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202, Cr. P. C. I agree therefore with my learned brother that the appeal fails and should be dismissed.

Civil Rule No. 408 (*M*) of 1927 is discharged.

Appeal dismissed; rule discharged.

A. A.

APPELLATE CRIMINAL.

Before Rankin C. J. and Chotzner J.

SERAJUL ISLAM

v.

EMPEROR.*

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Nov. 8.

Trial by Jury—Minimum number of persons to be summoned for selection of jury where accused person is charged with an offence punishable with death—Criminal Procedure Code (Act V of 1898), ss. 274, 326.

Where any accused person is charged with an offence punishable with death, the District Magistrate shall summon a number of persons for selection of jury—the number to be summoned not being less than double the number required for any such trial under the proviso to s. 274 of the Code of Criminal Procedure. The jury in such a case is to consist of not less than seven persons and, if practicable, of nine persons.

Rosan Ali v. *King Emperor* (1), referred to.

The appellants, Serajul Islam and 7 others, and one Khanjer Ali were committed by the Deputy Magistrate of Brahmanbaria to take their trial in the Court of Sessions on a charge under s. 148, I. P. C. framed against all and a charge under s. 302, I. P. C. against Serajul Islam alone. The accused were tried by the Additional Sessions Judge of Tippera and a jury of 7 jurors. The number of persons

* Criminal Appeal No. 164 of 1927, against the order of N. L. Hindley, Additional Sessions Judge of Comilla, dated Jan. 24, 1927

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summoned for selection of jury was 12. On the date on which the trial before the Court of Sessions commenced, only 8 out of the 12 persons summoned appeared in Court and the Sessions Judge selected a jury of 7 out of the 8 persons who attended. The jury by their verdict unanimously acquitted Khanjer Ali of the charge against him and convicted the appellants by a majority of 6 to 1 under s. 148, s. 157 or s. 304, I. P. C. The Sessions Judge accepted the verdict and sentenced Serajul Islam to transportation for life and the others to various terms of imprisonment.

Hence this appeal by the eight who were convicted.

Mr. A. K. Fazlul Huq (with the him *Babu Debendra Narain Bhattacharya*), for the appellants. The short point in this case is that the tribunal, which tried the appellants, was not constituted according to law, inasmuch as the jury were not empanelled in accordance with the provisions of the Criminal Procedure Code. In empanelling the jury, the Sessions Judge disregarded the provisions of sections 326 and 274, Criminal Procedure Code. Section 326 provides that the Judge should summon so many persons from the Jury List as would be necessary for the particular session, but the number shall not be less than double the number of jurors required for the particular case to be tried. Section 274 provides that the jury in a murder case shall, if practicable, consist of 9 persons, but shall not be less than 7 persons. In this case, which was a murder case, the learned Judge summoned only 12 persons for the case and of these 12 persons only 8 appeared and the learned Judge empanelled a jury of 7 jurors by lot from the 8 persons present on summons. By

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summoning only 12 persons, the learned Judge, in effect, deprived the appellants of their right to be tried by a jury of 9 jurors, if practicable. Further, on the authority of *Roson Ali* v. *King Emperor* (1), I contend that the chosing of 7 jurors by lot from 8 persons was illegal.

The Deputy Legal Remembrancer (*Mr. Khundkar*), for the Crown, conceded that the learned Judge had not complied with the provisions of s. 326, but contended that it was still possible to comply with the provisions of s. 274, if the persons summoned had appeared and so the appellants had not in any way been prejudiced. He further submitted that the case (1) relied on by Mr. Huq had not been rightly decided.

RANKIN C. J. In this case it appears that the eight appellants and another person were put upon their trial before the Sessions Judge and a jury on charge under section 302 of the Indian Penal Code and also upon charges under sections 147 and 148.

What was done with reference to the jury was this that only 12 persons were summoned to attend the court as jurors. Of these eight appeared on the day of the trial and, from the eight who appeared, seven persons were chosen to act as the jury. In these circumstances, Mr. Fuzlul Huq, for the appellants, calls our attention to sections 274 and 326 of the Criminal Procedure Code, and he contends that the tribunal was illegally constituted and that all the proceedings should be set aside.

Now, it is quite clear that under section 274 where any accused person is charged with an offence punishable with death, the jury should consist of not less than seven persons and, if practicable, of nine persons. By section 326 it is provided that the Sessions Judge

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should send a letter to the District Magistrate requesting him to summon a number of persons—the number to be summoned not being less than double the number required for any such trial. The exact effect of that section I will not now attempt to define, but it, at least, sets a minimum standard for the number to be summoned and section 327 also (where it is applied) can and should be applied so as to comply with this. In the present case only twelve jurors were summoned; and only eight persons appeared out of the 12. In these circumstances, the concluding words of section 274 could take no operation whatsoever. Now so far as can be seen, it was quite practicable to have this case tried by a jury of nine; but the manner in which the jury was empanelled and the insufficiency of the number of jurors summoned defeated the intention of the section.

Mr. Fazlul Huq, in addition to this, has referred to the judgment of my learned brother, Mr. Justice C. C. Ghose, in the case of *Roson Ali* v. *King Emperor* (1). This judgment gives rise to several additional questions to which it is open to Mr. Huq to refer. With regard to these questions, I do not propose to say anything now, because, in my judgment, it is unnecessary to delay this case so as to deal with them. I am of opinion that, contrary to the intention of the Code and to the standard set by the Legislature, an unreasonably small number of jurors was summoned with the result that it was not possible to have a jury of nine and that the proceedings ought not to be allowed to stand. The position is that the tribunal was illegally constituted and, in my judgment, in a case of this character it is necessary that the whole proceedings should be set aside and the case remitted for retrial.

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RANKIN C.J.

As regards bail, we will put the appellants back to the position in which they were at the time when the original trial commenced so that they may give security to the satisfaction of the District Magistrate in the same amounts.

CHOTZNER J. I agree.

S. M. *Appeal allowed; case remanded.*

CIVIL RULE.

Before Suhrawardy and Graham JJ.

AMBIKA RANJAN MAJUMDAR

v.

1927

Nov. 15.

MANIKGUNGE LOAN OFFICE, LTD.*

Limitation—Limitation Act (IX of 1908), s. 5—Appeal to the District Judge, memorandum returned on the ground of jurisdiction—Subsequent appeal to the High Court out of time—Extension of period of limitation.

An appeal against an order passed by the Subordinate Judge dismissing an application to set aside a sale under Order XXI, rule 90 of the Civil Procedure Code in a suit valued at more than Rs. 5,000 was preferred to the District Judge in time. The District Judge having returned the memorandum of appeal on the ground that he had no jurisdiction to hear it, an application was made to the High Court to file an appeal out of time.

Held, that inasmuch as the appeal was filed before the District Judge on the advice of a pleader of some standing and on whose words the petitioner had good reason to rely, he was entitled to an extension of time.

*Civil Rule No. 903 (M) of 1927, against the order of the District Judge of Dacca, dated June 27, 1927.