## APPELLATE CRIMINAL.

*Before Lort-Williams and S. K. Ghose JJ.*

SHAHEB ALI

*v.*

EMPEROR.*

1931

*Jan.* 21, 26, 30.

*Jury—"Jurors" in s. 276, prov. (2) of the Code of Criminal Procedure (Act V of 1898), meaning of—The proviso, if applicable to special jurors—Omission to consider if nine jurors are available, if vitiates trial—Code of Criminal Procedure (Act V of 1898), ss. 274, 276, 278.*

The word "jurors" in the second proviso to section 276 of the Code of Criminal Procedure is a general term and includes both special and common jurors. This proviso is a special provision to meet an emergency so that there may not be a deadlock. It is applicable to the case of special jurors as much as to that of common jurors.

In the trial for an offence punishable with death, the failure of the judge to apply his mind to the question as to whether it was practicable to have nine jurors, when less than nine were actually empanelled, was an illegality vitiating the whole trial.

It is the duty of the judge to consider that question and there is no duty cast upon the accused. The onus is not on the accused to prove that judge did not consider the question of such practicability.

CRIMINAL APPEAL.

The case for the prosecution was that, on the morning of the 1st November, 1929, one Matabarali and his son, Sekander, went to scatter *mâshkalâi* in their field. The accused came in a party of about 14 or 15 persons, variously armed. They chased Matabar and his son to some distance and three of the accused party struck Matabarali with *daos*, who ultimately died of his injuries. The accused were put upon their trial before Mr. R. M. Bhattacharya, Additional Sessions Judge of Mymensingh. The charges were under section 148 of the Indian Penal Code against all the accused, with additional charges under sections 324 and 302 against two of them. Eighteen jurors were summoned for the trial, of whom only seven were present, who were empanelled without any challenge from either side. The learned

*Criminal Appeal, No. 528 of 1930, against the order of R. M. Bhattacharya, Additional Sessions Judge of Mymensingh, dated May 20, 1930.

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judge, agreeing with the unanimous verdict of the jury, convicted the accused under sections 148, 324 and 302 of the Indian Penal Code and passed various sentences. The accused, thereupon, preferred this present appeal, which coming up for hearing on the 12th December, 1930, the following order was passed by Lort-Williams and S. K. Ghose JJ. :—

In this case, appellant No. 1 was charged under section 302 and all the appellants were charged under section 148 of the Indian Penal Code. The case was tried by Mr. R. M. Bhattacharya, Additional Sessions Judge of Mymensingh, with a jury of seven persons.

It is contended that the trial was vitiated by reason of non-compliance with the provisions of section 274 of the Criminal Procedure Code and attention is drawn to the following order of the learned judge, dated the 12th May, 1930 : "The charges under sections 148 and 302 of the Indian Penal Code were amended at the instance of the public prosecutor. The charges under sections 148, 302 and 324 of the Indian Penal Code were read out and explained to the accused, who all pleaded not guilty. Eighteen jurors were summoned for this case. The cards of the jurors were, one by one, drawn by lot. The names and addresses of the jurors were called aloud as each card was drawn. In this way seven jurors were chosen by lot. None of them was challenged by either side. Other jurors summoned were found absent on call. The jurors chosen appointed their foreman and were sworn." It is contended that from this order it does not appear that the learned judge at all applied his mind to the question as to whether it was practicable to have nine jurors. That certainly does not appear from the terms of the order. Nor does it appear that the learned judge considered the possibility, under the second proviso to section 276, of making up the deficiency by choosing from such other persons as might have been present. Before deciding on the validity or otherwise of the point raised, we think it is necessary to call for a report from the learned trial judge as to whether he considered if it was practicable to have nine jurors and also whether if in fact it was so practicable, regard being had to the number of persons present. To aid his memory the record will be sent down at once. The learned judge should return the record with his report as soon as possible.

A report, dated the 5th January, 1931, stated that the trial judge having retired, it was not possible to say whether the trial judge considered it practicable to have nine jurors.

*Narendrakumar Basu* and *Sukumar De* for the appellants.

*The Officiating Deputy Legal Remembrancer, Debendranarayan Bhattacharya*, for the Crown.

*Cur. adv. vult.*

GHOSE J. The learned Additional District and Sessions Judge of the 3rd Court, Mymensingh, reports

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in his letter, dated 5th January, 1931, that Mr. R. M. Bhattacharya who tried the sessions case in question has since retired from service and it is not possible for him to say whether he considered it was practicable to have nine jurors. He adds that the register of the list of jurors summoned shows that out of the number summoned only seven jurors were present and that all of them were empanelled.

Mr. Basu for the appellants has pointed out that this report does not touch the point at issue, namely, that the learned judge did not apply his mind to the question as to whether it was practicable to have nine jurors and, further, that he did not consider the possibility, under the second proviso to section 276 of the Code of Criminal Procedure of making up the deficiency by choosing from such other persons as might have been present. Mr. Bhattacharya for the Crown contends that this section will not apply, because this is a case of special jurors, the learned judge having, by his order, dated 29th March, 1930, directed that the case should be tried by special jurors. He contends that the fourth proviso to section 276 comes into play and that this is independent of the second proviso by which the court is given a discretion to choose from such other persons as may be present. In support of this contention, Mr. Bhattacharya has pointed out that the fourth proviso comes after the second proviso and is, therefore, not governed by the latter. It seems to me that an argument based on the collocation of the provisos, or even of the sections, cannot settle the point. For instance, the provisions as to the framing of the jurors' list and summoning them, which must necessarily in point of time come before the choosing of the jurors by lot, are embodied in section 321 and the following sections and not in any sections coming before section 276. In this connection, a reference to the history of the relevant sections will not be out of place.

It is important to remember that there was no provision for the appointment of special jurors in the

*mofussil* until 1896. In the Criminal Procedure Code of 1872 (Act X of 1872), section 236 provides for an uneven number of jurors, not being less than three nor more than nine. Section 240 provides that the jurors shall be chosen by lot from the persons summoned; there is no provision for supplying a deficiency similar to that in the second proviso to the present section 276. But section 243 of the Code of 1872 provides for making up a deficiency after objections and this is a provision which corresponds to the present section 279. Then, Act X of 1875 prescribed the procedure of the High Courts in the exercise of their original Criminal Jurisdiction. Chapter V of that Act deals with juries and it contains four sub-heads, of which sub-head (*a*) deals with juries generally, sub-head (*b*) deals with juries in the presidency towns, and sub-head (*c*) deals with juries in the *mofussil*. Under the general sub-head (*a*), there is section 33 which prescribes the number of jurors and then there is a proviso that in case of deficiency the number required may, with the leave of the court, be chosen from such other persons as may be present. Obviously, this general provision applies to the case of special juries in the presidency towns, such as is prescribed by section 38 under sub-head (*b*). There is no provision for special juries in the *mofussil*. Section 56 provides for the supply of jurors when objections are allowed and this corresponds to the present section 279. The Code of 1882 (Act X of 1882), repealed both the Acts of 1872 and of 1875 and in this Code we get section 276 with the three provisos as they stand now. But the fourth proviso was absent. The provision for special jurors in the *mofussil* was made by Act XIII of 1896. It introduced the second clause of section 269 and the fourth proviso to section 276 and by these two provisions it prescribed the appointment of special jurors in the *mofussil*. This Act also made the other provisions for the preparation of special jury list and so forth. Thus, we get the fourth proviso as the last proviso to section 276, because it

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was the last in point of time. It is also noteworthy that in section 279, sub-section (*2*), the reference to the whole of section 276 remained unaltered, so that the provision in that sub-section that, if there are no jurors present, then the deficiency may be supplied by selection from any other persons present in court whose names are on the list of jurors, or whom the court considers proper persons to serve on the jury, will apply to the case of special jurors as well. I may mention in passing that in England in the case of special jury, when there is a deficiency in the number of persons summoned to attend, it is not always necessary that the court should go back to the list of special jurors. When by reason of the persons summoned to attend not appearing, or for other cause, there is insufficient number of jurors to discharge the duties, the court may—

(*i*) cause any deficiency on the special jury panel to be made up out of the common jury panel, or any deficiency on the common jury panel to be made up out of the special jury panel;

(*ii*) at the request of any interested party, command the sheriff to add and annex to existing panels the names of any persons there present or to be found (*tales de circumstantibus*);

(*iii*) in the exercise of its inherent power, order the return by the sheriff of a new or enlarged panel of jurors. It is also said that in practice it is not unusual to requisition any person, whatever his residence or his qualification may be. *See* Halsbury's Laws of England, Vol. XVIII, Art. 620, page 252; also Archbold's Criminal Pleadings, 27th Edition, page 194.

Coming back to the present Code of Criminal Procedure and taking the sections as they stand now, it will be seen that all the four provisos to section 276 are really provisos to the main clause of that section. In proper cases, all the provisions must be interdependent. The main clause lays down the general rule that all jurors shall be chosen by lot from

the persons summoned. The fourth proviso lays down a rule which is applicable to special cases, namely, that in any district in which the Local Government has declared that the trial of certain cases may be by special jury, the jurors shall, in any case in which the judge so directs, be chosen from the special jury list.

Mr. Basu at one time contended that up to section 275 there was no mention of special jurors and that the fourth proviso to section 276 mentioned special jurors for the first time. This contention is not strictly correct, because there is section 269, sub-section (*2*), which makes provision for the Local Government to declare that in certain districts the trial of certain offences may be by special jury. However, this does not affect Mr. Basu's contention, because the two sections must be taken together as containing the provision to show where special jurors are to be chosen. Sections 325 and 326 merely provide for the framing of lists and for summons. Now, the question is, what would happen in case of deficiency of persons summoned. This is provided for by the second proviso to section 276. Obviously, this is a special provision to meet an emergency, so that there may not be a deadlock. Such emergency may occur in the case of special jurors, just as much as in the case of common jurors. Therefore, it stands to reason that the legislature intended to provide a remedy in both cases. Otherwise, in the case of special jurors, if there is deficiency, the court will have no option but to adjourn the trial and summon a fresh batch of jurors from the special jury list. Mr. Bhattacharya in fact contended this, but I think the argument is untenable. The word "jurors" in the second proviso is a general term, meaning both special and common jurors. Section 276 and the following sections 277, 278 and 279, must be read together as prescribing the procedure for empanelling jurors. I have already referred to the express provision in sub-section (*2*) of section 279. The reference in that sub-section is to the whole of

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section 276, and there is nothing to show that the fourth proviso to that section is excluded. Moreover, there is no real difficulty, because the court is to find, from amongst those present, persons of suitable standing to serve on the jury, whether common or special. It cannot be argued, because the words "whose name is on the list of jurors or whom the "court considers a proper person to serve on the "jury" occur in sub-section (*2*) of section 279 and do not occur in section 276, proviso (*2*), therefore, in the latter case, that is to say, in the case of selections before objection, the court has no guidance. As I have said already, these sections provide for one continuous procedure in the empanelling of the jury. On this principle was decided the Full Bench case of *Kedar Nath Mahato* v. *Emperor* (1), which prescribed the procedure to be followed in empanelling the jury. I may note in passing that one of the cases in which reference was made to the Full Bench, namely, Appeal No. 468, contained a charge under section 302 of the Indian Penal Code and presumably it was tried by special jurors. On the other hand, it is a condition of an emergency provision that the selection must be made from persons present. In particular cases, this may not be desirable. For instance, in an English case *King* v. *Dolby* (2), it was argued at the bar that it was not desirable to make up the deficiency from by-standers, because there was a danger of allowing a Coroner or a Sheriff to secure the attendance of persons chosen by himself and thereby in effect to select a part of the jury. Abbot C. J., however, remarked: "This objection is "in direct and manifest contradiction to the whole "principle and practice of the common law" and "even under the statute 35 Hen. VIII. c. 6, which "gave the *tales de circumstantibus*, as it is usually "called, a discretion is to be exercised by the officer. "The provision was made, as appears by the words of "the fifth section 'for the more speedy trial of issues,'

(1) (1927) I. L. R. 55 Calc. 371. (2) (1823) 2 B. & C. 104 (111); 107 E. R. 322 (324).

"not for the prevention of partiality, as was suggested "at the bar." So far as Indian courts are concerned, a more relevant authority is furnished in the case of *Abedali Fakir* v. *Emperor* (1). Mr. Bhattacharya's contention is, therefore, untenable. It cannot be said that, in this case, because a special jury was called, the second proviso to section 276 would not apply. It would apply, and the point arises in connection with this, namely, whether the judge applied his mind to the question as to whether it was practicable to have nine jurors. That was important so far as the prisoners were concerned.

Mr. Bhattacharya has next argued that the onus was on the appellants to show that the court did not consider the practicability of having nine jurors. But we have already pointed out that it does not appear from the terms of the judge's order that he at all applied his mind to the question as to whether it was practicable to have nine jurors and for that reason we called for report. It is the duty of the judge to consider whether it is practicable to have nine jurors and there is no duty cast upon the accused. Moreover, the objection touches the very constitution of the court and, therefore, it is not correct to say that the onus is upon the accused or the appellants.

Mr. Basu has also pointed out that as a matter of fact in this judiciary there are four or five sessions courts working at the same time and that, therefore, it is very likely that on the particular day a sufficient number of jurors of suitable standing were present. In these circumstances, we consider that we have no choice but to hold that the learned judge never applied his mind to the provisions of section 274, that the jury was not properly constituted, and that the illegality has vitiated the whole trial. This also affects the case of the other appellants who were not charged under section 302 of the Indian Penal Code but were tried jointly with appellant No. 1. The

(1) (1928) 33 C. W. N. 722.

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latest case on this point is that of the *Superintendent and Remembrancer of Legal Affairs* v. *Benozir Ahmad* (1).

We, therefore, reverse the verdict of the jury, the order of conviction of the appellants, and the sentences passed upon them, and we send back the case to the lower court for retrial.

Those of the appellants who are on bail will remain on the same bail, pending retrial.

LORT-WILLIAMS J. I agree.

*Appeal allowed. Retrial ordered.*

A. C. R. C.

(1) (1930) 34 C. W. N. 735.