

Suba and ors. Vs. Emperor

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Court : Kolkata

Decided On : Apr-14-1937

Reported in : AIR1937Cal389

Appellant : Suba and ors.

Respondent : Emperor

Judgement :

Henderson, J.

1. In our opinion, there will have to be a re-trial in this case. The jurors were summoned in the proper way, but for some reason or other, the ease 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.

2. 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 Section 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 that reported in *Abed Ali Fakir' v. Emperor* : AIR1929 Cal728 .

3. In that case, the learned Chief Justice Sir George Rankin 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 Section 302, I.P.C. They will be treated as under-trial prisoners pending the result of the re-trial.

Biswas, J.

4. I agree. Requisition of persons from outside the Court to make up the deficiency in the number of jurors to be empanelled is not proper, and as this is an irregularity which affects the constitution of the Court there must be a retrial: see *Brojendra Lal Sirkar v. Emperor* (1903) 7 C W N 188.

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