

Emperor Vs. Kishori Khanra (Khara) S/O Khetra Khanra (Khara)

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Court : Kolkata

Decided On : Jan-26-1943

Reported in : AIR1943Cal515

Appellant : Emperor

Respondent : Kishori Khanra (Khara) S/O Khetra Khanra (Khara)

Judgement :

Khundkar, J.

1. This is a reference under Section 374, Criminal P.C., for confirmation of a sentence of death passed on one Kishori Khanra, who was found guilty of murder by the unanimous verdict of a jury. Along with the reference there is an appeal by the condemned man. On behalf of the accused several points have been taken before us, but in the view I take, it is necessary to consider only the first of these. It is that the jury was not properly constituted, inasmuch as only seven persons were empanelled to serve on the jury, in violation of the proviso to Section 274(2), Criminal P.C. That proviso is in these terms:

Provided that, when any 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.

2. In the present case 18 persons were summoned as jurors for this particular trial, nine attended, and seven were empanelled. It is contended that, though it was practicable for the Judge to empanel a jury of nine, he in fact empanelled a jury consisting of a number less than nine, and this has vitiated the trial ab initio. In answer to this point the learned Deputy Legal Remembrancer has on behalf of the Crown, first argued that under Section 276, Criminal P.C., the jury has to be chosen by ballot, and that a ballot involves a selection of a certain number out of a larger number. As in the present case the total number of jurors present was no more than nine, it was not practicable to select nine by ballot. Section 274 and its proviso have been considered by this Court in a number of cases in which the offence charged was punishable with death. In *Serajul Islam v. Emperor* : AIR1928 Cal645 persons were summoned to attend the Court as jurors. Of these eight appeared on the day of the trial, and from the eight who appeared, seven persons were chosen to act as the jury. It was held that the tribunal had not been legally constituted. In this case there had initially been a failure to comply with the provisions of Section 326 of the Code, because 12 persons were summoned as jurors for the case instead of 18. Rankin C.J. said:

The exact effect of that section I will not attempt, to define, but it, at least, sets a minimum standard for the number to be summoned.... In the present case only 12 jurors were summoned; and only eight persons appeared out of the 12. In these circumstances the concluding words of Section 274 would take no operation whatsoever. Now so far as can be seen, it was quite practicable to have this case tried by a jury of nine; but the manner in which the jury was empanelled and the insufficiency of the number of jurors summoned defeated the intention of the section.... I am of opinion that, contrary to the intention of the Code and the standard set by the Legislature, an unreasonably small number of jurors was summoned with the result that it was not possible to have a jury of nine and that the proceedings ought not to be allowed to stand.

3. As I read it, the ratio of this decision is that it was practicable to empanel a jury of nine, though eight jurors only attended, but this was not done, and two circumstances contributed to the failure to do so; first, insufficiency in the number summoned, and second, the manner in which the jury was empanelled - the

allusion being to the omission to make an attempt to supply the deficiency by the method indicated in Clause (2) of the proviso to Section 276 i.e. by taking persons from those present in the Court precincts. The decision does not say that failure to summon, under Section 326, double the number required, is in itself a fatal defect. In *Dwarika Malo v. Emperor* : AIR1930 Cal60 , in which the case in *Serajul Islam v. Emperor* : AIR1928 Cal645 was followed, the facts were slightly different. Fourteen jurors had been summoned, eleven attended in obedience to the summons, and of these seven were empanelled as the jury. It was held that as it was practicable to empanel a jury of nine, the failure to do so was fatal to the trial.

4. The case in *Emperor v. Eрман Ali* : AIR1930 Cal212 , was one in which fourteen jurors were summoned and nine attended. A ballot was then held with the result that all these nine persons were empanelled. It was held that the jury had been properly constituted. Rankin C. J. repeated the propositions dealing with the matters covered by Sections 326 and 274 of the Code, which this Court, had by its decisions from time to time already laid down. In the course of this enunciation he observed as follows:

The second thing which this Court has laid down is that, if by reason of a 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 .

The third thing which has become a 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 eighteen persons and not fourteen persons only should be summoned : *Dwarika Malo v. Emperor* : AIR1930 Cal60 and *Amir Khan v. Emperor* ('29) 122 I.C. 557.

5. Proceeding to the questions raised by the Reference to the Full Bench, the learned Chief Justice said:

(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 in 33 C. W. N. 10545 rightly decided?

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

6. Later, in the judgment, the learned Chief Justice expressed his conclusion in the following words:

I do not understand what was meant when it was said in *Emperor v. Tamizuddin Ahmed* ('29) 122 I.C. 558. 'By summoning less than eighteen you initially reduce the chances of selection by lot and make it more possible to pack the jury.' Nor, save on the footing that one illegality is the same as the other, can I agree that the summoning of less than eighteen 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 *Subrahmania Iyer v. Emperor* ('02) 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.

7. This case decided, (1) that the failure to summon double the number of persons required as jurors for a trial was not in itself fatal to the proper constitution of the jury, and was curable under Section 537, Criminal P.C.; (2) that it cannot be said that it is impracticable to empanell a jury of nine merely because an insufficient number of persons have been summoned from the jury list. In *Emperor v. Damullya Molla* : AIR1931 Cal261 eighteen persons were summoned to serve on the jury which was to try the case. Eight only of these persons attended, and

seven of them were empanelled. In holding the jury to have been properly empanelled, Rankin C.J. observed:

It is suggested that the learned Judge should have obtained two more jurors from among the bystanders. But there is nothing on the record before us to show that this course was practicable in the circumstances of this case.

8. The case in *Emperor v. Benat Paramanik* : AIR1935 Cal407 was one in which eleven jurors were summoned, and seven appeared, and were empanelled. There was nothing on the record to indicate that the Judge had exhausted all possible sources for obtaining the extra number of jurors; but on the other hand, there were no materials to show that it was practicable to have a jury composed of nine. It was held, following *Emperor v. Damullya Molla* : AIR1931 Cal261 that it would have to be assumed that it was not practicable to empanel a jury of nine. A consideration of these decisions leads me to the conclusion that in the present case, the jury was not validly constituted. The learned Deputy Legal Remembrancer has however contended that by reason of Section 114 illust. (e), Evidence Act, it must be presumed until the contrary is shown, that it was not practicable to empanel a jury of nine. In my judgment, if it arises at all, the presumption has been amply rebutted. What did the learned Judge do? It is obvious that he ascertained that of those summoned to serve on this jury, nine were present. It is equally obvious that he drew out of the ballot box, one by one, the names of seven only, and then stopped. He did not attempt to empanel the remaining two persons. The only thing which could legally have prevented him from empanelling these two jurors, had he in fact drawn their names out of the ballot box, would have been the circumstance that they had been objected to. It is reasonably clear that they were not objected to, because had any objection been taken to either of them, the learned Judge would have been bound to record it under Section 279, Criminal P.C., and no such record was made. The procedure adopted was clearly erroneous. In *Kedar Nath v. Emperor* : AIR1928 Cal83 which was decided by a Full Bench, the correct procedure for empanelling the jury for a particular case has been laid down in the judgment delivered by Buckland, J. The passage appears at p. 387 of the report:..In the course of argument, we were informed that it is the practice in District Courts to ascertain beforehand how many

of the persons summoned to ' serve as jurors have attended and thus determine the 'deficiency' to be supplied. If that is the case, in my judgment it is a practice which is not authorised by law and should be discontinued. No doubt, persons summoned a jurors who do not attend are liable to fine. But the stage at which it should be ascertained whether they have attended or not is not reached until their names are called out for the purpose of empanelling a jury.

The procedure to be followed in nominating a jury is laid down in Chap. 1, Rule 54, General Circular Orders. If carefully observed, step by step, no difficulty will occur. It is to be presumed that the total number summoned is that required by Section 326, that is to say, at least ten, for a jury of five, and in the aggregate there may be more. This will depend upon the number required for the Sessions and stated in the letter to the District Magistrate. On the names being drawn from the box, one by one, each after another, and called aloud as each is drawn, it will become apparent who has not attended, and it is only when all the names have been so drawn and a number of persons insufficient for the purpose of constituting a jury have answered to their names, that the deficiency will become manifest. The deficiency will be the number by which the number of persons answering their names and empanelled falls short of the number of persons of which the jury should consist. It is then and not until then that, in my opinion, the proviso begins to operate, and on that point being reached, the Court has to exercise a discretion whether to allow persons to be chosen from among the bystanders in sufficient number to supply the deficiency, or whether to adjourn the case for a fresh jury to be summoned.

9. I would draw the attention of Sessions Judges to the direction contained in the passage quoted. There have been, from time to time cases in which it has gone unheeded. In the present case the order sheet of the trial shows that it was indeed practicable to obtain a jury of nine in the manner provided by Section 274 of the Code. The jury was therefore not validly constituted, and the entire trial has been vitiated thereby. The learned Deputy Legal Remembrancer finally attempted to maintain that the point was taken too late to be of avail, and he has relied on *Superintendent and Remembrancer of Legal Affairs Bengal v. Bhaju Majhi* : AIR1930 Cal291 . I cannot accept this contention. The objection is such that it

could be taken at any time, for, it is an objection to something fundamental and affects the very constitution of the tribunal. I doubt whether the case in *Superintendent and Remembrancer of Legal Affairs Bengal v. Bhaju Majhi* : AIR1930 Cal291 was correctly decided so far as this question goes. In the result the accused must be retried in accordance with law.

Sen, J.

10. Kishori Khanna has been tried by Mr. J.C. Gupta, Additional Sessions Judge of Midnapore and a Jury of seven on the charge of murdering his brother Haripada. The jury by a unanimous verdict have found, the accused guilty. The learned Judge has accepted the verdict and sentenced the accused to death. Against this order of conviction and sentence the accused has appealed and there is also a reference to this Court by the Judge under Section 374, Criminal P.C., for confirmation of the sentence of death passed by him. On behalf of the accused, his counsel Mr. Chakravarti argues that the whole trial is bad as the tribunal which tried the accused was not properly constituted. Other points were also raised but as I am of opinion that the trial was bad ab initio I do not propose to deal with them. I shall now examine the point regarding the validity of the trial. The learned Judge summoned 18 persons to attend for the purpose of being empanelled as jurors in this case. Nine persons attended. The learned Judge chose seven jurors by lot and proceeded to try the case. Mr. Chakravarti's contention is that it is clear from the record that it was practicable to have 9 jurors to try the case and that consequently it was not open to the Judge to have the case tried by seven jurors only. His view is that the provisions of Section 274, Criminal P.C., have been violated and that the whole trial is consequently bad. There are thus two matters which have to be decided viz. : (1) Have the provisions of Section 274, Criminal P.C., been disobeyed? (2) If so, does the disobedience vitiate the trial? I shall now deal with the first matter. Section 274, Criminal P.C., is in the following terms:

(1) In trials before the High Court the Jury shall consist of nine persons.

(2) In trials by Jury before the Court of Sessions the Jury shall consist of such uneven number, not being less than five or more than nine as the Provincial

Government, by order applicable to any particular district or to any particular class of offences in that district, may direct:

Provided that, where any 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.

11. It is quite clear from the proviso to Sub-section (2) of this section that whenever it is practicable the jury must consist of 9 members in a trial for murder. In this case the jury consisted of 7 persons. What has therefore to be ascertained is whether it was practicable to have a jury of nine. The learned Deputy Legal Remembrancer says that there being only 9 persons present it was not open to the Judge to empanel a jury of 9. His view is that the nine must be chosen by lot from a number exceeding nine. There is nothing in the Code to suggest this view nor is there any case in which such a view has been taken. On the contrary the cases show that a trial by a jury of seven empanelled when only seven jurors were present is quite valid *Emperor v. Benat Paramanik* : AIR1935 Cal407 . In *Emperor v. Erman Ali* : AIR1930 Cal212 which was a decision of the Full Bench of this Court, 9 persons were present and all 9 were empanelled and no question was raised that this was improper. This question cannot arise at all if the Code and the rules of this Court regarding the empanelling of jurors are carefully followed. The Judge under Section 326, Criminal P.C., has to summon twice the number of persons as may be required for the trial. On the date of the trial, all that he has to do is to draw out one by one the names from among the 18 names of the persons summoned. Section 276, Criminal P.C. says that the jurors shall be chosen by lot from the persons summoned to act as such; it does not say that jurors shall be chosen by lot from among the persons present. The Judge is not required before he draws lots to ascertain how many of the persons summoned to serve as jurors are present. If by drawing the names one by one he is able to empanel a jury of 9 in a murder case then he has done all that the law requires him to do and the jury is properly constituted. It does not matter that only 9 persons out of the 18 summoned were present. The procedure indicated by me has been laid down by the Full Bench of this Court in *Kedar Nath v. Emperor* : AIR1928 Cal83 where the practice of ascertaining how many persons are present before drawing the names

of the jurors is condemned. There is thus no point in the argument that because only 9 persons were present it was not practicable for the Judge to select 9 jurors.

12. Next, the learned Deputy Legal Remembrancer says that the very fact that the Judge empanelled 7 jurors shows that it was impracticable to empanel 9. He invokes the principle '*omnia praesumuntur rite acta esse*' and refers to *Emperor v. Benat Paramanik* : AIR1935 Cal407 . Where it was said that when a Judge proceeds to try a murder case with 7 jurors and there is nothing on the record to show otherwise this Court ought to presume that the requirements of Section 274, Sub-section (2) and its proviso were followed and that every thing was done in due form of law. This view the learned Deputy Legal Remembrancer points out was approved by the Judicial Committee in *Mirza Akbar v. Emperor* . It is quite true that this Court in the absence of anything to the contrary on the record ought to presume that the Court below knew the law and acted in accordance therewith; but here the record clearly shows that the Court acted (sic) that it was practicable to have a jury of 9. This is what the order sheet says:

Out of 18 Special Jurors summoned in this case 9 Jurors are present and from amongst them 7 are chosen by lot and they are allowed to sit without any objection. No jurors were challenged.

13. If there were any challenges the order sheet would show it as Section 279, Criminal P.C., requires the Court to record its decision on any objection taken to a juror. Thus the record clearly shows that only seven Jurors were chosen by lot by the Judge although it was practicable to choose nine. The principle embodied in the phrase '*omnia praesumuntur rite acta esse*' cannot therefore be invoked in this case. It has thus been established that the proviso to Sub-section (2) of Section 274, Criminal P.C., has not been obeyed.

14. The next point for determination is whether this disobedience vitiates the trial. There is no case which directly decides this question. There is authority for the following propositions : (a) When a Judge instead of summoning 18 persons to appear for service on the jury in a murder trial as provided for in Section 326, Criminal P.C., summons only 12 and only 8 persons attend out of whom seven are chosen to serve on the jury the trial is bad : *Serajul Islam v. Emperor* : AIR1928

Cal645 . The reason given is that it could not be said that it was not practicable to have a jury of nine when the insufficiency in the number of persons present to serve on the jury was due to a failure to follow the provisions of the law. (b) When a Judge in a murder trial in contravention of Section 326, Criminal P.C., summons 14 persons instead of 18 and 11 persons are present out of whom the Judge empanels only seven, that the trial is bad *Dwarika Malo v. Emperor* : AIR1930 Cal60 . It was pointed out in this case that there were two infringements, viz., first, an infringement of Section 236, Criminal P.C.; secondly, an infringement of the proviso to Sub-section (2) of Section 274 of the same Code, because the Court empanelled only 7 jurors when it was practicable to empanel 9 there being 11 jurors present, (c) When the Court disobeys the provision of Section 326, Criminal P.C., and summons 14 persons instead of 18 in a murder case and nine persons attend all of whom are chosen by lot the trial is not vitiated. It was held that the error in regard to the provisions of Section 326 is curable in such a case by the aid of Section 537, Criminal P.C., as the error did not lead to any violation of the provisions of Section 274 relating to the constitution of the jury : *Emperor v. Erman Ali* : AIR1930 Cal212 . In the present case there has been no disobedience of the provisions of Section 326, Criminal P.C., but a disobedience only of the provisions of Section 274 relating to the constitution of the jury. None of the cases referred to directly decide the precise question now raised, but if the cases be read together and the decisions correlated, it may be said that they would support the view propounded on behalf of the appellant. I do not, however, propose to base my decision on such correlation, as each case must be taken to be an authority only for the proposition that it lays down in the particular circumstances of that case. I have other reasons, which I shall presently state for supporting the contention urged on behalf of the appellant.

15. The learned Deputy Legal Remembrancer points out that in each of the two cases *Serajul Islam v. Emperor* : AIR1928 Cal645 and *Dwarika Malo v. Emperor* : AIR1930 Cal60 , where the Court held that the trial was bad there was a twofold error, one in respect of Section 326 and the other in respect of Section 274 whereas in *Emperor v. Erman Ali* : AIR1930 Cal212 where there was only a single error, viz., that in respect of Section 326 the Court held that the error was curable by the application of Section 537 and that the trial was not vitiated. He points out that in

the present case also there is only a single error, viz., one in respect of Section 274 and argues that in such circumstances the error should be deemed to be curable by the application of Section 537. I hope the learned Deputy Legal Remembrancer will forgive me for saying that his argument pays more regard to arithmetic than to logic. It is not the number of errors that matters. It is the nature of the error and its effect that must be the subject of consideration. All errors have not the same effect. Some errors are curable by the application, of Section 537, Criminal P.C., Abdul Rahman v. Emperor : and some errors are not : Subrahmaniam Iyer v. Emperor ('02) 25 Mad. 61. I shall show presently that the error under consideration is of the latter description. I am not going to say that the use of word 'shall' in the proviso to Section 274 makes it a mandatory provision the disregard of which cannot be cured. I am fully conscious of the fact that the mere use of this imperative will not render a disobedience of its direction incurable. The doctrine of the incurability of a 'mandatory' provision has been exploded by the Judicial Committee in Abdul Rahman v. Emperor . As Rankin C.J. said in Emperor v. Erman Ali : AIR1930 Cal212 .

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 which are directed to minor incidents of procedure.

16. Now, the disobedience of imperatives dealing with such matters would be curable if in fact no injustice has been caused. But where the disobedience is of a provision of the Code which may be described as vital or radical, Section 537 can have no application.

17. The learned Deputy Legal Remembrancer points out that the Full Bench in Emperor v. Erman Ali : AIR1930 Cal212 held that a disobedience of the 'mandatory' provisions of Section 326 was curable and did not render the trial void and he argues that the error in the present case should be treated in the same way. As I have said before it does not matter that mandatory terms like the word 'shall' are used in a section; that would not necessarily render a disobedience of the section fatal. One must look into the nature of the provision disobeyed and the effect of the disobedience upon the trial. In the Pull Bench case the disobedience

was in respect of a direction not directly connected with the trial. It was the disobedience of a provision enacted for the purpose of rendering it likely or probable that the number of persons present in Court would be sufficient for the constitution of a proper jury. Again the disobedience did not lead to any insufficiency in the number of jurors empanelled. The jury consisted of the proper number of persons and the trial was held by a properly constituted tribunal. The error did not take away any of the essential rights of the accused. In the present case the position is quite different. The disobedience relates to a provision of the Code which prescribes the constitution of the tribunal and the disobedience has led to a defect in the constitution of the tribunal. The Code provides that the tribunal shall in the circumstances of this case consist of a Judge and nine jurors. Owing to the error of the Judge, the tribunal consisted of a Judge and seven jurors. The tribunal was one which is different from that prescribed by the law. What followed the empanelling of the jury was no trial at all as the body was not empowered by the law to hold the trial. In a case of this description Section 537, Criminal P.C., cannot be called in aid. Let us examine Section 537. What does it say? It says that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed on account of any error, omission, etc., in the order, judgment, proceedings, etc., where the error, omission or irregularity, etc., has not in fact occasioned a failure of justice. The section in terms says that the sentence or order which it seeks to protect must be one passed by a Court of competent jurisdiction. A Court of competent jurisdiction means a tribunal constituted in accordance with law and empowered by law to deal with a particular matter and pass judgment in such matter. The sentence and order passed in the present case cannot be protected by Section 537 inasmuch as, it has not been passed by a legally constituted tribunal empowered to hold the trial.

18. In these circumstances I am of opinion that the entire trial has been vitiated. The learned Deputy Legal Remembrancer sought to maintain the order of conviction and sentence on another ground. He said that the point now urged about the constitution of the jury was not taken in the Court below or in the grounds of appeal here and he contends that no notice should be taken of such an objection made for the first time on appeal. He cites the case in *Superintendent and Remembrancer of Legal Affairs Bengal v. Bhaju Majhi* : AIR1930 Cal291 in

support of this view. It is true that the point has been taken for the first time before us and that it is not to be found in the grounds of appeal. For this reason we gave the learned Deputy Legal Remembrancer an adjournment so that he may be able to consider the point. He has had ample opportunity to do so and in fact he does not complain on that account. The point now raised is not one of mere technicality. It goes to the very foundation of the trial. It is a point of law based on facts regarding which there is no dispute whatsoever and it has been taken by a person who has been convicted. This Court always has entertained and I have no doubt always shall continue to entertain a point of law of this description raised by a convicted person, even if it is raised for the first time and even if it is not taken in the grounds of appeal. The case relied upon has really no application. That was a case of an appeal by Government against an order of acquittal. Lord-Williams, J. held that in an appeal against an acquittal the Court ought not to listen to any argument by the Crown based on an objection about the constitution of the jury when the point is taken for the first time in the appellate Court. I am not called upon to express any opinion on this view. All I need say is that the view is expressly limited in its application to an appeal by the Crown against an acquittal and that I can see no reason whatsoever to extend its application to an appeal by an accused against an order of conviction.

19. There is one other argument urged on behalf of the Crown. The learned Deputy Legal Remembrancer says that the use of the word 'practicable' in Section 274 shows that the Sessions Judge is given a discretion to empanel seven jurors or nine jurors and that where the Judge has exercised his discretion, this Court should not interfere. In my opinion this contention is unsound. The Judge is given no discretion in the matter at all. The section does not say that he may empanel seven jurors or nine jurors as he thinks fit. He is enjoined to empanel nine jurors where it is practicable to do so. Whether it is practicable to do so or not is a question of fact; no question of discretion arises. There is nothing more that I need say. The trial has been vitiated by the error of the learned Judge in empanelling only seven jurors in this case when it was practicable to empanel nine. The appeal must be allowed and the reference must be rejected. The order of conviction and the sentence are set aside. The accused shall be retried in accordance with law by some other Sessions Judge.

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