ORIGINAL CRIMINAL.

Before Mr. Justice Wassoodew.

EMPEROR *v.* YESHVANT VITHU AND OTHERS.*

1937
January 26

Criminal Procedure Code (Act V of 1898), sections 227, 271—Jury, empanelling of—Prisoner given in charge of jury—Alteration of charge before commencement of trial—Empanelling another jury for trying altered charge—Power of Court to empanel another jury—Bombay High Court Rules (O.S.), 1936, Rule 865.

Prisoners were brought up for trial before a common jury *inter alia* for the offence of culpable homicide not amounting to murder under sections 304 and 109 of the Indian Penal Code. Both these charges could be tried before a common jury. After the jury was empanelled but before the trial commenced, the charge was altered to one, *inter alia*, of murder under section 302 of the Indian Penal Code. This was a charge which could only be tried before a special jury.

On an objection being raised as to the competency of the Court to alter the charge so as to involve the empanelling of another jury :—

Held, that the powers of a Court as to altering of charges as contained in section 227 of the Criminal Procedure Code are very wide. If the alteration of the charge leads necessarily to the discharge of a jury already empanelled for the trial of a case, that result must be implied in the power of the Court to alter the charge.

Even if prisoners are "given in charge" to a common jury there is nothing in rule 865 of the Bombay High Court Rules (O.S.) which operates as a bar to the trial of the prisoners by a special jury upon the altered charge.

The expression "giving the accused in charge to the jury" explained.

THE accused, four in number, were committed to the Criminal Sessions of the High Court for offences punishable under sections 304 and 109 of the Indian Penal Code, 1860.

They were put up for trial at a Sessions presided over by Wassoodew J.

At the Sessions, a common jury was empanelled for the trial of three cases, of which the present was one. The accused in all three cases were allowed to challenge the jurors, a right which was exercised by them.

*First Criminal Sessions 1937 ; Case No. 10.

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The first two cases were duly tried by the jury so empanelled. When the third case was reached, the presiding Judge pointed out that on the facts as appearing from the depositions placed before him, the accused should be tried for the offence of murder and not for culpable homicide not amounting to murder. The altered charge proposed was triable only by a special jury. It was, therefore, suggested that the common jury already empanelled for the trial of the case should be discharged and a special jury empanelled to try the accused. Counsel for the accused raised an objection to the proposed alteration of the charge.

K. McI. Kemp, Advocate General, with *Rustom J. J. Modi*, for the Crown.

N. H. Jhabvala, for the accused.

Jhabvala submited that it is not competent for the Court now to alter the charge as proposed as it would involve the discharge of the present jury which was a common jury. The accused having already been given in charge of the present jury, that jury could not be discharged except under the circumstances referred to in sections 282, 283, 305 and 465 of the Criminal Procedure Code. Those sections are exhaustive on the point. None of them apply to the present case.

[WASSOODEW J. But you are assuming that the accused are "*given in charge*" to this jury. You have to satisfy me on that.]

This jury was empanelled to try among other cases, the case of the present accused. They have exercised their right of challenge under section 277 and the jury is sworn under section 281 to try this case. These acts constitute the formal giving of these prisoners "in charge of" this jury. The accused are "arraigned" before the Court and the jury. The expression "giving a prisoner in charge of

the jury" does not occur in the Criminal Procedure Code but it occurs in rule 865 of the Bombay High Court Rules (O.S.) 1936. Refers to pp. 173 and 208 of Archibold on Criminal Pleading,—Evidence and Practice and paragraph 227 at pp. 160–161 of Halsbury's Laws of England, Volume IX.

[WASSOODEW J. I have the power to alter the charge under section 227 of the Criminal Procedure Code. Your contention would render that section nugatory.]

This section only applies when the trial takes place before the same jury, and the same jury is competent and is asked to try the altered charge. In the present case the trial will have to take place before a special jury. I submit that as the altered charge involves the discharging of the present jury and as such a discharge does not fall within any of the sections of the Criminal Procedure Code, the charge cannot be altered to one of murder.

Modi, was not called upon.

WASSOODEW J. In this case the four prisoners have been committed for trial on a charge under section 304 of the Indian Penal Code. On reading the record and after hearing the Advocate General, I decided to alter the charge to one of murder as it was entirely within the province of the jury to decide from the nature and effect of the injury the question of the intention and knowledge of the prisoners. Upon the charge as framed by the Committing Magistrate the prisoners are entitled to be tried by a common jury. The common jury which has been empanelled to try cases would ordinarily have tried the prisoners if the charge had not been altered, their case being one of the cases set down for trial by the said jury. Upon the alteration of the charge to one of murder the prisoners are entitled to be tried by a special jury.

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The learned counsel who now appears on behalf of one of the prisoners has raised an objection to the alteration of the charge on the ground that, the prisoners having been given in charge to a common jury empanelled to try their case along with others they cannot be given in charge to a special jury, and, that, therefore, the alteration is illegal. The main force of the objection was directed to the support of a proposition which may be shortly stated as follows :— By the terms of sections 282, 283, 305 and 465 of the Criminal Procedure Code special provision is made for the discharge of the jury in particular circumstances only, and, as there is no other provision for the discharge of a jury except in those circumstances, any alteration of a charge leading to such discharge would be illegal and irregular ; and also by the terms of section 271 and the following sections of the Criminal Procedure Code, dealing with the plea of the accused and the choosing of a jury, the trial of the prisoners must be deemed to have commenced upon the empanelling of the jury and the administration of oath to the jurors, and the prisoners deemed to have been given in charge to the jury, so that, according to the prevailing practice and the rules of this Court, that jury can under no circumstances be discharged ; and that the alteration of the charge, if it entails that result, must be regarded as illegal.

I was referred to Archbold's Criminal Pleading, Evidence and Practice [(1931) 28th edition page 173] in support of the proposition that arraignment of prisoners is tantamount to the giving of the prisoners in charge to the jury, the arraignment consisting of calling the prisoner to the bar, reading the indictment to him and asking him whether he was guilty or not. The passage dealing with "arraignment" does not support that view. But apart from it, it is wrong to suppose that "arraignment" of the prisoners has taken place in the present case.

With regard to the first part of the argument relating to the conditions under which a jury can be discharged, the Criminal Procedure Code cannot be said in that respect to be exhaustive. For instance there is no provision for discharge of the jury upon termination of a trial. The only rule regarding the empanelling of another jury without discharging the former is contained in rule 865 of the High Court Rules which provides as follows :—

"If from any cause it is inconvenient for all the prisoners who have had their challenges in respect of a particular jury to be tried by such jury, another jury may be empanelled to try them without the former jury being formally discharged: provided only that such prisoners have not been given in charge to the former jury."

Although that rule does not govern the present case, it is helpful to show under what circumstances a fresh jury cannot be empanelled on the ground of inconvenience. In this case it is not a matter of inconvenience which compels the discharge of the jury. The want of jurisdiction of the former jury to try the accused upon the altered charge necessitates its discharge. The Court's powers, as contained in section 227 of the Criminal Procedure Code, to alter a charge are very wide. Any restriction of those powers must inevitably lead to failure of justice. If the Court's power under section 227 can be exercised within certain limits as contended, the provisions of the section would be rendered nugatory. If, therefore, the alteration of the charge leads necessarily to the discharge of the former jury, that result must be implied in the power of the Court to alter the charge. Indeed there has been a challenging of the common jury already empanelled, but that fact cannot affect the power of the Court to alter the charge.

With regard to the latter part of the argument, it seems to me that it is based upon a misconception of the expression "given in charge to the jury". That expression does not occur in the Criminal Procedure Code and is used in rule 865 of the High Court Rules in a technical sense. Even

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if the prisoners were given in charge to a common jury, rule 865 will not operate as a bar to the trial of the prisoners by a special jury upon the altered charge. Apparently rule 865 is not designed to meet such a case. The question whether the prisoners have been given in charge to a jury must be determined by reference to the form of the oath administered and the procedure followed thereafter. The oath administered to the jury is in the following form :—

"You swear that you shall well and truly try and true deliverance make between our Sovereign Lord the King Emperor and the prisoner at the Bar whom you shall have in charge and true verdict give according to the evidence."

That oath itself does not constitute the giving of the prisoners in charge to the jury for the indictment of the prisoners has subsequently to be read to the jury with the following direction :—

"On this charge the prisoner at the Bar has claimed to be tried : it is your duty to hearken to the evidence and to return a true verdict."

Under the paragraph "Proclamation and giving the prisoner in charge to the jury" in Halsbury's Laws of England, (Volume IX, page 160), the following statement occurs :—

"At the assizes, but not at quarter sessions, in cases of treason or felony, when a full jury has been sworn, a proclamation is made inviting any one who can inform the Court of any crimes committed by the prisoner at the bar to come forward. The clerk of the Court then states the effect of the indictment, or that part of it on which the defendant has been arraigned, to the jury, and gives the prisoner in charge to them."

That has not been done in the present case.

As to the manner in which a prisoner is given in charge to the jury, there is a reference in Archbold's Criminal Pleading, Evidence and Practice to the same effect as the above statement in Halsbury's Laws of England. It is clear therefrom that after the Clerk of the Court calls the prisoner to the bar and makes the following statement :—

"Members of the jury, the prisoner stands indicted for that he, on the (stating the substance of the offences charged in the indictment). To this indictment he has

pleaded not guilty and it is your charge to say, having heard the evidence, whether he is guilty or not,"

the prisoner is said to have been given in charge to the jury.

The substance of the offence charged in the indictment has not in this case been stated to the jury, and, except the fact that the jury is sworn and allowed to be challenged with a view to their trying the prisoners in due turn, nothing has been done to warrant the supposition that the prisoners have been given in charge to the jury.

I, therefore, overrule the objection and direct that the trial shall take place upon the altered charge with a special jury.

Order accordingly.

B. K. D.

PRIVY COUNCIL.

THE SURAT COTTON SPINNING AND WEAVING MILLS LTD., APPELLANTS *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL, DEFENDANT.

J. C.* 1937 *March* 5

[On Appeal from the High Court at Bombay]

Indian Railways Act (IX of 1890)—Risk Note B—Non-delivery of packages—Pilferage—Evidence—Duty of Railway Administration to give evidence—Presumption from failure to call witnesses.

The appellant Company consigned a number of bales of piece-goods to the B. B. and C. I. Railway at Surat for conveyance to Sealdah on the terms of Risk Note B.

Some of the bales were stolen in transit and the appellant Company claimed damages for their non-delivery.

The bales had been handed over to the E. I. Railway at Agra East Bank Station.

It was clear that the stolen bales were removed from a wagon while the train was in motion between Buxar and Arrah on the E. I. Railway.

The guard, engine-driver and firemen who were on the train at the time were not called as witnesses by the defendant, nor was any witness called from Arrah,

* *Present:* Lord Thankerton, Sir Shadi Lal and Sir George Rankin.