

1929.
 SUPERINTENDENT
 AND
 REMEMBRANCER
 OF
 LEGAL
 AFFAIRS,
 BENGAL
 C.
 JNANENDRA
 NATH
 GHOSH.
 BUCKLAND J.

affect the *quantum* of sentence, though a plea of guilty will generally influence the Court.

The Rule will be made absolute: the sentence will be set aside and I order that Jnanendra Nath Ghosh *alias* Jnan Ghosh do undergo eighteen months' rigorous imprisonment and pay a fine of Rs. 500 and that in default of payment he shall undergo rigorous imprisonment for a further term of six months.

Rule made absolute. Sentence enhanced.

A. C. R. C.

CRIMINAL REFERENCE.

Before Suhrawardy and Graham JJ.

DWARIKA MALO

v.

EMPEROR.*

1929.
 Feb. 8.

Jury—Murder case, number of jurors to be summoned and to be empanelled—Criminal Procedure Code (Act V of 1898), ss. 274, 326.

Under section 326 of the Code of Criminal Procedure, in a case where an accused is charged with an offence punishable with death, not less than eighteen persons should be summoned. Under section 274, whenever practicable, jury in such a case should consist of nine persons. Where in a trial for murder, only fourteen jurors were summoned, out of which eleven were present, but only seven jurors were empanelled and the trial proceeded with those seven jurors,

held that the jury was illegally constituted and trial was set aside.

Serojul Islam v. Emperor (1) referred to.

APPEAL by the accused, Dwarika Malo, with a reference for the confirmation of the sentence of death passed upon him.

Dwarika Malo was put upon his trial before Mr. H. G. Waight, Additional Sessions Judge of Dacca, with the aid of a jury, on charges under section 302 and section 302 read with section 34 of the Indian Penal Code for the murder of one Gomani Mandal on

*Criminal Reference, No. 79 of 1928, and Criminal Appeal, No. 954 of 1928, against the order of H. G. Waight, Additional District and Sessions Judge of Dacca, dated Dec. 1, 1928.

the 13th May, 1928. Altogether fourteen persons were summoned to act as jurors for the purpose of the said trial, but only seven were empanelled. No objection was taken to trial being proceeded with with those seven jurors. There were eleven "p" marks against the names of eleven out of those fourteen jurors, indicating that they were present in obedience to the summons. The jury, by a majority of six to one, found the accused guilty under section 302 of the Indian Penal Code and, accepting the verdict of the jury, the Sessions Judge sentenced him to death.

Mr. Surajitchandra Lahiri, for the appellant.

Mr. Ashrafali, for the Crown.

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SUHWARDY AND GRAHAM JJ. This is a Reference by the Additional Sessions Judge of Dacca under section 374 of the Code of Criminal Procedure, submitting for confirmation the proceedings in a case under section 302 of the Indian Penal Code, in which sentence of death has been passed upon the accused. The accused Dwarika Malo has also appealed against his conviction and sentence.

A preliminary point has been raised on behalf of the appellant that the jury, before which the case was tried, was not properly or legally constituted and that, as a consequence, the conviction and sentence are bad in law. We think that this contention is well founded and must prevail.

The sections of the Code which bear upon the point are sections 274 and 326 of the Code. Section 274 lays down that, in trials before the Court of Sessions, the jury shall consist of such uneven number, not being less than five, or more than nine, as the Local Government, by order applicable to any particular district, or to any particular class of offences in that district, may direct; and the proviso to this section, which was added by Act XII of 1923, states that, where any accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons and, if practicable, of nine persons.

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Section 326, which deals with the summoning of jurors and assessors, requires *inter alia* that the number to be summoned should be not less than double the number required for the trial.

Applying these provisions of the law to the present case, it is clear that, it being a murder case, not less than eighteen jurors should have been summoned. As a matter of fact only 14 were summoned, and there was, therefore, to commence with, a failure to comply with section 326. It appears, however, that section 274 could still have been complied with, since eleven jurors are shown as having been in attendance. For some reason, however, only seven of these were empanelled and the trial proceeded. In the circumstances stated, it cannot be said that it was not practicable to empanel a jury of nine as required by section 274, and, as there was a breach of this statutory provision, the jury must be held to have been illegally constituted. This view of the matter is supported by recent authority in this Court.

In the case of *Serojul Islam v. Emperor* (1), twelve persons were summoned and seven persons were selected as jurors out of eight who attended. It was held that the tribunal was illegally constituted, the proceedings were set aside, and the case remitted for retrial. We regret that we have no alternative but to follow the same course in the present case. We, accordingly, allow the appeal, set aside the conviction and sentence, and direct that the case be retried according to law.

We draw the attention of the Additional Sessions Judge to the importance of seeing that the sections of the Code to which reference has been made above are in future carefully complied with.

Appeal allowed. Retrial ordered.

A. C. R. C.

(1) (1927) I. L. R. 55 Calc. 794.