APPELLATE CRIMINAL.

Before Suhrawardy and Cammiade JJ.

1927

March 16.

RAHAMAT SHEIKH AND OTHERS

v.

EMPEROR*.

Jury, empanelling of—Criminal Procedure Code (Act V of 1898), s. 276 Procedure where the required number is present—Meaning of the expressions "deficiency of persons" and "number of jurors required" in s. 276 (2).

Where out of the persons summoned to act as jurors only five were present and were chosen as the jury without any objection by either party :

Held, that the procedure adopted was according to law and there was no reason why the drawing of lot should be insisted upon when the required number was present ; the provision of choosing by lot was applicable only when the persons summoned to act as jurors were present in such number as to make it possible to choose them by lot, when such number was not present the Judge was to take the help of persons present in court to form the jury.

The *Government of Bengal* v. *Muchu Khan* (1) relied upon.

Bhola Nath Hazra v. *Emperor* (2) doubted and dissented from.

The words "deficiency" and "number of jurors required" in the second proviso to section 276 mean deficiency in the number of jurors required to make up the jury and not deficiency in the number of persons necessary for the purpose of selection by lot.

APPEAL by Rahamat Sheikh and others.

This was an appeal by seven persons who were convicted by the Assistant Sessions Judge of Pabna agreeing with the unanimous verdict of the jury; the jurors found all the appellants guilty under section 147 and some of them also under section 325, I. P. C., the

Criminal Appeal No. 722 of 1926, against the order of N. G. Mukherji, Assistant Sessions Judge of Pabna, dated Sep. 7, 1926.

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case for the prosecution was that one Omejan Nessa had married a man Gopal against the will of her brothers who therefore set up a false marriage between Omejan Nessa and one Rahamat and while Omejan Nessa and Gopal and others were going to Court in connection with a criminal case, the brothers with the other accused persons waylaid them, and took away Omejan Nessa by force after giving them a beating. The main point urged in appeal was that the jury was not properly constituted, and there was no legal trial; of the jurors summoned only five were present on the day the case was taken up and they were chosen as the jury, this was a contravention of the provisions of section 276, Criminal Procedure Code.

Babu Jahnabi Charan Das Gupta, for the appellants. The Court was not properly constituted, jurors ought to have been selected by choosing them by lot, the requirements of section 276, Cr. P. C., were not complied with and there was no legal trial. *Bholanath Hazra* v. *Emperor* (1) relied upon.

Mr. Heramba Chandra Guha, for the Crown. The procedure adopted was not in contravention of the provisions of section 276 of the Criminal Procedure Code, moreover, the five jurors who acted were selected with the consent of the parties, the decision in the case of *Bhola Nath Hazra* (1) does not lay down the correct law and is in conflict with the decision in the case of the *Government of Bengal* v. *Muchu Khan* (2).

SUHRAWARDY J. This is an appeal by seven persons all of whom have been convicted under section 147, I. P. C., and sentenced to two years' and one year's rigorous imprisonment and four of them

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(appellants Nos. 1 to 4) have also been convicted under section 325, I. P. C., and sentenced to four and five years' rigorous imprisonment and a fine of Rs. 200 each, in default, one and a half years' rigorous imprisonment—the sentences of imprisonment to run concurrently. They were unanimously found guilty by a Jury of five and convicted as above. The real ground upon which this appeal is based is with regard to the irregularity complained of by the accused as to the empanelling of the Jury. It appears from a reference to the order-sheet of the Assistant Sessions Judge that of the Jurors that were summoned to act only five were present on the day on which the case against the accused was taken up. The learned Judge thereupon passed the following order: "Among the Jurors summoned five jurors are only "present and they are chosen Jurors--neither party "having got any objection". It has been represented by the Crown that the five Jurors who acted in the present case were selected to act with the consent of both parties. It seems so, but it does not materially affect the question that has been raised which is one of illegality in the trial. The ground stressed is that Jurors were not selected according to the procedure laid down in the Criminal Procedure Code and therefore the Court was not rightly constituted, and hence the trial must be held to be no trial under the law. It is argued that under section 276, Cr. P. C., the Jurors must be chosen by lot and the Judge had no authority to ask the five persons present to act as Jurors without choosing them by lot; and in support of this contention reference has been made to the recently decided case of *Bhola Nath Hazra* v. *Emperor* (1) of which the facts are similar. In that case what happened was that 12 Jurors were summoned to attend

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but only five appeared and those were empanelled as Jurors. The learned Judges (Chotzner and Duval JJ.) who decided that case held that the procedure followed was in contravention of section 276 and therefore the trial was illegal. I regret very much to say that I cannot bring myself to accept the decision as correct on the materials on which it is based. I respectfully submit that the learned Judges who decided that case did not give a correct interpretation to the previous decisions of this Court which lay down a contrary rule. In *Empress* v. *Jhubboo* (1) the Sessions Judge himself selected the Jurors instead of choosing them by lot; but as no objection was taken by the appellant in that case at the trial, Field J. thought that the objection was not one which ought to be entertained for the purpose of interfering with the verdict in view of the provisions of section 283 of the Code of Criminal Procedure (Act X of 1872) corresponding to section 537 of the present Code. This case was considered in *Brojendralal Sirkar* v. *King Emperor* (2). There what happened was that for some reason or other on the date fixed for the trial of the case only three Jurors were in attendance. Thereupon nine other persons were summoned from among the residents of the town and eight of them appeared. Two of them were found to have no relationship with the accused persons and were asked by the Judge to act as Jurors. On these facts Stevens J. was of opinion that the trial was contrary to law and so invalid. In the first place, according to the learned Judge, the procedure laid down by section 326, Criminal Procedure Code, was not followed in not subsequently summoning the Jurors out of the Jury list but summoning them from the residents of the town,

(1) (1882) I. L. R. 8 Calc. 739. (2) (1902) 7 C. W. N. 188.

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on the day fixed for the trial. It appears that the persons summoned were specially selected and were not summoned after being chosen as the law requires by lot from the list of persons liable to serve on the jury. The next irregularity which appeared to the learned Judge on the face of the proceedings was that instead of proceeding to choose by lot from among the jurors who were present, including the jurors formerly summoned, the Sessions Judge seemed to have at once exempted most of those persons merely on their own representation and chosen only two but not by lot. The learned Judge rightly observed that the procedure laid down by the Legislature for summoning the Jurors by lot and again when they appeared before the Court for selecting them by lot was to secure impartiality in the trial by avoiding a packed jury, and there can be no question that when it is possible to follow this procedure it must be followed and a violation of the rule will render the constitution of the Court illegal. With reference to the decision of Mr. Justice Field in the case of the *Empress* v. *Jhubboo Mahton* (1). Stevens J. said that it was unnecessary to say more with reference to that case than that it could apparently be distinguished from the case then before him, as it did not appear from the report of that case that objections were taken at the time to the selection of the jurors as was done in the case before him. I am prepared to go further and hold that the provisions of sections 326 and 276, Criminal Procedure Code, are imperative and their violation will render the constitution of the Court illegal. It is not a question of jurisdiction but more a question relating to the constitution or even the very existence of a valid forum; much less is it an irregularity

(1) (1882) I. L. R. 8 Calc. 739.

curable by section 537, Cr. P. C., or with the consent of parties.

The above case upon which the learned Judges who decided the case of *Bhola Nath Hazra* v. *Emperor* (1), have relied, has neither on its facts nor on the law laid down there any bearing on the question before them. The view taken in that case seems to be that when three of the Jurors out of the number summoned were present the Sessions Judge should have acted under the provisions of section 276, clause (*2*), Criminal Procedure Code, or postponed the trial and summoned more jurors out of the persons entitled to serve on the jury and further he was wrong when he had 11 persons before him not to choose Jurors by lot but to ask two of the persons recently summoned by him to act as Jurors. We cannot say what the learned Judges in that case would have said if the Sessions Judge had asked two persons present in the precincts of the Court to complete the number of jurors required. I am not called upon to defend the irregularity pointed out in that case but I am decidedly of opinion that the ratio of that case has no application to the facts of the present case or the case of *Bhola Nath Hazra*(1). The learned Judges also relied upon the decision in the case of *Emperor* v. *Bradshaw* (2). There the accused being a European ten Jurors were summoned to attend on the date of trial but only three of them appeared and those three were empanelled without being selected by lot. There were therefore only three Jurors with whose help the case was heard by the Sessions Judge. According to the rules, referred to in the judgment of the High Court the number of Jurors should have been five and the learned Judge in deciding that case further held that

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the Jury should have been selected by lot. The facts of that case too do not help us in coming to a right decision on the question raised in the present case excepting the observation made therein that the Jury should be selected by lot according to the provisions of the Criminal Procedure Code. The case of the *Government of Bengal* v. *Muchu Khan* (1), was dismissed by the learned Judges who decided the case of *Bhola Nath Hazra* v. *Emperor* (2) with the remark that that case did not lay down any different proposition of law. With all respect I think that the *ratio decidendi* of that case was not correctly appreciated and the view taken in the case of *Emperor* v. *Bhola Nath Hazra* (2) is in direct conflict with the view of law taken in *Muchu Khan's case* (1). In the latter case the facts were that on the date fixed for the trial, out of 14 special Jurors summoned three only appeared. The Sessions Judge thereupon called four gentlemen who happened to be in the precincts of the court to serve as Jurors and make up the required number of seven. They were not chosen by lot and were not all on the Jury list. The learned Judges (Newbould and Mukerji, JJ.) held that the procedure adopted was not illegal in view of the provisions of clause (*2*) of section 276, Cr. P. C. I agree in the interpretation put by the learned Judges upon section 276 with all its provisos read together. Section 276 requires that the Jurors shall be chosen by lot *from the persons summoned to act as such.* The second proviso to that section clearly indicates that in case of a deficiency of persons summoned the procedure laid down in the first part of the clause need not be followed and the number of jurors required may be chosen from such persons as may be present. In other words, the provision of choosing jurors by

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lot is applicable only when the persons summoned to act as jurors are present in such number as to make it possible to choose them by lot and when such number is not present the Judge is to take the help of persons present in Court to form the Jury.

The learned Judges who decided the case of *Bhola Nath Hazra* (1) were of opinion that if enough jurors were not present to permit of their being chosen by lot, the proper course for the Sessions Judge to follow was to make good the deficiency by calling some persons who were present (presumably according to second proviso to section 276), then adding them to the five summoned jurors to choose from the whole body the necessary five by lot to act as the Jury in the case. This of course presupposes that the number to be requisitioned out of the persons present in Court must be more than the number required to form the Jury and enough to make up the deficiency in the number required for the purpose of drawing lot. If this procedure were followed I venture to think that it would have been as much against the provisions of section 276, Cr. P. C., as the procedure adopted by the Sessions Judge in that case and condemned by Chotzner J. That section provides that jurors shall be chosen by lot only from the persons summoned to act as jurors and not out of a body consisting of some persons summoned and some called by the Judge under the second proviso to that section. There is also no provision in law that the Sessions Judge may choose more persons present than the number required to complete the Jury.

Then again a reference to section 279, Cr. P. C., upon which the learned Judges in *Muchu Khan's* case (2) relied, ought, in my opinion, to set the matter at rest. That section says that when objection is taken to a

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juror by a party the place of such juror shall be supplied by any other juror attending in obedience to a summons or if there is no such other juror present, then by any other person present in Court whose name is on the list of jurors or whom the Court considers to be a proper person to serve on the Jury. It is idle to say that in the circumstances mentioned in that section, any claim to choose the jury by lot can be made.

Suppose instead of five there were four jurors present on the date of the trial. The Judge undoubtedly had the power under the second proviso, section 276, to choose only one person who may be present to complete the required number. In that case according to the interpretation I have ventured to put upon section 276 there will be no choosing of jurors by lot; for it is not specifically provided that in such a case the number to be chosen by the Judge must be more than the number required and the jurors chosen by lot out of the total number. There is no reason why the drawing of lot should be insisted upon when the required number is present.

The question therefore that falls for consideration is as to the meaning to be attached to the words "deficiency" and "number of jurors required" in the second proviso to section 276. I take them to mean deficiency in the number of jurors required to make up the Jury, and not to make up a sufficient number for the purpose of selection by lot.

The result of all these considerations is that in my opinion the procedure that has been followed by the Sessions Judge in this case is not illegal or contrary to law and therefore the trial was not vitiated. I am further of opinion that the case of *Bhola Nath Hazra* v. *Emperor* (1) has not been correctly decided. It would have been my duty to refer this matter to a Full

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Bench but in the special circumstances of this case I do not think I am called upon to do so. The learned Judges in *Bhola Nath Hazra's* case (1) have according to my opinion not given full effect to the decision in the case of the *Government of Bengal* v. *Muchu Khan* (2). If they had done so and appreciated the reasonings there it would have been proper for them, differing from the view taken in that case, to have referred the point of law to a Full Bench. Of the two conflicting decision, therefore, namely, in *Bholanath Hazra's case* (1) and *Muchu Khan's case* (2) I choose to follow the latter. In this view I hold that the trial was not vitiated.

The learned vakil who has appeared for the appellant has not argued any other ground which would require any serious consideration. He has urged that the conviction under section 147, I. P. C., in the circumstances of the case is bad. The accused were charged under sections 147, 325/ 149 and 366/149 and some of them were charged with the substantive offences under sections 366 and 325, I. P. C. They have been acquitted by the Jury of the charges under sections 325/149 and 366/149. They have also been acquitted of the charge under section 366. On these findings the learned vakil argues that this conviction under section 147 ought not to stand. We do not think that there is any substance in this contention. The common object mentioned in the charge under section 147 is to abduct the woman Omerjan. That common object has been found by the Jury to be the common object of the unlawful assembly. They have further found that some of the accused individually caused grievous hurt to several persons. On that finding they have convicted some of the accused under section 325, I. P. C. and acquitted all

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under sections 325/149. As I read the verdict of the Jury I do not find any illegality in it. This argument is applicable to the cases of three of the appellants. As regards the other four it is a matter of no importance because the sentence under section 147 is to run concurrently with the sentence under section 325. The appeal is accordingly dismissed. As regards the sentence we do not think it is severe.

CAMMIADE J. I agree with what my learned brother has said with regard to the interpretation of the provision of section 276, Cr. P. C. It is true that according to the terms of that section the Jurors have to be chosen by lot from amongst the persons summoned to act as such. It is, however, in my opinion, with all respect to the learned Judges who decided the case of *Bhola Nath Hazra* v. *Emperor* (1) only in cases where the number of jurors summoned exceeds the number required to sit that selection by lot becomes necessary. The object of the provisions of that section is to prevent the packing of Juries, and that object is safeguarded by the summoning of jurors whose names have been drawn by lot in the first instance. Even after the attendance of the jurors and even after their being chosen to sit, it is open to the accused or to the prosecution to object to their sitting, so that when no objection is made to the sitting of any particular juror it must be taken that the object of section 276 is fully carried out. The difficulty which arises in the case, as my learned brother has pointed out, is in connection with the meaning of the words "deficiency" and "the number of jurors required"—words which appear in the second proviso to section 276, Cr. P. C. In my opinion, there can be no difficulty as to the

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interpretation to be put on those terms. The second priviso reads as follows: "In case of a deficiency of persons summoned, the number of jurors required may, with the leave of the Court, be chosen from such persons as may be present". The word "chosen" does not mean chosen for the purpose of a lottery. The word "chosen" will be found in the section itself and it there has the meaning of chosen to sit. So if the word "chosen" occurs in this proviso, it can only denote that if there is deficiency in the number of persons required to sit, one or more persons required to fill the deficiency may be selected. That this interpretation was put upon the second proviso seems to appear from the decision in the case of the *Government of Bengal* v. *Muchu Khan* (1). It does not clearly appear from the report that the two vacant seats in the Jury were filled from among the four persons who were subsequently called by the Court. But the acceptance of that meaning seems to be implied, because the words we find used in the judgment are as follows: "Section 276, Cr. P. C., provides that in case of a deficiency of persons summoned the number of jurors required may with the leave of the Court be chosen from such *other* persons as may be present". So that the section, as I understand it, means that if the number of persons who had been summoned and who were in attendance fell short of the required number, the vacant places may be filled from among the persons who may be present in Court or subsequently called by the Court. In these circumstances I entirely agree with my learned brother that the appeal should be dismissed.

Appeal dismissed.

A. S. M. A.

(1) (1924) 29 C. W. N. 652.