JURY REFERENCE.

Before Costello, Panckridge and M. C. Ghose JJ.

1935

Feb. 5, 6.

EMPEROR

v.

BENAT PRAMANIK*.

Jury—Empanelling of jury, if erroneous—Code of Criminal Procedure (Act V of 1898), s. 274.

Where, in a case in which the accused persons were charged with an offence punishable with death, and out of eighteen jurors summoned only seven attended and were chosen by lot without any objection from either side, in the absence of anything on the record to the contrary, it must be assumed that it was not practicable to have more than seven jurors and consequently the trial was not vitiated.

When there is nothing on the record to show otherwise, the High Court ought to proceed on the principle embodied or implied in the phrase "*Omnia rite acta*", that is to say, upon the assumption that the trial took place in full accordance with the requirements of law.

Emperor v. *Damullya Molla* (1) followed.

Shaheb Ali v. *Emperor* (2) dissented from.

Where the jury found the accused guilty of an offence punishable with death, the judge acted wrongly in releasing the accused on bail, although he disagreed with the verdict and made up his mind to refer the case to the High Court.

CRIMINAL REFERENCE.

The material facts and arguments appear from the judgment.

Surajitchandra Lahiri for the accused.

The Deputy Legal Remembrancer, Khundkar, Anilchandra Ray Chaudhuri and *Siddheshwar Chakrabarti* for the Crown.

COSTELLO J. This is a reference under section 307 of the Code of Criminal Procedure made by the Sessions Judge of Pabna by a letter of reference dated the 23rd November, 1934.

*Jury Reference, No. 55 of 1934, made by B. K. Basu, Sessions Judge of Pabna, dated Nov. 23, 1934.

(1) (1930) 34 C.W.N. 1127. (2) (1931) I. L. R. 58 Calc. 1272.

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Eight persons Benat Pramanik, Gayanath Sarkar, Kashi Pramanik, Baser Fakir, Sakurali Sardar (*alias* Sukra), Mallik Pramanik, Bhawanicharan Sarkar and Jagannath Chanda were put on their trial before a jury on charges of murder and conspiracy. The jury unanimously acquitted all the eight accused persons of the charge of murder and also the last four out of the eight accused of the charge of conspiracy. But they convicted Benat Pramanik, Gayanath Sarkar, Kashi Pramanik and Baser Fakir of the charge of conspiracy to murder, and it is with regard to these four persons that this reference has been made to this Court.

The learned judge disagreed with the verdict of the jury, and he was very emphatically of opinion that these four persons ought not to have been found guilty of an offence under section 120B read with section 302 of the Indian Penal Code. In the opinion of the learned judge, the accused persons ought to have been acquitted, as in his view, the evidence recorded in the case did not justify an inference either that there was a conspiracy at all, or that any one of the accused persons was a party to the conspiracy.

The case put forward by the prosecution in outline amounts to this: at 11 p.m. on the 17th June, 1934, a man named Sanatan Goon living at a place called Madla in the police district Shahajadpur came to the police station and there stated that in the evening Sureshchandra Biswas, Bishweswar Biswas and Rahimuddin Sarkar and another man, all belonging to a place called Potajia, had come to his house and had informed him that they had seen a man named Hriday Sarkar of Madla, who was a relation of Sanatan's, leave Potajia *hât* carrying a lantern, and that shortly after they had heard from a man Rumi that he had seen a man passing along with a lantern in hand, and had then heard certain cries which had caused Rumi to suspect that foul play was taking place.

In view of the fact that Hriday had not returned to his house, Sanatan sent out a search party to look for him and himself started for the *thânâ*. Before

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he reached the *thânâ* he got news that Hriday's dead body had been found floating in water. Actually the dead body was taken out of a small river or *khâl* at a spot near Potajia. On one side of the river there was a burning *ghât* which was referred to in the evidence as the cremation ground, and on the other side of the river there was a *bâblâ* tree.

On the 18th June, an inquest was held by the Sub-Inspector of police, on the dead body. No marks of injury were found, but from the circumstances the persons who were summoned to take part in the inquest, and the police officer all came to the conclusion that Hriday had been murdered. The body was examined by Dr. Singh, who was the Assistant Surgeon of Sirajganj, on the 19th June. By that time, it was in such an advanced stage of decomposition that the doctor was unable to find anything either on external examination or on dissection, to show what was the cause of death. The doctor said that in his opinion death must have taken place two days prior to the *post-mortem* examination.

That the man Hriday was murdered, there is, in our opinion, no doubt whatever. The only real question in the case is whether the prosecution had succeeded in establishing that the accused or any of them had conspired together to bring about the death of the deceased. The learned Sessions Judge for some reason or other which is not apparent, seems to have taken the view that these persons had nothing to do with the occurrence and that most or part of the relevant evidence against them had been fabricated by persons whom the learned judge boldly described as "liars."

[After discussing the evidence in the case in detail, His Lordship proceeded as follows]:—

The arguments put forward very forcibly by Mr. Lahiri and the comments he made with regard to the credibility of the witnesses have only served to bring into relief the strength of the case for the prosecution, and the more one scrutinizes the evidence given in the case, the more, in our opinion, does it become apparent

that the verdict of the jury so far from being perverse, as the learned judge thought, was not only a reasonable verdict but the right verdict. It would have been surprising if the jury had arrived at any other conclusion.

The main method of attacking the evidence given in the case was, as the learned judge said, to seek to discredit many of the witnesses as being deliberate and wilful liars. We see nothing whatever in the evidence (all of which has been placed before us) to indicate that any one of the witnesses was a deliberate liar, or anything of the kind. It seems that the learned judge, for some unknown reason, himself took a somewhat perverted view of the whole of this case. A perusal of the evidence indicates, in our opinion, that the making of the Reference which has been sent to us, was wholly unwarranted in the circumstances of this case.

At a late stage of the argument before us, Mr. Lahiri, on behalf of the accused persons, raised a question as to the legality of the trial owing to the fact that the jury was composed of no more than seven jurors. It appears from the order-sheet that the jurors were duly chosen by lot without objection from either side, and it is stated that the trial proceeded with the aid of seven jurors only as all the other eleven jurors who were duly summoned were absent on call.

Mr. Lahiri contended that there is nothing in the record to show that the provisions of sub-section (*2*) of section 274 of the Code of Criminal Procedure were properly complied with. That proviso was added to the sub-section by Act XII of 1923 and reads as follows :—

> Provided that, where any 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.

It was argued that the learned judge ought to have satisfied himself that it was not practicable to secure the additional number of jurors necessary to make up a total number of nine, and that the learned judge

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ought to have made some entry in the record to indicate that he had exhausted all possible sources for obtaining the extra number of jurors. I doubt very much whether there is any such obligation imposed upon the learned judge by the provisions of section 274 even read with the provisions of section 276.

The point now under discussion came under the consideration of this Court in the case of *Shaheb Ali* v. *Emperor* (1). In that case there had been a trial of one of a number of accused persons on a charge under section 302 and of all the other accused under section 148 of the Indian Penal Code. The case was tried by the Additional Sessions Judge of Mymensingh with a jury of seven persons. When the appeal came before this Court for hearing on the 12th December, 1930, an order was made by Lort-Williams J. and S. K. Ghose J. In giving reasons for the making of the order S. K. Ghose J. said:—

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."

Then comes the material part of the matter;—

"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.

Then the learned judge said:—

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. The record was sent down with a direction that the learned Sessions Judge should return it as soon as possible with his report.

(1) (1931) I. L. R. 58 Calc. 1272.

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When the matter came before the Court again it appeared that the learned judge who had tried the case had retired from service and, therefore, it was not possible to obtain from him a report as to whether he had considered the question of the practicability of securing nine jurors or not. It was then argued that the onus was on the appellants to prove that the court had not considered the practicability of having nine jurors. Mr. Justice S. K. Ghose in his judgment at page 1279 says :—

> 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.

Mr. Lahiri has relied upon that decision in support of the argument placed before us attacking the validity of the trial with which we are now concerned. With all respect to the learned Judges in *Shaheb Ali's* case (1), we find ourselves unable to agree with the view they adopted. In our opinion, where, as in the present case, there is nothing on the record to show otherwise, this Court ought to proceed on the principle embodied or implied in the phrase '*omnia rite acta*', that is to say, we ought to proceed upon the assumption that the trial in the court below took place in full accordance with the requirements of section 274, sub-section (*2*) and its proviso, and that everything in connection with the empanelling of a jury was done in due form of law.

There is weighty authority for that point of view in a judgment of Sir George Rankin, Chief Justice, which he gave with the concurrence of two other Judges of this Court in the case of the *Emperor* v. *Damullya Molla* (2). That case came before this Court upon a Reference under section 302 of the Code of Criminal Procedure from the Additional Sessions Judge of Jessore, who had disagreed with the unanimous verdict of the jury, and it was numbered as Jury Reference No. 31 of 1930. We have taken the precaution of

(1) (1931) I. L. R. 58 Calc. 1272. (2) (1930) 34 C. W. N. 1127.

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sending for the printed record of the case as it came before this Court, in order to ascertain as far as possible what the situation had been at the time of the trial, and we find in the order-sheet of the proceedings at the trial this entry :—

> Dated the 30th May, 1930. The accused is brought before the court. Charge under section 302 is read and explained to the accused, who pleads guilty to the charge. As the court thinks it reasonable to record the evidence of some of the eye-witnesses in the case and as there are eight jurors out of eighteen jurors called for, present in court, seven jurors of cards Nos. 37, 44, 45, 147, 152, 154, 156 are selected by lot without objection and their foreman elected. They are then sworn and empanelled.

The position, therefore, was very much the same as the situation which arose in the present case, the only difference being that instead of seven jurors out of eighteen being present as they were in the present case, there were eight jurors out of eighteen present in court. So far as that difference is of any materiality at all, it tells against the argument put forward by Mr. Lahiri, because it opens the way to an argument that, as there was only a deficiency of one juror, it would have been comparatively an easier matter to secure one more juror from amongst the bystanders than to secure two more jurors as would have been necessary in the present instance.

The passage in the judgment of Sir George Rankin to which I have referred appears at page 1128 of the report and it is in these words : "It is pointed out by "the learned counsel for the accused that in this case, "though eighteen jurors were summoned, the accused "was tried with seven jurors only because only eight "jurors attended. It is suggested that the learned "judge should have obtained two more jurors from "among the bystanders. But there is nothing on the "record before us to show that this course was "practicable in the circumstances of this case". With all respect, we entirely agree with the view taken by the learned Chief Justice and adopt the passage just quoted as being a correct enunciation of the law. In that view of the matter, unless there is an indication on the face of the

record itself or there is other material before the court which leads to the conclusion that it was or might have been practicable to have the jury composed of nine jurors rather than seven, one must assume that it was not practicable to have nine jurors.

In the Reference now before us, just as in the Reference before Sir George Rankin C.J. and C. C. Ghose and Patterson JJ., there is nothing to show that it was practicable, in the circumstances of this case, to obtain the full number of jurors. We must, therefore, assume that the Sessions Judge had sufficient knowledge and experience to know what was required under the terms of section 274 of the Code of Criminal Procedure, and therefore in the circumstances in which the trial began it was not practicable to have more than seven jurors for the trial of the accused persons. In our judgment, the point of view indicated in the judgment of Sir George Rankin is preferable to that adopted in the case cited by Mr. Lahiri; so it follows that there is no substance in the point of law belatedly taken by Mr. Lahiri.

There is one other matter to which I desire to call attention in connection with this Reference and it is this: that, in spite of the unanimous verdict of the jury convicting Benat Pramanik, Gayanath Sarkar, Kasi Pramanik and Baser Fakir of an offence which is punishable with death, the learned judge saw fit to make an order that these four accused persons might be released on bail of Rs. 500. It would, in our opinion, have been quite wrong to have released these persons on bail even during the pendency of the trial or during the course of the trial, and it is, therefore, still more wrong that they should be released on bail after they had been convicted of such a serious offence by the unanimous verdict of the jury even though the Sessions Judge disagreed with the verdict of the jury and made up his mind to refer the matter to this Court. In circumstances, such as those in the present case, it is desirable that the convicted persons be held in custody pending the final decision of this Court. The bail

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required for these persons was of a very trifling amount, and apparently no sureties were called for. There was in fact little or no sanction provided to prevent them from endeavouring to escape from the just consequences of the crime of which they had been convicted. It is to be hoped that in future cases of this kind these observations will be borne in mind by Sessions Judges when making References to this Court.

Having regard to the view taken by us of the facts in this case and there being no substance in the point of law raised by Mr. Lahiri, the result is that this Reference is rejected. The four persons, whose names I have mentioned, therefore, stand convicted of an offence under section 120B read with section 302 of the Indian Penal Code, and the sentence of the Court upon each and every one of them is that of transportation for life.

PANCKRIDGE J. With regard to the point of law raised on behalf of the accused persons, I only wish to observe that our judgment, as well as the judgment in the case to which my learned brother has referred, assumes that, in circumstances like the present, it is in the discretion of the Sessions Judge to permit supplementary jurors to be empanelled under the second proviso to section 276 of the Code of Criminal Procedure.

The learned Deputy Legal Remembrancer, however, has argued that when there are seven jurors in attendance in obedience to the summonses issued to them, there is not "a deficiency of persons summoned" within the meaning of the proviso. If that view is correct, it is clear that it would be illegal to increase the number of jurors to nine in the manner which is suggested.

I merely desire to say that, as far as I am concerned, the fact that our judgment is based on the assumption that it was within the discretion of the judge to permit the procedure laid down in the proviso to be followed,

must not be taken to mean that I have come to the conclusion that the submission made by the Deputy Legal Remembrancer is incorrect. I desire that the point may, as far as I am concerned, be left open for consideration in any future case in which it may arise.

M. C. GHOSE J. In this case eight persons were charged with murder and conspiracy to murder. They were tried by a jury of seven persons in the court of the Sessions Judge of Pabna. The jury unanimously found four of the men guilty and the other four to be not guilty. The learned Sessions Judge accepted the finding of not guilty in respect of the four men and acquitted them. He disagreed with the finding of guilty in respect of the other four men, and referred the case to this Court recommending that the jury's verdict is perverse and these men should be acquitted.

Upon hearing Mr. Lahiri, the learned advocate for the four men, who has taken us through the whole of the evidence, I am of opinion that there is no sufficient reason to set aside the unanimous verdict of the jury. I agree that the Reference should be rejected and these men should be convicted of conspiracy to murder.

It was argued that the trial was illegal inasmuch as it was held with the aid of seven jurors only. Under the proviso to section 274 (*2*), where any 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 this case the order-sheet shows that eighteen persons were summoned but only seven of them were present, the other eleven were absent and, thereupon, the trial was held with seven jurors only.

It has been argued that the judge should have considered the second proviso to section 276, which provides that "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

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"persons as may be present". It was strenuously urged by Mr. Lahiri, following the decision of Mr. Justice Lort-Williams and Mr. Justice S. K. Ghose in the case of *Shaheb Ali* v. *Emperor* (1), that it was the duty of the judge to apply his mind to the question whether it was practicable to have nine jurors, and as the record did not show positively that he had applied his mind to that purpose, the trial should be held to be illegal. But in the case of *Damullya Molla* (2), decided by Sir George Rankin, Chief Justice, Mr. Justice C. C. Ghose and Mr. Justice Patterson, the argument was that where eighteen jurors were summoned and the accused was tried with seven jurors only, because only eight jurors attended, the trial judge should have had two more jurors from among the bystanders. The learned Chief Justice remarked:—

> But there is nothing on the record before us to show that this course was practicable in the circumstances of this case.

In the present case, there were seven jurors present out of eighteen jurors summoned, and the record does not show that it was practicable for the trial judge to obtain two other qualified men to serve as jurors. I agree with the view expressed by Sir George Rankin in the case of *Damullya Molla* (2), and am of opinion that the trial was not illegal in this case.

Reference rejected.

A. C. R. C.

(1) (1931) I. L. R. 58 Calc. 1272. (2) (1930) 34 C. W. N. 1127.