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property; and the mortgagees must give him an indemnity against this contingency.

* * * *

The result is that the mortgagee's appeal no. 610 will be decreed, while the mortgagor's appeal no. 753 will be dismissed. The decree of the District Judge is set aside and the decree of the Subordinate Judge is restored, with these modifications, that the date by which the sum of seven hundred rupees is to be paid to the defendants by the plaintiff, will be fixed as September the 19th, 1927; and that by August the 19th, 1927, the mortgagees must execute a bond in the sum of Rs. 110 to the satisfaction of the Subordinate Judge, indemnifying the mortgagor against the possibility of his being made liable to pay twelve years' arrears of malikana after recovery of possession, and if this indemnity bond is not duly executed within the period prescribed, the plaintiff will be permitted to redeem on payment of the sum of Rs. 950. The plaintiff Mohit Narain Jha will bear the costs of defendants 1st party in this Court and in the Lower Appellate Court.

JAMES, J.

JWALA PRASAD, J.—I agree.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Ross and Wort, JJ.

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July, 26.

TAJALI MIAN

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 276 *and* 278—*out of jurors summoned only five present—trial by these five—whether trial legal—objection to juror on ground of partiality.*

Where an accused person objects to a juror on the ground of partiality the objection must be upheld even though the partiality is not actual but presumed.

* Criminal Appeal no. 100 of 1927, from a decision of J. G. Shearer, Esq., I.C.S., Sessions Judge of Bhagalpur, dated the 15th of May, 1927.

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Per Wort, J.—Where, out of twelve jurors summoned, only five attended, and the accused was tried by a jury consisting of these five, *held*, that the trial was not a mere irregularity but was invalid.

Bhola Nath Hazra v. *Emperor* (1), followed.

Anipe Palladu, In re. (2), referred to.

[*Reporter's Note.—See*, however, *Akbar Ali* v. *King-Emperor* (3). *C. M. A.*].

The facts of the case material to this report are stated in the judgment of Ross, J.

Fazle Ali (with him *N. C. Roy* and *D. L. Nandkeolyar*), relied on *Bhola Nath Hazra* v. *Emperor* (1) on the construction of section 276, Code of Criminal Procedure.

C. M. Agarwala, Assistant Government Advocate, for the Crown, relied on the cases cited in *Bhola Nath Hazra* v. *Emperor* (1) and section 537 of the Code. Reference was also made to *Anipe Palladu, In re* (2).

Ross, J.—The appellants Tajali Khan and Kokai Rai and Saukhi Mahra have been found guilty by the unanimous verdict of a jury and have been sentenced to nine years' rigorous imprisonment each by the learned Sessions Judge of Bhagalpur on a charge of dacoity committed on the 16th January, 1927. The dacoity took place in a house belonging to Maru Mahto and his brother Katki. Katki and the four sons of Maru, Kanhai, Ritlal, Ram and Ramlal were all sleeping in the Bathan when they were attacked by the dacoits. In the house were some women and a boy named Gurdayal, sixteen years of age, a cowherd. Some property and Rs. 4 in cash were taken away by the dacoits who inflicted some injuries on Katki and Kanhai.

(1) (1926) 44 Cal. L. J. 541. (2) (1916) 36 I. C. 847.

(3) *Post*, p. 61.

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The first point taken on behalf of the appellants is that the jury was not properly constituted inasmuch as the jurors were not chosen by lot. There is authority for this argument and apparently none against it. Another objection to the constitution of the jury is that the accused objected to one of the jurors Ganpatram Marwari on the ground that he was the agent of one Debiprasad Dhundhunia between whom and the Lachmipur Raj, in whose employment the accused are, there was an important litigation pending. The learned Sessions Judge did not disbelieve these facts; but he came to the conclusion that there was no reason why on this ground Ganpatram Marwari should be prejudiced against the accused. Now section 278 of the Code of Criminal Procedure requires that any objection taken to a juror on the ground of some presumed or actual partiality of the juror, if made out to the satisfaction of the Court, shall be allowed. The facts were accepted by the Court, and they evidently gave ground for presumed partiality in the juror. The decision of the learned Judge relates to actual partiality and is really not a decision on the objection taken. It seems clear from the situation of parties on the admitted facts that the accused did presume partiality in this juror and that consequently the objection should have been allowed.

Apart from the constitution of the jury the learned Counsel contends that there is misdirection in the charge itself on important points. Generally, his objection is that the charge is more in the nature of a judgment than a charge and that the learned Judge has expressed his opinion on the facts too dogmatically and in too unqualified a manner.

* * * * *

The result is that the convictions and sentences are set aside and the appellants will be set at liberty.

WORT, J.—I agree. In my opinion also the charge to the jury is quite unsatisfactory. It takes

the form of a considered argument tending in favour of the prosecution rather than an impartial summing up of evidence to the jury. Whether the explanation of that is to be found in the order sheet under the date 19th May, 1927, I cannot say; but there it is stated that on that date the trial was resumed, the public prosecutor finished his argument, pleader for the defence addressed the Court and jury in reply, charge "read out" to the jurors by the Court and the verdict of the jury recorded. This clearly indicates that that charge had already been dictated before the trial was concluded. But I leave that point, because, as already stated, the first point which was argued by the learned Counsel for the petitioners related to section 276 on the question of the constitution of the jury and with that I propose to deal.

Now it appears in this case that although the requisite number of jurors were summoned five only appeared on the day of trial. The point taken is that having regard to the fact that five only appeared the learned Sessions Judge could not comply with section 276 in choosing the jurors by lot. Now two authorities have been quoted to us; the case of *Bhola Nath Hazra* v. *Emperor* (1) in which the very same circumstances occurred. Twelve jurors were summoned in that case, but five only appeared, five being the requisite number, and that five constituted the jury. On appeal the objection having been taken that the jury was not properly constituted a Division Bench upheld the objection and decided that the procedure adopted was not a mere irregularity, but was of such a character as to make the trial invalid. Another authority has also been quoted to us by the prosecution, the case of *Anipe Palladu* (2). The facts in that case were that there not being a sufficient number of jurors, the Court supplied the deficiency from the persons present in Court, as it was clearly entitled to do, but the objection was taken that the jurors being members of the

(1) (1926) 44 Cal. L. J. 541. (2) (1916) 36 I. C. 847.

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public who were made to supply the deficiency had not been chosen by lot. The Court decided that there was no provision in the Criminal Procedure Code which made it necessary to choose by lot, those members of the public thus added, as it was in the case of jurors who were summoned. But of course quite clearly that case can be distinguished from the one which I first quoted and, in any event, if this Court has to follow one or the other, it must follow the decision of the Calcutta High Court. But although in my opinion the irregularity which existed in this case is sufficient to make the trial invalid, yet there is another point which has been argued before us which is one of substance. One of the jurors was challenged on behalf of the accused on the ground of presumed prejudice. The Court disallowed the objection. As my learned brother has already stated, the Sessions Judge did not disbelieve the fact from which the prejudice was said to arise, but stated that he saw no reason why on this ground there should be prejudice. In my opinion the learned Judge had no alternative but to allow the objection under section 278 which reads,

"Any objection taken to a juror on any of the following grounds, if made out to the satisfaction of the Court, shall be allowed:—

Of these grounds one is

'Some presumed or actual partiality in the juror'."

Having regard to the nature of the objection taken, in my opinion, he had no other course open to him than to allow it and, therefore, the jury on that view was not properly constituted, and therefore, the trial was invalid.

For these reasons I think that the convictions and sentences passed against the appellants must be set aside.

Convictions set aside.

C. M. A.