

Emperor Vs. Yeshvant Vithu

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Court : Mumbai

Decided On : Jan-26-1937

Reported in : (1937)39BOMLR355

Judge : Wassoodew, J.

Appeal No. : First Criminal Sessions 1937, Case No. 10

Appellant : Emperor

Respondent : Yeshvant Vithu

Judgement :

Wassoodew, J.

1. 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.

2. 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.

3. I was referred to Archbold's Criminal Pleading, Evidence and Practice, ((1931) 28th edn., p. 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.

4. 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.

5. 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 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.

6. 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.

7. Under the paragraph 'Proclamation and giving the prisoner in charge to the jury' in Halsbury's Laws of England, (Volume IX, p. 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.

8. 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.

9. 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.

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

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