

APPELLATE CRIMINAL.

Before Costello and S. K. Ghose JJ.

MANIR SHEIKH

v.

EMPEROR.*

1933

Jan. 13.

Jury—Special jury—Deficiency—How to be filled—Code of Criminal Procedure (V of 1898), s. 276, proviso (2).

Where eighteen special jurors had been summoned for a trial, it was open to a Sessions Judge to supplement five special jurors, who were available and who were chosen by lot, and one special juror, who happened to be present, with three persons who were jurors awaiting in another court but presumably were not on the special jury list at all.

The second proviso to section 276 of the Code of Criminal Procedure, which provides for the making up of deficiency in jurors from among persons other than those summoned present in court, applies to special juries as much as to common juries.

Shaheb Ali v. Emperor (1) followed.

CRIMINAL APPEAL by the accused.

The material facts appear in the judgment.

Hemantakumar Biswas for the appellants.

The Deputy Legal Remembrancer, Khundkar, for the Crown.

COSTELLO J. In this case the three appellants, Manir Sheikh, Syedañi and Abbasali, were charged, the first two under section 302 and the third under section 302 read with section 109 of the Indian Penal Code. All the three were found guilty by the jury and were sentenced to transportation for life.

Mr. Biswas on behalf of these appellants has attacked the summing up of the learned Additional Sessions Judge of Mymensingh in several particulars, but the chief ground for criticism is in reference to the evidence given by a witness named Safiruddin Fakir.

*Criminal Appeal, No. 716 of 1932, against the order of Nagendrakumar Basu, Additional Sessions Judge of Mymensingh, dated June 2, 1932.

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The case for the prosecution, put very shortly, is this: The deceased man, Kasem Fakir, and his brother Yasin were returning home from Katakhalî *hât* on the 30th of June, 1931. Kasem was walking ahead of his brother and, when he reached a *bund* by the Kalibajail river, Yasin heard a cry from Kasem. He then ran towards him and saw the accused, Syedali, strike Kasem with a *sulpi*. Subsequently Manir gave certain blows with a *dâo* on the neck of the deceased, Kasem, and then the third man, Abbas, attacked the deceased with a *sulpi*. When Yasin came up towards Kasem, he was driven away by Syed with the *sulpi*, which was in his hand. The evidence given by Yasin is corroborated by a man named Abdul Gani, who was also an eye-witness of a considerable part of the occurrence. The alarm, which was raised by Yasin, attracted to the spot a number of persons, two of whom saw the three accused making off with weapons in their hands and the rest of them heard from Yasin that the three accused were the assailants of his brother.

[His Lordship then dealt with the merits of the case and the charge to the jury under the following heads: (1) the evidence of Safiruddin; (2) whether there were really independent witnesses for the prosecution; (3) the first information report and (4) the significance or otherwise of the absence of blood stains on the river bank.]

These were all the points, which were urged by way of challenge to the charge given by the learned Additional Sessions Judge, and we are of opinion that there is really no substance in the criticism made by Mr. Biswas. Looking at the charge as a whole we are of opinion that it is quite satisfactory and that the case has been fairly and properly put by the learned judge to the jury.

There is one other matter, to which I must allude. Mr. Biswas took what he described as a preliminary objection, which was based on the manner in which the jury who tried these appellants, was constituted. It appears from the order-sheet that this is what

happened. The case was to have been tried by a special jury. In accordance with the provisions, in that behalf contained in the fourth proviso to section 276 of the Code of Criminal Procedure, special jurors to the number of eighteen had been summoned for the purpose of the trial. The order-sheet records what happened in these words: The cards of the eighteen special jurors summoned in this case "were taken and "drawn by lot one after another. As each card was "drawn by lot the name and address of the "corresponding juror were called aloud and in the "case of cards Nos. "—then the learned Judge enumerates thirteen—"the jurors were found absent, "while in the case of each of the cards Nos. " (he mentions five) "the jurors stood up and the accused "were asked if they objected to be tried by that juror "and the accused and their pleader had no objection. "As there were no other jurors summoned in this case "present, one gentleman—Nagendrakumar De—who "happened to be present in court and who said his "name appeared in the list of special jurors and " (he mentions by name three other persons, who were summoned as jurors in another sessions court) "are chosen as jurors in this case by me and in the case "of each juror the accused were asked, if they objected "to be tried by that juror, and the accused had no "objection. The defence pleader and the Public "Prosecutor also had no objection to any of the four "jurors chosen". Upon that state of affairs, Mr. Biswas has proceeded to argue at considerable length that the whole trial ought to be declared irregular and the conviction quashed on the ground that the jury was not properly constituted, in that it was not open to the learned Additional Sessions Judge to supplement the five special jurors, who were available and who were chosen by lot, and one special juror who happened to be present, with three persons, who were jurors awaiting in another court but presumably were not on the special jury list at all. In any event, I would have

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been of opinion that there was no real substance in the point urged by Mr. Biswas having regard to the fact that both the accused and their legal representative at the trial categorically said that they had no objection to what was taking place and no objection to their being tried by these imported jurors. Further, to my mind, the words of the second proviso to section 276, Criminal Procedure Code, are sufficiently wide in their import to cover a case such as the present one. That proviso says "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". Had this point come before me and I had had to decide it without reference to any authority, I would still have said that the point had no substance in it; but it appeared, after we had listened to Mr. Biswas for some considerable time, that he had at hand an authority, which was not only in point and directly in point but, so far as it was material, on all fours with the present circumstances: I refer to the case of *Shahab Ali v. Emperor* (1), where it was held by Mr. Justice Lort-Williams and Mr. Justice S. K. Ghose that the second proviso to section 276, Criminal Procedure Code, which provides for the making up of deficiency in jurors from among persons, other than those summoned, present in court applies to special juries as much as to common juries. With that decision I respectfully and entirely agree. It is quite obvious that that authority entirely disposes of the point sought to be made by Mr. Biswas in the present case as regards the constitution of the jury.

For the reasons I have already given it follows that this appeal must be dismissed.

GHOSE J. I agree.

Appeal dismissed.

G. S.