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Court : Kolkata

Decided On : Jan-09-1930

Reported in : AIR1930Cal212

Appellant : Emperor

Respondent : Ermanali and ors.

Judgement :

Rankin, C.J.

1. In this case there were nine accused persons. One of them was charged with murder under Section 302 and the remaining eight with an offence under Section 302 read with Section 149, I.P.C. They were tried by the Sessions Judge of Bakarganj with a jury of nine persons chosen by lot from among 14 persons who had been summoned to serve as jurors under the provisions of Section 326, Criminal P.C. The learned Judge, disagreeing with the verdict of the jury, referred the case to the High Court under Section 307, Criminal P.C.

2. At the hearing of the reference it was objected by the learned advocate for the accused that the jury had not been constituted in accordance with law and that accordingly the proceedings before the trial Judge should be set aside altogether. The objection taken is not that the number of persons who served on the jury, namely nine, was not the correct number under Section 274, but that under Section 326 the number of persons to be summoned was not less than 18

whereas summonses were sent to 14 persons and no more.

3. By Section 326, it is provided:

326(1) The Sessions Judge shall ordinarily, seven days at least before the day which he may from time to time fix for holding the Sessions, send a letter to the District Magistrate requesting him to summon as many persons named in the said revised list or the said special list as seem to the Sessions Judge to be needed for trials by jury and trials with the aid of assessors at the said Sessions, the number to be summoned not being less than double the number required for any such, trial.

4. Upon this subsection, the first thing to notice is that it purports to prescribe something that is 'ordinarily' to be done by the Sessions Judge. He is to request the District Magistrate to summon as many persons as seem to the Sessions judge to be needed for trials by Jury. The subsection envisages him as having fixed time for holding the Sessions and the number referred to is the number not for any particular trial but for the trials by jury which are to take place at the Sessions. The minimum number to which the subsection refers is not less than double the number required for any such trial, i.e., for any one of the trials to take place at the Sessions.

5. It has been found convenient in Bengal and is a practice generally adopted, to fix dates for each particular case to be tried before the Sessions Judge and to summon a certain number of persons to attend on the date fixed in order to provide a jury for that particular case. This practice is authorized by Section 327, and in the pre sent case it has been followed.

6. Under Section 274, Criminal P.C., it is provided that where an 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.

7. Now, in dealing with these matters this Court has by its decisions from time to time laid down four things. The first is that although a jury is summoned for a particular case, the number to be summoned should always be double the number

required or the trial. If the summoning of persons to act as jurymen for the whole of a Sessions as contemplated by Section 326 is not to be carried out, nevertheless the direction 'not less than double the number required for any such trial' can and should be carried out by adopting that minimum in each individual case. The standard set by the subsection should not be lowered by reason that the services of the persons summoned are in practice to be utilized for one case only : Serajul Islam v. Emperor : AIR1928 Cal645 .

8. The second thing which this Court has laid down is that if by reason of as failure to observe this standard, it results, whether from non-attendance of jurymen or otherwise, that a jury of nine persons cannot be empanelled for the trial of an accused charged with an offence which is punishable with death, this fact will not entitle the Sessions Judge to proceed to trial in such a case with a jury of seven in other words that it cannot be said that it was impracticable to have a jury of nine merely because an insufficient number of persons have been summoned from the jury list : Serajul Islam v. Emperor : AIR1928 Cal645 .

9. The third thing which has become matter of decision is that in applying this standard to such a case it is not correct to regard seven as 'the number required for any such trial' in the absence of circumstances which make it impracticable to have nine. Hence 18 persons and not 14 persons only should be summoned : Dwarika Malo v. Emperor : AIR1930 Cal60 and Amir Khan v. Emperor [1929] 33 C.W.N. 1053.

10. The fourth thing which this Court has determined is that the persons who are actually to serve as jurors must be chosen in strict compliance with the provisions of Sections 276 to 278, Criminal P.O. and that if these provisions are not strictly observed the proceedings will be treated as altogether bad : Kedar Nath Mahato v. Emperor : AIR1928 Cal83 .

11. Upon this reference we are asked by the learned advocate for the accused to hold that notwithstanding that the number of persons empanelled on the jury was the correct number, and not withstanding that they have all been chosen from among persons summoned to act as jurors in strict accordance with the provisions of Sections 276 and 278, the proceedings have been altogether illegal and must

be quashed because summonses were not issued to at least 18 persons. Fie contends in view of Section 326 that if any less number of persons be summoned, there is a breach of a mandatory provision of the law which affects the constitution of the tribunal and renders void the proceedings. For this contention there is the authority of Emperor v. Tamizuddin [1929] 33 C.W.N. 1054, which is directly in point. The learned Judges of the Division Bench who dealt with the present case disagreed with that decision and they have referred to us the following questions:

(1) In a murder case where the number of jurors summoned is fourteen, nine of whom appear and are chosen by lot, is the trial bad by reason of the fact that only fourteen jurors-have been summoned in contravention of the provisions of Sections 274 and 326, Criminal P.C.?

(2) Was the case of Emperor v. Tamizuddin Ahmed [1929] 33 C.W.N. 1054, rightly decided?

12. In my opinion these questions should be answered in the negative and the case should be remanded to be dealt with on the merits.

13. The persons who are summoned to attend are chosen by lot (Sub-section 2, Section 326) and in addition, the accused persons have the right of challenge given to them by Section 277. Mr. Taluqdar for the accused contends that the requirement that the number to be summoned shall not be less than double the number required for any trial finds place in the Code not merely for the purpose of ensuring that a sufficient number of persons whose names are on the jury list shall attend at the hearing and be found competent to be jurors and unobjectionable, but in order that an additional element of chance may exist in the interest of the accused person who is, therefore, prejudiced if the area of selection by lot under Section 276 is more limited than Section 326 contemplates. In Kedar Nath Mahto v. Emperor : AIR1928 Cal83 . I find in the order of reference the following observations:

If the accused cannot successfully challenge him, any one of the persons summoned can be a juror to try the case. On this view the object of a second choice being made by lot is to eliminate arbitrary or biased choice as' between one

person summoned and another.

14. In the judgment of Buckland, J., in which the Full Court agreed, it was said:

In the course of the argument it was suggested that the ballot required by Section 325(2) as to the persons to be summoned, and that required by Section 276 were intended to benefit the prisoner by ensuring as far as possible an unbiassed and impartial jury, chosen haphazard and that this furnishes an additional reason for requiring that even when the proviso is to be invoked, there shall nevertheless be a ballot. With this, in some measure, I agree, but inasmuch as the prisoner has a right to challenge conferred by Section 278, I should be disposed to think that the object of the several ballots was as much to ensure a fair and impartial incidence of the duty of service upon juries upon those who are liable to it.

15. This passage, it is clear, in no way conflicts with the other. The contention before us that if in a murder case 18 persons are summoned, 9 attend upon summons and 9 are chosen to serve without objection, the trial will be good; but that if 17 persons are summoned 17 attend and 9 are chosen without objection, the trial will be bad. In my judgment very clear reason must be shown for any such contention.

16. In the interests alike of the jury and of the prisoner, it is desirable that the persons who are in fact to serve as jurymen should not be selected by the concious choice of any one, whether it be the District Magistrate, the Judge or any other person. It is necessary in practice to summon a greater number of persons than is required to serve and for this reason some method of elimination is required. This method must be free of the dangers attendant upon a voluntary choice. It is no part, so far as I can see, of the intention of the legislature to have a large area of selection in the persons attending upon summons on the theory that the larger the number of effective names in the ballot box the greater the chance that the persons chosen will make good jurors. This aspect of the matter is dealt with by the ballot under Section 326(2) which directs that all the names on the jury list (with certain exceptions) are to be entered for that ballot. There is much sense in saying that the jurors are to be chosen haphazard from the whole of the jury list but this having been done there would indeed be little point in another lottery but

for the considerations I have mentioned. Since mistake, sickness or accident may diminish the number of persons attending upon summons and challenges may diminish their number still further, it is reasonably clear, that the provision as to the number to be summoned is not motived by any idea that a certain superfluity of jurors is required to provide an additional element of chance. It is required to meet these very contingencies and the element of chance is required as a consequence of the superfluity.

17. It is said that the requirement as to the number to be summoned is 'mandatory'. This word is used in various senses but I understand it to be used as the equivalent of 'imperative' as distinct from 'advisory' 'directory' or 'facultative'; Now if we look carefully at the wording of Section 326 we will find it to be expressed somewhat loosely. There are two clauses which may be compared. Immediately after the word 'ordinarily' comes the phrase:

seven days at least before the day which ho may from time to time fix for holding the sessions.

18. This fixes a minimum in spite of the word 'ordinarily' but the minimum fixed is governed by the word 'ordinarily'. The requirement as to the number to be summoned is also a minimum and in strictness of form it too is part of a statement of what the Sessions Judge shall 'ordinarily' do. The whole practice of summoning jurors for special cases is a departure from the strict terms of the section and is a departure which can be justified under the word 'Ordinarily' and by Section 327. If one is summoning a number of people from whom juries have to be chosen for the trial of several cases, the legislature thinks that the number to be summoned should never fall below double the number required for any single case. The legislature has not dealt expressly with the question whether for the purpose of a single case the minimum might be reduced. But the word 'ordinarily' can be explained by Section 327 which refers to 'other periods than the period mentioned in Section 226' and unless it is so explained a very important provision which ensures that jurors are to be taken from the jury list by means of a ballot becomes optional as under the word ordinarily a Judge could in a particular case ignore the section altogether. This he certainly cannot do Brojendra Lal Sircar v. Emperor

[1902] 7 C.W.N. 188; Rahamat Sheik v. Emperor : AIR1927 Cal593 . Hence in such cases as Serajul Islam v. Emperor : AIR1928 Cal645 , this 'Court' has held that the standard set by the section for the case contemplated therein is in all cases to be complied with.

19. When the circumstances which call for certain action are in character and and number such as can be fully stated or clearly implied the Code constantly uses the word 'shall' or other imperative words. The Code is a long list of such imperatives some of which have reference to matters which are in no way vital and many of such are directed to minor incidents of procedure. But for Section 537 there would be grave disadvantages in a Code which makes statutory so many and so various requirements. That section obviates the difficulty which would arise by reason of all irregularities bearing the character of transgressions of a Statute.

20. The Judicial Committee pointed out in Subrahmania Iyer v. Emperor [1902] 25 Mad. 61, that though in a sense the merest irregularity may be illegal, it does not follow that all illegalities are within the scope of Section 537. They did not say or suggest that nothing could be cured under the section if it was illegal and as the Division Bench has painted out we now have in Abdul Rahman v. Emperor , an express decision to the contrary. Both decisions are really a condemnation of the view that all illegalities are as such in the same category for the present purpose. In the former case it was idle to suggest that there was no prejudice. The accused had suffered in an aggravated form the very prejudice from which the Code intends to save him. In Abdul Rahman v. Emperor , the test applied was whether there was ground for any probable suggestion of any failure of justice. The Judicial Committee in view of difference of opinion in India and of the fact that no case had come before them since Subramania Iyer v. Emperor [1902] 25 Mad. 61, carefully explained and applied Section 537 'for the guidance of the Courts' and this decision must now govern the interpretation of the section unless and until the legislature shall see fit to amend the section.

21. In my judgment the test there laid down cannot be evaded by saying that the omission here is an omission to do what is required by a 'mandatory' provision of the Code. Nor by saying on the one hand that the summoning of jurors is not even

a 'proceeding before or during the trial' and on the other hand that it is such a matter that a defect therein will vitiate the trial.

22. I do not understand what was meant when it was said in Emperor v. Tamizuddin Ahmad [1929] 33 C.W.N. 1054:

By summoning less than 18 you initially reduce the chances of selection by lot and make it more possible to pack the jury.

23. Nor, save on the footing that one illegality is the same as another, can I agree that the summoning of less than 18 persons is on a par with trying a murder case with a jury of five. The present case has no analogy to the error in the 'mode of trial' referred to in Subramaniya Iyer v. Emperor [1902] 25 Mad. 61. The fact that the legislature has expressly provided in Section 537 that in the absence of prejudice to the accused an omission even to revise the list of jurors shall not render a trial void an irregularity which would prima facie entitle the accused to 'challenge the array' in no way inclines me to think that the present case is beyond the scope of Section 537.

24. In the course of the argument before us the case was put of some jurors having to be chosen from among 'persons present in Court' whose names were not on the jury list and of the need for this course having been occasioned by reason that the number of persons summoned was insufficient. I desire to express no opinion as to the effect upon the validity of a trial of such events as these.

25. Moreover as I have had occasion to refer to previous decisions upon Section 537 and as we are sitting as a Full Bench, I think it well to add that in view of Abdul Rahman's case some of the previous decisions of this Court may require to be revised. This case does not require us to consider that aspect of the matter and it should be left for discussion when the need arises, and when specific questions can be considered.

26. In my opinion, the view taken by the learned Judges who have referred this matter to the Full Bench is correct and the questions which they have propounded for oar decision should be answered in the negative.

27. The ease should be remanded to a Division Bench for disposal on the merits of the other questions which arise.

C.C. Ghose, J.

28. I agree.

Suhrawardy, J.

29. I agree.

Pearson, J.

30. I agree.

Page, J.

31. I agree and I desire to add some observations on the general question raised, which I regard as of prime importance.

32. The maintenance of law and order in India, as in other countries, depends mainly upon criminal law and procedure being HO plain and sensible that ordinary persons are not mystified by its intricacies, and recognize that thereby substantial justice is done between the Crown and the accused. No one doubts that the utmost precaution should be taken to ensure that an innocent person is not convicted, but the extent to which the administration of the criminal law suffers when an obviously guilty person succeeds in evading conviction is not so fully appreciated. In truth, a miscarriage of justice of either description bewilders the public, and tends to shake the faith that is reposed in the stability and good sense of the Courts that administer justice in criminal cases. For this reason I am strongly of opinion that when the decisions of a criminal Court in substance appear to be correct an appeal Court should endeavour to uphold the decision even in cases where the rules of procedure by which the trial is to be regulated have been transgressed; except where the breach of the prescribed rules is of so grave a nature that the form of trial was substantially different from that provided by law for

the offence charged, or where, although the violation of the rules was not so profound as radically to alter the mode of trial, it is proved that thereby in the event a failure of justice has in fact been occasioned.

33. The test to be applied, in cases where the prescribed rules of procedure have not been followed, to ascertain whether there has been a mis-trial is always essentially the same, namely, whether there has been a miscarriage of justice for if the appeal Court is satisfied in point of fact that the accused has materially been prejudiced by the breach of procedure clearly a failure of justice has occurred; while if by reason of the breach of procedure there has in effect been substituted another mode of trial for that prescribed by the legislature as affording the best means of obtaining a fair trial, it is presumed that a fair trial has not been accorded the accused, and that in that case also there has been a failure of justice. In either case, therefore, the proceedings protanto will be set a side upon the ground that by reason of the breach of the rules of procedure a miscarriage of justice has been occasioned. On the other hand, if the appeal Court is not satisfied that the breach of procedure falls within one or other of those categories, in my opinion it ought not to hold that the proceedings have become vitiated merely because there has been a transgression of the prescribed rules by which such proceedings are to be regulated. It is ever to, be borne in mind that rules and regulations are intended to be the handmaid and not the mistress of the law, and that in criminal proceedings it is of the utmost importance that a decision just, and reasonable on the merits should not be disturbed because in the course of the proceedings some flaw can be detected that is not fundamental and which is not proved to have worked injustice to the accused, although it may constitute a breach of the rules of criminal procedure. Now, in 1901 Subramania Ayyar v. Emperor [1902] 25 Mad. 61, was decided by the Privy Council. It was a plain case in which there had been a flagrant violation of a rule of procedure enacted to prevent the prejudice that an accused person inevitably will suffer if he is called upon to answer in one trial a multiplicity of charges. In that case the failure to confirm to the procedure laid down in the Code of Criminal Procedure clearly went to the root of the trial, and vitiated it. Lord Halsbury (Lord Chancellor) however, in the course of delivering the judgment of the Board took occasion to animadvert upon the view expressed by Maclean, C.J., in Abdur Rahman v. Keramat [1900] 27 Cal. 939:

that because all irregularities are illegal, as he says in a sense, and this trial was illegal, that therefore all things that may in his view be called illegal are, therefore, by that one adjective applied to them, become equal in importance, and are susceptible of being treated alike Subramania Ayyar v. Emperor [1902] 25 Mad. 61.

34. That, no doubt, was a sound criticizm of the propsition enunciated by Maclean, C.J., and I apprehend that it would equally be incorrect to assert that every violation of the Code of Criminal Procedure is curable as that every failure to conform to the rules of procedure ipso facto vitiates the proceedings. There is no magic in the use of the imperative in this connexion, and it cannot reasonably be contended that each and every transgression of the mandatory rules of procedure set out in the code are 'equal in importance' or 'are susceptible of being treated alike.' I respectfully agree with the observations of Brown, L.J., in R. v. Justice of the County of London [1893] 2 Q.B. 491:

that there is no such exact division of sections in Acts of Parliament into those that are directory and those that are imperative as is ordinarily assumed to be a categorical division which exhausts every possible class of section. You must look at each Act of Parliament and each section to see exactly what it moans. No other rule of construction of Acts of Parliament that I know of is of much use, except to try and find out as best you can what the Act of Parliament means, and that is not a rule of construction at all.

35. Whether a particular breach of the procedure prescribed in the Code vitiates the proceedings or not, in my opinion must depend upon the gravity of the breach and the consequences that are presumed or proved to have flowed from it and I am satisfied that Lord Halsbury, whose judgments were permeated with sturdy common sense, and who in Allen v. Flood [1901] A.C. 506, laid down:

that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found

did not intend to encourage in any way a tendency to exaggerate the importance of breaches of procedure that did not materially affect the due course of justice.

36. I discern, however, in the numerous decisions which purport to be founded upon Subramania Ayyar v. Emperor [1902] 25 Mad. 61 a tendency to regard the judgment in that case as indicating that, in the opinion of the Judicial Committee, where there has been a departure from the strict letter of the Code of Criminal Procedure indeed, according to some of the decisions as I venture to think with all due deference even in matters of mere triviality and where it cannot reasonably be suggested that the accused has suffered any prejudice the appeal Court ought toll old that a mistrial has taken place. The result has been that the path of a Judge exercising criminal jurisdiction is beset with pitfalls and obstructions, and his attention must needs be diverted unduly from the substance to the form of the proceedings, lest perchance if he fails in any particular to conform to the provisions of the Code the proceedings may be set aside. Of course, a Judge who deliberately or through inadvertence does not follow the procedure laid dow in the Code fails in the performance of his duty, but the effect of non-compliance with the statutory rules of procedure, in my opinion, must vary according to the gravity and effect of the breach, and the test in each case is whether the proceedings have resulted in a miscarriage of justice. In Allen v. Flood [1901] A.C. 506 Lord Halsbury added:

that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the law is not always logical at all.

and in, my opinion, no sanction or warrant can be found in Subramania Ayyar's case [1902] 25 Mad. 61 for a method of construction that tends to magnify the importance of technical defects to the detriment of the substance and the merits of a case. In my opinion the objection raised to the validity of the trial in the present case is misconceived. The accused was tried by the statutory number of jurors, who were chosen by lot without objection or challenge from the accused. It is not proved that the accused was prejudiced in making his defence or in any other way

by reason of the course that the proceedings took. In these circumstances an argument that the trial was a nullity merely because only 14 instead of 18 persons were summoned as jurors is one that with all due deference, in my opinion, ought not to be countenanced, and I agree that a negative answer should be given to the questions that have been propounded. The case of Abdur Rahman v. Emperor A.I.R. 1927 P.C. 44, decided in 1926 marked the turning of the tide, and the decision of the Full Bench on this reference will, I trust, have the salutary effect in criminal matters of discouraging objections that are merely technical, and broadening the outlook of those whose duty it is to administer justice according to law.

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