

CRIMINAL REVISION.

Before Buckland and Cuming JJ.

1923

April 27.

RAHIM SHEIKH

v.

EMPEROR.*

Jury—Power of Judge to discharge the jury, before verdict, for misconduct, and order retrial—Inherent jurisdiction—Criminal Procedure Code (Act V of 1898) ss. 232, 233 and 308.

The Sessions Judge has inherent power to discharge the jury, before the verdict, for misconduct or other similar and sufficient ground, and to empanel another.

The power is discretionary and not to be used nor until the Judge has satisfied himself, by such inquiry as in the circumstances he can adopt, that reasonable grounds exist for exercising it.

Section 308 of the Code applies where a jury is discharged for misconduct.

Reg. v. Ward (1), *Reg. v. Davison* (2), *Emperor v. Oli Mahamad* (3) referred to.

THE petitioners were committed to the Court of Sessions, at Rajshahi, on a charge under ss. 436 and 34 of the Penal Code, for setting fire to some huts belonging to one Hamid Ali. The trial commenced with five jurors on 28th February 1923, and proceeded until the 6th March, and in the course of it eleven witnesses were examined for the prosecution. On the last mentioned date, on resumption of the trial after the midday recess, the Sessions Judge intimated that it had come to his notice that some of the jurors had been seen

* Criminal Revision No. 327 of 1923, against the order of B. K. Basu Sessions Judge of Rajshahi, dated March 6, 1923.

(1) (1867) 10 Cox. C. C. 573. (2) (1860) 8 Cox. C. C. 360.

(3) (1902) 7 C. W. N. xxxi.

associating with the person looking after the defence, and that there was reason to believe this to be true. He recorded the matter in the order sheet, and directed a retrial by another jury. It appeared that some inquiry was held, though no evidence was taken, in the matter, in the presence of the accused. The petitioners thereupon moved the High Court and obtained a Rule on the ground that the Judge acted without jurisdiction in discharging the jury, and ordering a fresh trial in the circumstances.

1923
 RARIM
 SHEIKH
 v.
 EMPEROR.

Babu Bimal Chandra Das Gupta, for the petitioners. Sections 282 and 283 are the only provisions in the Code relating to the discharge of the jury before verdict. When there are express provisions in the Code, as to a particular point, they are intended to be exhaustive, and there is no room for the exercise of inherent powers. The Judge had, therefore, no jurisdiction to discharge the jury for misconduct. The rules of English law have no application to India where the law is codified, and the position of the jury different. If a verdict is improper for misconduct of the jurors, ss. 306 and 307 provide an adequate remedy. In *Empress v. Khagendra Nath Banerjee* (1), and *Emperor v. Oli Mahamad* (2), the Judges considered they had no power to discharge the jury in similar cases. Section 308 is limited to cases falling under ss. 282, 283 and 305. The orders of the Judge here are *ultra vires*.

No one appeared for the Crown.

BUCKLAND J. This application raises a novel point on which there does not appear to be any authority. The petitioners were put on their trial before the learned Sessions Judge of Rajshahi and a

(1) (1898) 2 C. W. N. 461.

(2) (1902) 7 C. W. N. xxxi.

1923
RAHIM
SHEIKH
v.
EMPEROR.
BUCKLAND
J.

jury, upon charges under sections 436 and 34 of the Indian Penal Code, and the trial began on the 28th February last, and continued from day to day until the 6th March. On that day, when 11 witnesses for the prosecution had been examined, the learned Judge recorded in the order sheet that it had come to his notice that some of the jury had been seen associating with the man looking after the case for the accused. The learned Judge appears to have held some sort of enquiry, the nature of which is not specified, though I will assume it was sufficient and that he was reasonably satisfied as to the conclusion at which he arrived, and thereupon stated that he had reason to believe this to be the case, and he consequently ordered the jury to be discharged and the case to be tried *de novo*.

These are all the facts with which we have to deal, and it is now objected on behalf of the petitioners that the order discharging the jury and directing the trial to recommence *de novo* was made without jurisdiction.

The contention submitted to us is that a case such as this is not provided for by the Code of Criminal Procedure, and that sections 282 and 283 are exhaustive as regards discharging a jury during the continuance of the trial; there are other sections referring to the discharge of a jury, such as section 305, but those are sections which only apply at a later stage. The sections, however, do not profess to deal with the circumstances in which a jury may be discharged, rather it is the other way, and in the circumstances to which they refer they state that that course may be pursued.

The argument submitted to us involves the proposition that whatever the stage of the trial may be, however gross the misconduct of a jury, and

however patent to everybody concerned it may appear, there is no remedy, but that the trial must continue to run its course to its conclusion, when, it is submitted, it will be open to the presiding Judge to submit the case to the High Court under section 307 of the Criminal Procedure Code. So farcical a procedure would only bring the administration of justice into disrepute. In my judgment where the question of misconduct on the part of the jury or other similar sufficient cause arises, the Sessions Judge has inherent power to discharge the jury and empanel another. It is true that the Code does not provide for such circumstances, but on the other hand, the presumption that jurors will discharge their duties without impropriety may explain the omission. The power to discharge a jury on such grounds is one not to be exercised lightly, nor until the Judge has satisfied himself, by such form of enquiry as in the circumstances he can adopt, that reasonable grounds for exercising such a right exist. The learned Sessions Judge in this case has held an enquiry. With his statement as to that I am satisfied, and the power being one that is not covered by any section of the Code of Criminal Procedure, I think it suffices to say that the matter is one for the Judge's discretion. So far as it deals with any point specifically the Code of Criminal Procedure must be deemed to be exhaustive, and the law must be ascertained by reference to its provisions, but where a case arises which obviously demands interference, and it is not within those for which the Code specifically provides, it would not be reasonable to say that the Court had not the power to make such order as the ends of justice require. Holding, therefore, as I do, that the jury may be discharged in circumstances other than those specifically provided for by the Code, section 308 cannot be held to relate

1923
 ———
 RAHIM
 SHEIKH
 v.
 EMPEROR.
 ———
 BUCKLAND
 J.

1923
 RAHM
 SHEKH
 v.
 EMPEROR.
 BUCKLAND
 J.

exclusively to the discharge of a jury in the circumstances stated in the preceding sections. The learned Sessions Judge has in effect made an order under that section, though he has not referred to it, and there is, therefore, no reason to interfere. In my judgment this Rule must be discharged.

CUMING J. The facts are as follows. Certain persons were on their trial before the Sessions Judge of Rajshahi, and some 11 witnesses for the prosecution had been examined. It was then brought to the notice of the learned Judge that some of the jury had been seen associating with the man who was looking after the defence. The Court held an enquiry, and being satisfied as to the truth of the allegation ordered the jury to be discharged and the accused to be tried *de novo* with a fresh jury. The present petitioner, the accused, has moved this Court on the ground that the Judge had no jurisdiction to discharge the jury and order a *de novo* trial. He contended that the case was not covered by either section 282 or section 283 of the Criminal Procedure Code.

No doubt the contention is correct so far that these sections do not provide for the discharge of the jury for improper conduct during the trial. In England the Judge has the power to discharge the jury if a necessity arises, and whether the necessity has or has not arisen is for the Judge alone to decide, and his decision is not open to review. In one case [*Reg v. Ward* (1)] this course was followed because one of the jurors had left the box without leave. Such discharge is not equivalent to a verdict of acquittal, and the prisoner can be remanded for a fresh trial: *Reg. v. Davison* (2). There is in this country no decided case bearing on this point. In one case tried at the High

(1) (1867) 10 Cox. C. C. 573.

(2) (1860) 8 Cox. C. C. 360.

Court Sessions the jury before hearing the evidence for the defence wanted to give their verdict. Counsel for the defence pressed for their discharge on the ground of misconduct. The prosecution objected to this course. The point was not decided as the Advocate-General entered a *nolle prosequi*: *Emperor v. Oli Mahamad* (1). The learned vakil for the petitioner contended that the trial should have been allowed to proceed, and then apparently that the point that some of the jury had been associating with the accused's man might be taken in appeal if necessary. The objection to such a course is obvious, and in the present case the further difficulty arises that the jury have been discharged. It, however, seems quite clear that, unless the Judge had the power to discharge the jury in cases of misconduct, great difficulties must arise, and in many cases a serious miscarriage of justice, and although the Code does not specifically provide for such a contingency, it seems clear that the Judge must have such powers.

In this view the order of learned Sessions Judge was right, and I would discharge this Rule.

E. H. M.

Rule discharged.

(1) (1902) 7 C. W. N. xxxi.

1923
 RAHIM
 SHEIKH
 v.
 EMPEROR.
 CUMING
 J.