing power to grant a new trial for that would subject him to private appeals from the friends of the man convicted.<sup>11</sup> The trial judge is allowed by the rules to extend the time necessary for him to consider a timely made motion, and this is felt a sufficient safeguard against the trial judge's having to act hurriedly and without sufficient consideration on the merits of the motion.<sup>12</sup> Also, beyond the express provisions of Rule 33, there is an ever-present remedy in the event of a miscarriage of justice. This remedy, a writ of habeas corpus, is available without limit of

<sup>5</sup> *Flowers v. United States*, (C.C.A. 8th, 1936) 86 F. (2d) 79; *City of Orlando v. Murphy*, (C.C.A. 5th, 1938) 94 F. (2d) 426; *Swartz v. Kaplan*, (D.C. Mass. 1931) 50 F. (2d) 947; and for a general treatment of the subject see the annotation in 139 A.L.R. 340 (1942).

<sup>6</sup> *United States v. Mayer*, 235 U.S. 55, 35 S.Ct. 16 (1914); *In re Metropolitan Trust Co.*, 218 U.S. 312, 31 S.Ct. 18 (1910); *Wetmore v. Karrick*, 205 U.S. 141, 27 S.Ct. 434 (1907).

<sup>7</sup> Federal Rules of Criminal Procedure, 1946, Rule 45 (c). This rule corresponds to Rule 6 (c) of the Federal Rules of Civil Procedure in abolishing the term rule. State courts in general are controlled by statutes limiting the time for filing or determining a motion for new trial; for a general treatment of this subject see, 48 A.L.R. 362 (1927).

<sup>8</sup> The rule enlarges the time limit for motions for new trial on the ground of newly discovered evidence from sixty days, allowed under old Rule II of the Criminal Appeals Rules of 1933, 18 U.S.C. (1934) § 688, to two years. The Preliminary Draft of the Federal Rules of Criminal Procedure prepared by the Advisory Committee on Rules of Criminal Procedure (1943), Rule 31 (c) abolished limitations on the time for making a motion for a new trial solely on the ground of newly discovered evidence, but this was changed by the Supreme Court on review of the recommended rules.

<sup>9</sup> Principal case at 474. Judicial Code, § 128 (a), 28 U.S.C. (1940) § 225 (a).

<sup>10</sup> Principal case at 474. The Court felt that the recognition of power to grant a retrial on the court's own motion might open a serious question of double jeopardy, but discussion of this problem and of whether Memolo's intervention in this case in support of the trial judge's power amounted to a consent to a second trial, was dismissed as beyond the scope of the case.

<sup>11</sup> Principal case at 475.

<sup>12</sup> Federal Rules of Criminal Procedure, 1946, Rule 33.

time to remedy jurisdictional and constitutional errors at the trial.<sup>13</sup> The power of the trial judge to grant a new trial is limited to cases where a motion has been timely made by the accused and before an appeal has been taken.<sup>14</sup> This decision recognizes the wisdom in maintaining the finality of appellate decisions, of terminating litigation within a reasonable time, and further allows to the defendant fair procedural opportunities to move for a new trial.<sup>15</sup>

*Irving Slifkin, S.Ed.*

<sup>13</sup> *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019 (1938); *Bowen v. Johnston*, 306 U.S. 19, 59 S.Ct. 442 (1939); *Walker v. Johnson*, 312 U.S. 275, 61 S.Ct. 574 (1941); *Waley v. Johnston*, 316 U.S. 101, 62 S.Ct. 964 (1942); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 63 S.Ct. 236 (1942).

<sup>14</sup> Rule 33 provides for the granting of a motion for a new trial after an appeal has been taken only on remand of the case by the appellate court.

<sup>15</sup> For discussions of this case in the lower court see, 95 *UNIV. PA. L. REV.* 414 (1947); and 60 *HARV. L. REV.* 145 (1946).