APPELLATE CRIMINAL.

Before Guha and Nasim Ali JJ.

1934

Feb. 7, 13, 14.

NAGEN KUNDU

v.

EMPEROR.*

Jury—Misconduct—Sessions Judge's power to discharge such jury—Retrial. —Code of Criminal Procedure (Act V of 1898), s 282

Where the question of misconduct on the part of the jury or other similar sufficient cause arises, *e.g.*, leaving the retiring room without permission, the Sessions Judge has inherent power to discharge a jury and empanel another, even after a verdict of not guilty has been recorded but before the trial terminates.

This power is not covered by any provision of the Code of Criminal Procedure, the matter being one for the judge's discretion.

Reg v. *Ward* (1) referred to.

So far as it deals with any point specifically, the Code must be deemed to be exhaustive and the law must be ascertained by reference to its provision; but where a case arises, which demands interference and it is not within those for which the Code specifically provides, it would not be reasonable to say that the court had not the power to make such order as the ends of justice require.

Rahim Sheikh v. *Emperor* (2) relied on.

In England the Judge has the power to discharge the jury, if necessity arises, before or after the verdict and, in the absence of any provision to the contrary in the Indian statute relating to procedure, a rule recognised under the English law, which is not a mere rule of practice and procedure, but a rule embodying a principle of justice, may safely be applied in British India.

The King v. *Fowler* (3), *Mamfru Chaudhuri* v. *Emperor* (4) and *I. G. Singleton* v. *King-Emperor* (5) referred to.

CRIMINAL APPEAL by the accused.

The facts of the case and the arguments advanced at the hearing of the appeal appear sufficiently in the judgment.

*Criminal Appeal, No. 732 of 1933, against the order of Phaneendranath Mitra, Assistant Sessions Judge of Khulna, dated July 27, 1933.

(1) (1867) 10 Cox C. C. 573.
(2) (1923) I. L. R. 50 Calc. 872.
(3) (1821) 4 B. & Ald. 273; 106 E. R. 937
(4) (1923) I. L. R. 51 Calc. 418.
(5) (1924) 29 C. W. N. 260.

Nalinikumar Mukherji, *Sureshchandra Talukdar* and *Nakuleshwar Som* for the appellants.

The Deputy Legal Remembrancer, *Khundkar*, *Siddheshwar Chakrabarti* and *Hamidul Huq Chaudhuri* for the Crown.

Cur. adv. vult.

GUHA AND NASIM ALI JJ. The appellants were tried for having committed an offence under section 395 of the Indian Penal Code, by the learned Assistant Sessions Judge, Khulna, and a jury, twice, and, at the second trial, were, on the unanimous verdict of the jury, recorded by the judge on the 27th July, 1933, convicted and sentenced to five years' rigorous imprisonment each. At the first trial, the jurors empanelled unanimously brought in a verdict of not guilty, on the 30th June, 1933. After the verdict was recorded by the judge, the Public Prosecutor filed a petition, stating that, after the charge to the jury, when the jury retired for deliberation for their verdict, one of the jurors had, without leave of the court, separated from the rest of the jury, and went to say his *jummâ* prayer, and was away from the retiring room of the jurors for about an hour, and the Public Prosecutor urged that the trial was vitiated on account of the same. The judge recorded in the order sheet that the juror in question was specially enjoined by him and by the Public Prosecutor, in clear terms, not to leave the retiring room without the special leave of the court, and that he was also told that, if he had any necessity for that, he would have to take the direction and instruction of the court. It appears that the juror concerned was questioned by the judge and that pleaders on both sides were heard on the question that arose for consideration. The judge then held that the facts admitted by the juror were sufficient to vitiate the entire trial; and that the only course open to the court under the circumstances was to discharge

1934

Nagen Kundu v. *Emperor.*

the jury, and to commence the proceedings afresh. It was stated by the judge in his order recorded on the 30th June, 1933, that it was a great misfortune that so much time of the court had been wasted for the act of a juror in spite of clear injunctions by the court to the contrary. The jury were, accordingly, discharged, and direction was given by the judge for the postponement of the trial to the 17th July, 1933. It was, at this second trial, that the appellants have been convicted and sentenced as mentioned already.

The main ground urged in support of this appeal was that the second trial was *ultra vires*, illegal and improper; the conviction of the appellants and the sentences passed on them could not, therefore, be sustained. It was argued that, regard being had to the fact that the jury returned a verdict of not guilty at the first trial, the judge ought to have accepted the verdict and acquitted the appellants. It was further contended, in support of this appeal, that the judge acted without jurisdiction and with material irregularity in discharging the jury on the 30th June, 1933, and that the procedure followed by the judge was in contravention of the law, operating to the serious prejudice of the accused. It may be stated at the outset that there can be no question that it was entirely for the judge to determine, and it was entirely within his discretion to determine, whether there was such misconduct on the part of a juror as necessitated a discharge of the jury, and the decision given by the judge on the question is not open to review [see in this connection *Reg.* v. *Ward* (1), in which case one of the jurors left the box without the leave of the judge]. The Assistant Sessions Judge had, in the case before us, used the discretionary power, after he had satisfied himself by an enquiry, which, in the circumstances of the case, he thought necessary to adopt, that reasonable grounds existed for exercising the same. He came to the decision that, in the circumstances brought to his notice and on the facts

(1) (1867) 10 Cox C. C. 573.

1934

Nagen Kundu
v.
Emperor.

before him, there was no other course open to him but to discharge the jury. We are not prepared, on the materials before us, to go behind the judge's order relating to the discharge of the jury, passed on the 30th June, 1933; and the appellants did not, at any stage before this, challenge the propriety of the order discharging the jury.

The point, on which there does not appear to be any authority of decided cases by any of the High Courts in this country, and which was submitted for our consideration, was whether the judge had the power, under the law, to discharge a jury after a verdict had been recorded. The argument proceeded on the basis that the procedure followed by the judge, of discharging a jury after the verdict of the jury had been recorded, was not prescribed by the Code of Criminal Procedure, and that section 282 of the Code was exhaustive, as regards the discharge of a jury by a judge. It appears to us that, where the question of misconduct on the part of the jury or other similar sufficient cause arises, the Sessions Judge has inherent power to discharge a jury and empanel another. This power is not covered by any provision of the Code of Criminal Procedure, the matter being one for the judge's discretion. It is to be noticed that, so far as it deals with any point specifically, the Code of Criminal Procedure must be deemed to be exhaustive, and the law must be ascertained by reference to its provision, but where a case arises, which demands interference, and it is not within those for which the Code specifically provides, it would not be reasonable to say that the court had not the power to make such order as the ends of justice require. In the above view of the question for consideration before us, which is in accordance with the considered opinion expressed by two learned Judges of this Court in their judgment in the case of *Rahim Sheikh* v. *Emperor* (1), a case in which the jury were dischaged by the judge before the verdict,—but which

(1) (1923) I. L. R. 50 Calc. 872.

1934

Nagen Kundu v. *Emperor.*

opinion, in our judgment, applies with equal force to a case where the jury are discharged by the Sessions Judge in circumstances other than those specially provided by the Code of Criminal Procedure, either before or after verdict, before the trial terminates in the court of sessions. As indicated already, in England, the Judge has the power to discharge the jury, if necessity arises, before or after the verdict, and, in the absence of any provision to the contrary in the Indian statute relating to procedure, a rule recognised under the English law, which is not a mere rule of practice and procedure, but a rule embodying a principle of justice, may safely be applied; [see in this connection *The King* v. *Fowler* (1), referred to in *Mamfru Chaudhuri* v. *Emperor* (2), and *I. G. Singleton* v. *King Emperor* (3)].

In our judgment, there is no force in the contention urged, in support of this appeal, that the trial, at which the appellants were convicted, was *ultra vires*, inasmuch as the procedure followed by the Assistant Sessions Judge in discharging the jury, who gave a verdict of not guilty on the 30th June, 1933, in favour of the appellants, was in contravention of law. We are unable also to give effect to the argument in support of the appeal that the verdict of not guilty should have been accepted by the judge and the appellants acquitted on that verdict and the further argument that the conviction of and sentences passed on the appellants at the subsequent trial were illegal.

It remains now to deal with the question raised in the appeal upon the Assistant Sessions Judge's charge to the jury, at the second trial. Certain passages in the judge's charge to the jury were pointed out to us, with a view to make out that there were misdirections in the charge. Exception was taken to that part of the judge's statement to the jury, where it was said that the jury were to decide whether it was likely that a false case was started

(1) (1821) 4 B. & Ald. 273; 106 E. R. 937.

(2) (1923) I. L. R. 51 Calc. 418, 430.

(3) (1924) 29 C. W. N. 230.

against the accused placed on their trial, and it was also urged that the jury were not properly directed on the question of some of the accused having absconded and not having been found, when the attempt was made to arrest them. The summary by the judge of the evidence bearing upon the question of identification of the individual accused persons were referred to before us, and it was urged that the judge's charge in this behalf was not a fair and proper one. We have given our careful consideration to the judge's charge to the jury bearing on the points mentioned above, and generally to the method followed by him in summarising the evidence, and in putting the material points arising for consideration in the case, and we are unable to hold that there was any such misdirection or non-direction by the judge, which could properly have resulted in an erroneous verdict of the jury.

All the points raised in support of this appeal have to be overruled for the reasons set forth above. The conviction of the appellants and the sentence passed on them are affirmed. The appeal is dismissed.

Appeal dismissed.

G. S.