APPELLATE CRIMINAL.

Before Panckridge and M. C. Ghose JJ.

1932

Jan. 14.

ISRAIL

v.

EMPEROR.*

Jury—"Present in court", meaning of—Code of Criminal Procedure (Act V of 1898), s. 276.

Persons, who are within the precincts of the court building, either because they have been summoned for other cases or by mere chance, are persons "present in court" within the meaning of section 276 of the Code of Criminal Procedure. They need not necessarily be within the four walls of the court room.

Emperor v. *Abedali Fakir* (1) and *Sadarat Sheik* v. *King-Emperor* (2) distinguished.

CRIMINAL APPEAL.

The material facts appear from the judgment.

Sureshchandra Talukdar for the appellant.

The Deputy Legal Remembrancer, Khundkar, and *Aneelchandra Ray Chaudhuri* for the Crown.

PANCKRIDGE J. The appellant in this case has been found guilty by a majority of the jury of 8 to 1 of an offence punishable under section 304, part I of the Indian Penal Code. The learned judge, after expressing an opinion that, in his view, the prosecution evidence was not wholly reliable, stated that he did not feel justified in disagreeing with the verdict of such majority and he accordingly convicted the accused and sentenced him to undergo transportation for life.

A preliminary point has been taken on behalf of the appellant which raises a question of some interest and importance. It is said that the trial has been

* Criminal Appeal, No. 618 of 1931, against the order of S. N. Guha Ray, Additional Sessions Judge of Mymensingh, dated June 9, 1931.

(1) (1928) I. L. R. 56 Calc. 835. (2) (1928) 48 C. L. J. 479.

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vitiated because the provisions of the Code of Criminal Procedure with regard to the empanelling of the jury have not been observed. What happened is set out in some detail in the order-sheet. It appears that of eighteen jurors summoned, eleven failed to appear. Of the remaining seven, one was successfully objected to on behalf of the accused. The other six jurors were not objected to and the position, therefore, was that there were six jurors competent to serve leaving a deficiency of three jurors. The order-sheet reads as follows :—

> As there was no other juror summoned in this case present, two special jurors, Jamineekumar Chanda of Dholla, police-station Trishul, and Sadhucharan Shaha of Kalibati, police-station Kalibati, who were summoned in another sessions court, and one Akbar Ali Munshi of Astodhar, police-station Kotwali, also a special juror, who happened to be present in court premises were chosen as jurors, one after another, and the accused was asked if he objected to be tried by them and the accused had no objection. The prosecution and the defence pleader also had no objection to any of the nine persons chosen.

I will assume that none of the three gentlemen, to whom the order-sheet refers, was present in the actual room in which the proceedings were being conducted. The learned advocate for the appellant argues that if they were not within the four walls of that room they were not "persons present" within the meaning of the second proviso to section 276 of the Code of Criminal Procedure, and he has relied on two reported cases, namely, *Emperor* v. *Abedali Fakir* (1) and *Sadarat Sheik* v. *King-Emperor* (2). In my opinion, both those cases can be distinguished, for it is clear from both reports that, when the deficiency in the number of jurors was discovered, individuals were summoned from the locality to make up the deficiency. The court in those cases, if I may say so with respect, appears to me to have rightly rejected the argument that such persons were present within the meaning of the section, because they must, of necessity, have been present when they were empanelled. It is to be observed that if it had been the intention of the legislature that for a person to be eligible as a juror

(1) (1928) I. L. R. 56 Calc. 835. (2) (1928) 48 C. L. J. 479.

under the second proviso he must be present within the actual court room it would have been perfectly easy to say so. In my opinion, persons who are within the precincts of the court building, either because they have been summoned for other cases or by mere chance, are persons "present" within the meaning of section 276 and I apprehend that the intention of the legislature was to prevent such a course being taken as was taken in the two cases to which I have referred, namely, the summoning of individuals from the locality when it became apparent that there was not a sufficient number of jurors summoned in the case and present to permit of the trial proceeding. I may say in passing that it does not appear to me that in the Full Bench case *Kedar Nath Mahato* v. *Emperor* (1), the use of the word "bystanders" by Buckland J. is of any assistance in considering the point with which we are at present concerned. The Full Bench case was concerned with a totally different question and there was no need for the Court to consider the proper construction of the word "present" in the second proviso to section 276. We are, therefore, of opinion that the method followed in empanelling the jury in this case affords no ground for allowing the appeal.

With regard to the merits, the learned advocate for the appellant contends that the case of the defence was not properly put before the jury. But he very frankly admits that, taken as a whole, the summing up was not prejudicial to the accused and he urges this as a ground for the favourable consideration of such criticisms as he makes. The answer, I think, to the point made on behalf of the appellant is that in this case there was no specific defence put forward and the defence really was a denial of the charge coupled with destructive criticism of the prosecution evidence. It must have been perfectly clear to every juror that the accused person was challenging the prosecution evidence and it seems to me that the learned judge did

(1) (1927) I. L. R. 55 Calc. 371.

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all that could be expected of him when he drew the jury's attention to the discrepancies in the evidence and to the criticism of the evidence advanced by the pleader for the defence. I do not think that any useful purpose would have been served by his formally charging the jury that the defence was a denial of the prosecution case. It appears to me that the learned judge was very careful to draw the jury's attention to the various points on which the accused placed reliance. He drew the attention of the jury to the discrepancies between the first information report and the evidence and also to the various difficulties as to the hour assigned in the prosecution story to the occurrence. Only one specific instance of misdirection is suggested by the learned advocate for the appellant. The defence relied on the fact that although the evidence was that the deceased met his death by being hit on the head with a heavy agricultural instrument there was no blood to be found at the place of occurrence. The learned judge pointed out to the jury—what indeed they must have known for themselves—that at the end of the month of August when this occurrence took place it was the height of the rainy season and that it may well have been that all traces of blood, if any, would have disappeared. It is said that, in the absence of specific evidence that there was rain at or about the time of the occurrence, the learned judge should not have suggested this argument to the jury. In my opinion, it is a matter which, in any case, must have been present in the minds of the jury and I do not think that the interest of the accused has suffered by reason of the judge's observations. In the circumstances, we consider that the appeal against the conviction must be dismissed.

We have been asked to reduce the sentence imposed on the accused and we do so with some hesitation, bearing in mind that the learned judge was of opinion that the evidence was not entirely trustworthy and that, on the day previous to the occurrence, the appellant had been grossly insulted by the deceased

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man. In the circumstances, we consider that the requirements of justice will be met if we reduce the sentence of transportation for life to one of rigorous imprisonment for ten years.

M. C. GHOSE J. I agree.

Appeal dismissed, sentence reduced.

A. C. R. C.