APPELLATE CRIMINAL.

Before Ameer Ali and M. C. Ghose JJ.

1933

Sept. 12.

MUKUNDAMURARI PAL

v.

EMPEROR.*

Jury—Duty of the judge in case of deficiency—Code of Criminal Procedure (Act V of 1898), s. 276.

Section 276 of the Code of Criminal Procedure does not cast any duty upon the judge to send his court officers to other court-rooms and bring from there such jury-men as were available, it merely says that in case of deficiency the number of jurors may, with the leave of the court, be chosen from such persons as may be present.

When in a murder case, out of 18 jurors summoned 8 were present and there was no other suitable person present in the court of the judge, the trial by 7 jurors was legal.

Serajul Islam v. *Emperor* (1) and other cases referred to.

CRIMINAL APPEAL.

The material facts and arguments appear from the judgment.

Ramendrachandra Ray for the accused.

The Deputy Legal Remembrancer, Khundkar, for the Crown.

GHOSE J. This is an appeal by Mukundamurari Pal *alias* Jateendra Pal *alias* Harendrachandra De, who has been convicted under section 393 read with section 398 and section 75 and also under section 302 read with section 114 of the Indian Penal Code. He was sentenced under the first section to transportation for life and under section 302/114 sentenced to death. There is a reference by the learned Sessions Judge for confirmation of the sentence of death.

The facts in short are that, about 2 to 3 a.m. on the 1st of May, 1931, two men armed with guns entered into the shop of Seetanath Sil at Bahadurabad and

*Criminal Appeal, No. 580 of 1933, with Death Reference, No. 19 of 1933, against the order of R. F. Lodge, Sessions Judge of Mymensingh, dated July 4, 1933.

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

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put the inmates into fear of instant hurt and demanded the keys. Some of the inmates managed to escape, others were put to terror. About this time many villagers came up and wanted to know what was the matter, whereupon one of the intruders opened the door and threatened the villagers. The intruders fired two shots and got out of the room and proceeded to go away. The villagers pursued them at a distance. The offenders continued to fire at them. At a certain place in the pursuit one of the pursuers Asthalal Mali came very near the two men and shouted, whereupon one of the two, not the present accused, shot and killed Asthalal Mali. The villagers, however, continued to pursue the men who continued to fire shots. One of the shots struck and caused slight injury to witness Salim. After a long pursuit the two men at last ceased firing and the villagers concluded that their ammunition was exhausted. Then the villagers beat them down, captured them together with two guns and brought them back to Bahadurabad where they were kept in the local *zemindâr's kâchâri*. A *chaukidâr* went to the *thânâ* and the police arrived in the morning and took charge of the two captives and the two guns. The two men took the police to a certain boat where a dog prevented the police party from entering. The present accused caught the dog and tied it and thereafter the boat was searched and the present accused produced a bag containing gold, silver and coins from the sand near the boat. The two men were duly sent up and were committed to the Court of Sessions. While the trial was pending one of the two men, Ismail, died in prison. It appears that the present accused was allowed bail and absconded from bail by reason of which the trial was not held till more than two years after the occurrence.

The learned advocate for the appellant has read the whole of the evidence before us. It is urged that many of the witnesses who were said to have seen the occurrence have not been examined. It appears that

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there were 5 men inside the shop when the offenders entered. Of them, 3 men were examined in the Sessions Court and two were tendered for cross-examination. Of the pursuers, who amounted to a large number, a good many have been examined in the Sessions Court. There is, in our opinion, no prejudice caused to the accused because all the pursuers were not examined.

The two guns which were found in the possession of the two offenders were proved by evidence to have been stolen shortly before the occurrence. It is urged that a certain bullet was found on the body of the deceased but the bullet was not produced in the Sessions Court and further that no expert was examined to show that the guns had been recently fired. We are of opinion that these omissions have not cast any doubt upon the prosecution story.

Upon the whole of the evidence it is clear that the jury had sufficient materials in finding the present accused guilty under section 393 read with section 398 and section 75 of the Indian Penal Code.

It is urged that the conviction under section 302 read with section 114 is wrong in law inasmuch as there is no evidence that the present accused abetted his companion Ismail to shoot and kill Asthalal Mali. The charge of the learned Sessions Judge on this point has been read and commented upon before us. There is no doubt on the evidence that the accused's companion Ismail deliberately shot and killed Asthalal Mali and thereby committed an offence of murder punishable under section 302 of the Indian Penal Code. The question is whether in the circumstances it can be said that the accused abetted his companion in committing the murder. Under section 107 of the Indian Penal Code:—

> A person abets the doing of a thing, who—
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> (1) instigates any person to do that thing; or
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> (2) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing, or
>
> (3) intentionally aids, by any act or illegal omission, the doing of that thing.

As the learned Sessions Judge rightly pointed out to the jury in the present case, there is nothing to show that the present accused instigated Ismail or intentionally aided him to commit the murder. The question is whether he engaged in a conspiracy with Ismail for the commission of the murder. For this purpose, the whole of the circumstances must be taken into account. The two men were armed with guns and had plenty of ammunition and they entered the shop for the purpose of committing robbery. When they were disturbed in their act by a large number of villagers they decided to retreat and in so retreating they fired a large number of shots. It is clear that their primary intention was to effect their escape from their pursuers and it was their determination to prevent the pursuers from arresting them. It may be conceded that it was not their primary intention to kill any of their pursuers. Their intention was merely to effect their escape from the pursuers. But from the circumstances, it may be concluded that their intention was to effect their escape even though for that purpose it was necessary to shoot any of the pursuers mortally. There can be no other conclusion from the fact of their constant shooting. It is true that if none of the pursuers had come within the range of their shots no one would have been killed. Asthalal Mali happened to run near the pursuers and immediately one of the offenders turned and shot him dead. That person was the accused's companion, Ismail. From these circumstances, the jury, in our opinion, were right to conclude that the accused conspired with Ismail to commit the robbery and to effect their escape, if necessary, by shooting with their guns. In the prosecution of the object of their conspiracy the accused's companion shot Asthalal Mali dead. There is thus no doubt that accused Mukundamurari Pal has been rightly convicted under section 302 read with section 114 of the Indian Penal Code. Indeed, in the circumstances of this case, the accused might well have been convicted under section 302 read with section 34 of the Indian Penal Code.

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[See the case of *Barendra Kumar Ghosh* v. *Emperor* (1).]

A preliminary objection was taken that the whole trial was illegal inasmuch as the jury were not properly constituted. The facts are that 18 jurors were duly summoned for the trial of the case. But when the learned Judge took up the trial and the names of the 18 jurors were called one by one, only 8 of them were found present in court. Thereupon the learned Sessions Judge chose 7 of them and held the trial with the aid of 7 jurors. It is provided by section 274 of the Criminal Procedure Code that where an 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. In numerous cases of this Court it has been held that the meaning of this section is that in trying an offence punishable with death the jury shall consist of nine persons but if it be not practicable to have nine persons then it may be held with the aid of seven persons. Section 326 of the Code of Criminal Procedure provides that the number of jurors to be summoned shall not be less than double the number required. Upon the two sections it has been held that in a murder case at least eighteen jurors must be summoned for the trial. [See *Serajul Islam* v. *Emperor* (2), *Dwarika Malo* v. *Emperor* (3), *Amir Khan* v. *King-Emperor* (4), *Shaheb Ali* v. *Emperor* (5).] In the case of *Emperor* v. *Munshi Tamizuddin Ahmed* (6), the learned Judges went so far as to hold that where less than eighteen jurors were summoned though nine jurors attended and were chosen without objection yet the jury were not properly constituted according to the above sections. This case, however, was over-ruled by the Full Bench decision in the case of *The Emperor* v. *Erman Ali*, where the Court held that in a murder case where fourteen jurors were

(1) (1924) I. L. R. 52 Calc. 197; L. R. 52 I. A. 40.
(2) (1927) I. L. R. 55 Calc. 794.
(3) (1929) I. L. R. 56 Calc. 1154.
(4) (1929) 33 C. W. N. 1053.
(5) (1931) I. L. R. 58 Calc. 1272.
(6) (1929) 33 C. W. N. 1054.

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summoned and nine of them were chosen without objection the trial was not bad merely by reason of the fact that only fourteen jurors were summoned. In the present case, eighteen jurors were summoned and there can be no objection on the score that a proper number of jurors were not summoned under section 326 of the Code of Criminal Procedure. The question is whether the learned judge duly complied with section 274 of the Code according to which he should have considered whether it was practicable to have nine jurors. Upon considering the fact that only eight jurors were present it is clear that there were not a sufficient number of persons from whom nine jurors might have been chosen. The question is whether the learned judge complied with section 276 which provides *inter alia* that in case of 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. It is apparent in this case that there were no such persons present in the court of the learned Sessions Judge. It has been urged by the learned advocate for the appellant that there are four or five sessions courts in Mymensingh and it may be presumed that there were sessions cases going on in one or other court on that date and it is urged that it was the duty of the learned Sessions Judge to send his court officers to those other court-rooms and bring from there such jury-men as were available. The question is whether section 276 of the Code of Criminal Procedure casts a duty upon the trial judge to send his court officers to adjacent sessions courts to find out men to serve as jurors in his court. Upon considering the wording of the section, we are of opinion that no such duty is cast upon the trial judge. The section merely says that the number of jurors required may, with the leave of the court, be chosen from such persons as may be present. The meaning of the words is plain. It cannot, in our opinion, be held to mean that it was the duty of the judge to send his court officers to search for jurors in adjacent

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sessions courts. We are, therefore, of opinion that in this case as there were not nine suitable persons present in court, it was not practicable for the trial judge to empanel nine jurors. The constitution of a jury of seven, in the circumstances, was not, in our opinion, an illegality such as would render the trial invalid. The preliminary objection is over-ruled.

It remains to consider the sentence of death which has been passed upon the appellant. The learned Sessions Judge recorded his age to be about 28 to 30 years. The committing magistrate estimated his age to be about 25 years. He did not fire the fatal shot. He fired many shots from his gun but it does not appear that he caused hurt to any one. His companion who fired the fatal shot died in jail while he was under trial. Having regard to all the circumstances, we are of opinion that a sentence of transportation for life will meet the ends of justice in this case.

In the result, the convictions are upheld and the sentence of death is reduced to transportation for life.

AMEER ALI J. I agree. I desire only to emphasise that we have no intention of laying down any general rule as to what is or is not to be considered "practicable" under any particular set of circumstances.

Sentence reduced.

A. C. R. C.