APPELLATE CRIMINAL.

Before Rankin C.J. and Buckland J.

EMPEROR

v.

ABEDALI FAKIR.*

1928.

Dec. 11.

Jury—Empanelling of the jury—Code of Criminal Procedure (Act V of 1898), ss. 276, 279.

Where, in a trial for murder and culpable homicide, a person, whose name was on the Juror's Special List, but who was not in attendance in court, was requisitioned from the local school to sit as a juror and being unchallenged was accepted as such,

held that this mode of requisitioning a juror was contrary to the provisions laid down in the Code of Criminal Procedure.

APPEAL by the accused.

In this case eight accused persons were convicted by the Additional Sessions Judge of Mymensingh and a jury of seven on charges under section 302 read with section 34 of the Indian Penal Code. The learned trial Judge agreeing with the majority of the jury, sentenced each to transportation for life. Against this conviction and sentence all the eight accused persons preferred this appeal.

Mr. H. S. Suhrawardy (with *Mr. A. S. M. Akram*), for the appellants. The ordersheet itself shows that the jury was empanelled in a manner which is contrary to law.

The Officiating Deputy Legal Remembrancer, Mr. Debendra Narayan Bhattacharya, for the Crown. There are four unreported dicisions of this Court which support the contention of the appellants.

RANKIN C. J. In this case, 8 accused persons were convicted by the Additional Sessions Judge of Mymensingh and a jury of seven on charges under

* Criminal Appeal, No. 504 of 1928, against the order of Behari Lal Sarkar, Additional Sessions Judge of Mymensingh, dated April 27, 1928.

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section 302 read with section 34 of the Indian Penal Code. The jury were not unanimous, 4 of them being in favour of a conviction and 3 in favour of an acquittal.

On this appeal, Mr. Suhrawardy takes the point that, according to the order of the learned Judge himself, the jury was empanelled in a manner which is contrary to law and which is entirely outside the scope of sections 276 and 279 of the Criminal Procedure Code. The learned Judge has recorded: "The names "of all the 14 jurors, who were summoned for the case, "were called by lot one after another. Nine of them "were found present, of whom three, being challenged "by the pleader for the defence, were discharged. "Six being unchallenged were elected to sit at the "trial. Another person whose name was on the "juror's special list was, therefore, requisitioned "from the local school to sit as a juror and being "unchallenged was accepted as the seventh juror. "They then elected their foreman and were duly "sworn."

If the learned Judge would look again at sections 276 and 279 he will find that there is no provision for requisition of jurors from a local school or from anywhere else. He will find that selection will have to be made from jurors attending in obedience to summons and chosen in the manner provided by section 276 or if there is no such other juror present then any other person present in the court, whose name is on the list of jurors or whom the court considers a proper person to serve on the jury may be selected. I think the learned Judge was wrong in acting in contravention of the provisions of the section and in inventing a procedure which is entirely unauthorised. It is quite true that the person whose services were obtained must at some stage have complied with the condition of being present and it is a point to consider whether or not the requirement of being present in court finds its place in the section with any intention to limit the arbitrary power to choose a juror entrusted to the

learned Judge or whether it merely recognises the fact that in the ordinary way a person not present will be of no immediate assistance as a juror. This matter has been more than once considered. I understand from Mr. Bhattacharya that there are four unreported cases of this Court on this point and two of them have been placed before us.* They all hold this procedure to be bad.

* The four unreported decisions are:—

(1) *Gayesuddin Mandal* v. *King Emperor.*
(Cr. App. No. 312 of 1925, decided on 19th August, 1925).

MUKERJI J. This appeal has been preferred by one Gayesuddin Mandal against his conviction under section 494 read with section 109, Indian Penal Code, and a sentence of rigorous imprisonment for one year passed upon him, by the Sessions Judge of Nadiya.

The trial was held with the aid of a jury who unanimously brought in a verdict of guilty against the appellant in respect of the aforesaid offence.

Out of the grounds which have been urged in support of this appeal, it is necessary to refer to only one and that is a ground which relates to the empanelling of the jury in the present case. From the affidavit filed along with the memorandum of appeal and the explanation submitted by the learned Sessions Judge to this Court, what actually happened in connection with this matter appears to have been this: Ten jurors were summoned, but only four of them appeared on the day fixed for the trial. Upon that, summons were sent out to two gentlemen residing in the town, of whom again only one appeared, with the result that there were only five jurors present in court. These five jurors were thereupon asked to constitute the panel and with them the trial proceeded.

The empanelling of the jury in the way described above, in my judgment, was illegal and in contravention of the provisions of the law. Under section 326, Criminal Procedure Code, the summoning of jurors is to take place when the names of the persons to be summoned have been drawn by lot in open court excluding of course those who are entitled to exemption if that is possible. When the persons summoned in the aforesaid manner are present in court, the jurors have to be chosen by lot from amongst them under the provisions of section 276, Criminal Procedure Code. If there is a deficiency in the persons summoned there are two courses left open to the court to make up the deficiency. The first is to proceed under the second clause of section 276, that is to say, to choose the jurors with the leave of the court from such other persons as may be present in court. The other alternative course is to issue summons upon other persons to appear and serve as jurors under the provisions of section 326. If the learned Judge had followed the procedure laid down in the second clause of section 276 he had to choose the jurors from the persons present in court in accordance with the practice which prevailed in such court or under the rules of the court, if there are any such rules in force. The learned Judge did not proceed under section 276, obviously as that course was impossible. He proceeded under section 326. Therefore, persons should have been summoned after their names had been

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In these circumstances, it appears to me that we have no option but to enforce the principle that the jurors are to be empanelled as required by the sections.

drawn by lot in open court under the provisions of clause 2 of section 326. The law by making this provision enables the accused person to obtain jurors who have been called to act as such after their names have been twice drawn by lot. Section 326 provides that those who are to be summoned are to be drawn by lot from amongst the whole body of the persons who are liable to serve as jurors and section 276 provides that those again who are to try a particular case are to be similarly chosen by lot from amongst the persons so summoned unless the deficiency is filled up from amongst the persons present in court. A failure to comply with this provision is a material irregularity and must necessarily be taken to have prejudiced the accused person. This has been the view taken by this Court in the case of *Brojendra Lal Sirkar* v. *King Emperor* (1).

Furthermore, in the present case there appears to have been another irregularity and that of a very serious nature. Under section 277, Criminal Procedure Code, as each juror is chosen his name will have to be called aloud and upon his appearance the accused is to be asked if he has any objection to such juror. In the present case, having regard to the fact that only five jurors appeared at the end and these five jurors were asked to constitute the panel, there was no occasion to call for any objection from the accused person under the provisions of section 277 of the Criminal Procedure Code. That also, as I have said, is a serious irregularity. A trial held with jurors chosen in the way described above must necessarily be taken to have been a trial bad in law. The conviction of the appellant and the sentence passed upon him, therefore, are fit to be set aside and they are set aside. The accused should be discharged from his bail-bond.

The question now is whether the appellant is to be retried. We feel some difficulty in giving a direction for retrial in this particular case in view of the fact that when the matter was pending before the trial court and before the trial commenced an application was made to the court for leave to compound the offence. The learned Judge refused the application. The only ground for such refusal as appears from the record is that the complainant had been coaxed to agree to the compounding of the offence. Speaking for myself I do not understand what exactly the learned Judge means by using that expression, for in the case of compounding an offence or of an attempt at compromise there must necessarily be some amount of coaxing and if this be the only reason for not granting the leave prayed for it is not a good reason. The proper order in the circumstances, in my opinion, is not to make an order for retrial but to leave it open to the complainant Fagu Mandal if he chooses to proceed with the matter any further to apply to the learned Judge for holding a fresh trial.

CUMING J. I agree.

(2) *Muhammad Sagiruddin* v. *Emperor*.
(Cr. App. No. 743 of 1926, decided on 23rd March, 1927).

CAMMIADE J. The two appellants were charged with offences under sections 295, 297 and 436, Indian Penal Code. They were found

(1) (1902) 7 C. W. N. 188.

The appeal must be allowed. The convictions and sentences are set aside and a retrial is ordered.

We make no order as to bail.

BUCKLAND J. I agree.

O.U.A.

guilty by a majority of 3 to 2 of the jury of offences under the first two sections. They have been found not guilty by the unanimous verdict of the jury of the offence under section 436. The objection taken in regard to the trial are *firstly*, that the procedure in empanelling the jury was illegal. * * * * * *

In regard to the first matter what happened is this: out of twelve jurors summoned only two were in attendance. The learned Judge sent for three of the professors from the local college and when objection was taken to the sitting of one of them as a juror he sent for another professor of the same college to fill up the vacancy in the jury. This procedure is not justified by the provisions of section 276, Criminal Procedure Code. The second proviso to that section provides that in case of a deficiency in the required number of jurors, the court may empanel other persons present in court to fill up the vacancy in the jury. There has been illegality in regard to the empanelling of the jury and this illegality has vitiated the trial.

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The appellants are therefore acquitted. They will be discharged from their bail bond.

SUHRAWARDY J. I agree.

(3) *Chandfar* v. *Emperor* (Cr. App. No. 876 of 1927, decided by Chotzner and Lort-Williams JJ. on 24th February, 1928).

(4) *Sadarat Sheikh* v. *Emperor* (Cr. App. No. 295 of 1928, decided by C. C. Ghose and Jack JJ. on 7th August, 1928).