

APPELLATE CRIMINAL.

Before Henderson and Biswas JJ.

SUBED ALI

v.

EMPEROR.*

1937

April 14.

Jury—Deficiency, if can be filled up from jurors summoned from the town.

When there is a deficiency in the number of jurors to be empanelled from amongst the jurors summoned for the purpose, the Court can make up the deficiency from the persons actually present whom he considers suitable. If he is unable to do this, the only other course left is to postpone the trial and summon another jury. He cannot summon jurors from the town and fill up the deficiency.

Emperor v. Abedali Fakir (1) and Brojendra Lal Sirkar v. King-Emperor (2) held applicable.

CRIMINAL APPEAL.

The three appellants in this case, with eleven others, were committed to the Court of Session at Tippera on charges under ss. 302 and 302-120 B of the Indian Penal Code. The trial began on September 28, 1936, and order No. 1 as recorded in the order-sheet of that date was as follows :—

The charge under s. 302-120B was amended at the instance of the P.P. as it was found necessary. This charge and the charge under s. 302, I. P. C., was read over and explained to the accused who pleaded not guilty. Eighteen persons were summoned in this case. On their names being called out one by one by lot, two jurors (Nos. 672 and 765) were found absent and of those who were present and responded the nine jurors (Nos. 164, 217, 225, 290, 427, 475, 581, 743 and 776) were discharged on objection raised by the Crown as well as by the defence. P.P. objected to the selection of juror No. 164 who happened to be man of B. Baria town where the occurrence took place and as he was related to one of the defence pleaders. Juror No. 796 lived in the same house where one of the defence pleaders, Babu Rajendra Ranjan Ray, resides. So his selection was objected to by both sides. Another juror No. 290 is a co-villager of one of the defence pleaders. His selection also was objected to by the P.P. Pleader for defence raised objection against

*Criminal Appeal, No. 29 of 1937, against the order of J. George, Sessions Judge of Tippera, dated Oct. 10, 1936.

(1) (1928) I. L. R. 56 Cal. 835.

2) (1902) 7 C. W. N. 188.

the other remaining jurors mentioned above on the ground that they were money-lenders or in some way or other connected with the money-lending business. The objection being sustained, the jurors were discharged as noted above. There being no objection against the jurors Nos. 205, 301, 565, 755, 924 and 1006, they were selected. As the requisite number of the jurors fell short, jurors Nos. 51, 511, and 519 and 954, whose names find place in the jurors' list were chosen at random therefrom and were summoned from the town, and out of them jurors Nos. 51 and 511 were taken as they appeared in Court before the other jurors—no objection being raised by either side. The jurors then selected (315 juror) Babu Jyostna May Basu as their Foreman and were duly sworn.

As a result of the trial all the other accused were acquitted of all the charges except the three appellants who were convicted under s. 302 of the Indian Penal Code and sentenced to transportation for life.

Anil Chandra Ray Chaudhuri for the appellants. The trial is vitiated by the improper constitution of the forum. As the order-sheet discloses, there was a clear contravention of ss. 276 and 279 of the Code of Criminal Procedure. When there was a deficiency in the number of jurors, the Court might take in suitable persons from those present in Court, if there were any. The order-sheet makes it clear that no such person was available. The only other course left was to adjourn the trial. The Court had no jurisdiction to summon jurors from the town and thereafter when they arrived to treat them as persons present in Court and fill up the deficiency of jurors from amongst them. This has been condemned in several cases. *Emperor v. Abedali Fakir* (1), *Sadarat Sheik v. King-Emperor* (2) and *Mahammad Sagiruddin v. Emperor* (3).

Being a defect in the actual constitution of the forum, it was not curable under s. 537 of the Code. *Brojendra Lal Sirkar v. King-Emperor* (4).

Although these decisions were before the Full Bench case of *Emperor v. Erman Ali* (5), they are not

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(1) (1928) I. L. R. 56 Cal. 835.

(3) [1928] A. I. R. (Cal.) 551.

(2) (1928) 48 C. L. J. 479.

(4) (1902) 7 C. W. N. 188.

(5) (1930) I. L. R. 57 Cal. 1228.

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affected thereby. All that the Full Bench held was that a defect in the preliminary ballot under s. 326 of the Code might be cured by s. 537. But as Rankin C. J. observed at page 1236 in the Full Bench Case, any departure from the strict procedure laid down in ss. 276 to 279 relating to actual constitution of the forum would vitiate the trial. In my submission, therefore, there has been a mis-trial in the present case.

The Officiating Deputy Legal Remembrancer, Debendra Narayan Bhattacharjya, Shyama Pada Deb and Ajit Kumar Datta for the Crown. I concede that the procedure laid down by the Code has not been strictly followed, but I submit that the spirit thereof has been observed. The Judge ticked off the names at random which practically amounted to a ballot. The cases cited on behalf of the appellants require reconsideration after the Full Bench Case of *Emperor v. Erman Ali* (1). His Lordship Rankin C. J. at page 1240 pointed out that every illegality is not fatal to the trial and may be cured by s. 537. I submit that in the absence of any prejudice, the defect complained of is cured by that section.

HENDERSON J. In our opinion, there will have to be a retrial in this case. The jurors were summoned in the proper way, but for some reason or other, the case appears to have created a considerable amount of sensation and there were a large number of objections taken sometimes by both sides in agreement and sometimes by one side or the other. The result was that after these objections were allowed, there were not enough jurors left to proceed with the trial. The learned Judge then issued summons to three jurors whose residence happened to be in the town and had the summons immediately served upon them. The jury was finally constituted by two out of these three extra persons.

(1) (1930) I. L. R. 57 Cal. 1228.

Now, the procedure which the learned Judge ought to have followed is clearly laid down in the Code itself. It was open to the learned Judge to make up the deficiency from persons actually present whom he considered suitable. If he was unable to do this, the only other course left was to postpone the trial and summon another jury.

On behalf of the Crown the learned Deputy Legal Remembrancer contended that this is the sort of thing which is cured by s. 537 of the Code. Now, I can well understand the position being taken that, when once the jury have been selected and sworn, no objection as to the suitability or eligibility of a person on the jury can be taken at any later stage of the proceedings. But that is not the provision of the Code and is not the effect of the decisions. This case is exactly similar to the case of *Emperor v. Abedali Fakir* (1). In that case, Rankin C. J. came to the conclusion that the only course was to order a retrial. We propose to take the same course in this case too.

We, therefore, set aside the convictions and sentences passed upon the appellants and direct that they be retried on a charge under s. 302 of the Indian Penal Code. They will be treated as under-trial prisoners pending the result of the retrial.

BISWAS J. I agree. Requisition of persons from outside the Court to make up the deficiency in the number of jurors to be empannelled is not proper, and this is an irregularity which affects the constitution of the Court. There must be a retrial. See *Brojendra Lal Sirkar v. King-Emperor* (2).

Retrial ordered.

A. C. R. C.

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