

Rosonali and ors. Vs. Emperor

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Court : Kolkata

Decided On : Aug-18-1927

Reported in : AIR1927Cal787

Appellant : Rosonali and ors.

Respondent : Emperor

Judgement :

C.C. Ghose, J.

1. In all these seven appeals the point has been taken that the trials in the sessions Courts, out of which these appeals have arisen, have been bad inasmuch as the provisions of Section 276, Criminal P.C., and of the other relative sections were not complied with. In other words, it is contended in these appeals that the constitution of the Courts for the trial of the accused in these cases has not been in accordance with law.

2. Before we deal with this point it maybe desirable to set out briefly the facts involved in each of these appeals. In appeal 111 of 1927, the accused were charged under Section 148, I.P.C. There was also a charge against accused 1 and 4 under Section 324, I.P.C. Accused 2 was further charged with an offence under Section 304, I.P.C. It is pointed out in the affidavit of Meserali which has been filed before us, that out of the number of persons summoned under Section 326, Criminal P.C., only five persons attended at the time of the commencement of the

trial. The five persons who attended were asked by the learned Additional Sessions Judge to act as a jury. It is, therefore, contended that the jury in this appeal were not chosen by lot in manner required by Section 276, Criminal P.C., and that, therefore, there was no properly constituted Court consisting of judge and jury for the trial of the accused. In the order sheet it is stated that after the charges were read and explained to the accused and after their pleas were taken the persons, whose names are mentioned in the affidavit of Meserali were chosen by lot without any objection and duly sworn. On behalf of the Crown, however, it has not been challenged that as a matter of fact only five persons out of the number of persons summoned were present at the time of the commencement of the trial, who could be empanelled to act as a jury.

3. In appeal 117 of 1927 the accused were charged with having committed offences punishable under Sections 366 and 368, I.P.C. It is stated in the affidavit of Ghulam Makdum Mia which has been filed before us, that out of ten jurors summoned under Section 326, only seven attended at the time of the commencement of the trial and that out of the said seven persons two were excused on personal grounds by the Sessions Judge and that out of the remaining five persons the accused objected to one juror when his name was called out and that the said objection was allowed by the Sessions Judge. There remained, therefore, four persons who could be asked to act as jurors and the deficit in this case was made good by calling one Babu Motilal Banerjee to take his seat on the jury as the fifth juror. It is, therefore, contended that the jury were not chosen by lot in manner required by Section 276, Criminal P.C. In this case we sent down the affidavit of Ghulam Makdum to the learned Sessions Judge for a report and the facts according to him are as follows:

Ten jurors were summoned to attend Court on 29th November 1926. Out of the ten summoned only seven appeared. From the seven it was necessary to select five by lot to serve on the jury. Seven tickets bearing the names of the seven jurors were put in the ballot bag and were drawn out one by one by me personally. As each ticket was drawn out of the bag, the name on it was read out to the Court, and the defence asked if they objected to the juror. If no objection was raised then the juror immediately took his seat in the jury box. Two jurors, when the tickets

bearing their names were drawn out, asked to be excused on personal grounds and were excused. The defence objected to one juror and the objection was allowed. The result was that when the last ticket had been drawn out of the bag, there were only four jurors in the jury box. To make up the deficiency I sent out notices to several persons whose names are on the jury list and who reside near the Court, to attend. So far as my recollection goes four or five such urgent notices were sent out. Two of the new jurors so summoned attended. Their names were written on tickets and the tickets put in the ballot bag. I drew out one ticket and on the name being read out asked if the defence objected to the juror. No objection was raised. This juror then took his seat, joining the other four in the jury box. The one remaining juror was discharged and the trial commenced.

4. In appeal 185 of 1927 the, accused were charged under Sections 325/34 and 323/24. It appears that out of 12 jurors summoned under Section 326, only eight persons were present at the time of the commencement of the trial. One juryman was excused on personal grounds. Out of the remaining seven, five jurors were chosen by lot as stated in the order sheet without objection.

5. In appeal 266 of 1927 the accused were charged under Sections 325 and 325/34. It appears that out of ten jurors summoned under Section 326 only five persons attended before the commencement of: the trial. Two persons from among those present in the Court compound were added to the five mentioned above. Thereafter five persons were chosen by lot as stated in the order sheet from among the seven.

6. In appeal 297 the accused was charged under Sections 467/109, I.P.C. It as said that out of the number of jurors summoned under Section S26 only four jurors were present in Court before the commencement of the trial and that the learned Sessions Judge sent for one juror and he thereupon asked the five to serve on the jury and that thereafter the trial commenced. It is not stated in the order sheet that the jurors were chosen by lot, nor is it clear how there was or could have been a lottery.

7. In appeal 307, it appears that ten persons were summoned under Section 326. In the order sheet it is stated by the Sessions Judge in an addendum that

more than five persons were present so that a selection was possible, and as far as I know all those summoned were present.

8. The trial commenced on 14th March 1927, but later on it stood adjourned to 7th April 1927. On 16th March one of the jurors asked to be excused from further serving on the jury as he wanted to go on pilgrimage. His prayer was granted. The Sessions Judge then proceeded to summon two jurors from the special jurors list, but on 7th April only one such juror attended and he was substituted in place of the juror who had gone on pilgrimage and who had been excused. The accused in this case were charged under Sections 436 and 436/109 I.P.C.

9. In appeal 366 the accused was charged with an offence punishable under Section 302, I.P.C. It was, therefore, necessary in a case like this to have, a jury of at least seven persons. It is said in the affidavit of Afsaruddin, which has been filed before us, that out of 14 jurors summoned under Section 326, Criminal P.C. only seven appeared in Court before commencement of the trial, and that the learned Sessions Judge did not take any steps to have the jury chosen by lot.

10. Under Section 274, Criminal P.C., it is provided that in trials by jury before the Court of Session, the jury shall consist of such uneven number, not being less than nine as the local Government, by order applicable to any particular class of offences in that district, may direct. It is further 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 seven persons. In Bengal, where the accused is not a European or American, it has been laid down by Government that the jury should consist of five persons. Sections 319 to 332 deal, among other matters, with questions relating to lists of jurors and assessors for that Court. Under Section 326, Criminal P.C., 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, and including, where any accused person is a

European or an American, as many Europeans or Americans as may be required for the purpose of choosing jurors or assessors for the trial. The names of the persons to be summoned shall be drawn by lot in open Court excluding those who have served within six months unless the number cannot be made up without them; and the names so drawn shall be specified in the said letter. Where the accused requires and is entitled to be tried under the provisions of Section 275, there shall be chosen by lot, in the manner prescribed by or under Section 276, from the whole number of persons returned, the jurors who are to constitute the jury until a jury containing the proper number of Europeans or Europeans and Americans or of Indians, as the case may be, has been obtained, Provided that in any case in which the proper number of Europeans or Americans cannot otherwise be obtained, the Court may, in its discretion for the purpose of constituting the jury summon any person excluded from the list on the ground of his being exempted under Section 320.

11. It is, therefore, clear that the minimum number of persons to be summoned ordinarily is ten and that in case where the accused is charged with an offence punishable with death, the minimum number of persons to be summoned is 14 and that the number may be as many as 18. The form of precept to district magistrates to summon jurors and assessors, is set out in Schedule V, Form No. 32. We then come to Sections 276-279. Under Section 276 the jurors shall be chosen by lot from the persons summoned to act as such, in such manner as the High Court may from time to time by rule direct, provided that in case of a deficiency of persons summoned, the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present. Under Section 277 provision is made for objections to jurors whose names are called out and Section 278 sets out the grounds of objection which may be urged by the accused or by the prosecutor. Then comes Section 279 which runs as follows:

Every objection taken to a juror shall be decided by the Court, and such decision shall be recorded and be final. If the objection is allowed, the place of such juror shall be supplied by any other juro attending in obedience to a summons and chosen in manner provided by Section 276, or if there is no such other person present; then by any other person present in the Court whose name is on the list

of jurors, or whom the Court considers a proper person to serve on the jury, provided that no objection to such juror or other person is taken under Section 278 and allowed.

12. It is apparent that the object of the provisions in the code to which we have just referred is to secure an impartial trial by rendering impossible any intentional selection of jurors to try a particular case and that an accused person has a right to claim to be tried by a jury chosen with strict regard to all the safeguards provided in the code to secure perfect impartiality. These being the guiding principles underlying the sections, we have to ascertain the true meaning of Section 276. In 'our view there can be no doubt that the central idea is to have a jury chosen by' lot from the persons summoned to act as jurors. In other words, in ordinary cases, five persons are to be chosen by lot for the purpose of acting as a jury out of ten persons summoned to act as jurors. In murder trials, as already noticed, seven or nine persons, as the case may be, are to be chosen by lot for the purpose of acting as a jury out of 14 or 18 persons summoned to act as jurors. In case, however, of a deficiency of persons summoned, i.e., where the persons attending in obedience to the summonses are less than the numbers summoned, the number of jurors required may with the leave of the Court be chosen from such other persons as may be present. It is this last clause which is the subject of controversy in these appeals. 'What is the true meaning of the words 'required' and 'chosen' in the Proviso 2, Section 276? Does the word 'required' mean required to constitute the quorum for a 'jury,' or does it mean 'required to make up the minimum number of jurors which will render a choice of jurors by lot possible,' or lastly, does it mean 'required to make up the minimum number of jurors summoned under Section 326 to attend?' Section 326 requires a definite minimum of jurors to be summoned for a particular case and it is important to bear this in mind considering the sense of proviso 2, Section 276. This proviso has been introduced to meet a case where there is a deficiency of persons summoned, and it seems to us that the word 'required' in the proviso must refer and is relative to the words immediately preceding, namely 'in case of a deficiency of persons summoned.' To hold otherwise, it would not be possible to give effect to the section itself which requires the jury to be drawn by lot. Under the first and second of the three possible constructions noticed before, a choice by lot of the required

number of jurors would not be possible; indeed, if it so happened that only one summoned juror attended, no member of the jury could be chosen by lot. It is only under the third and last suggested construction that the proviso to Section 276 can be read so as to allow the terms of the section to receive their natural interpretation. In other words, in our view, if there is a deficiency of persons summoned to act as jurors, it is this deficiency that under the proviso: may be made good from such other persons as might be present in Court, and the meaning of the, word 'chosen' in the proviso must mean chosen by lot.

13. We do not agree with the contention that if there is a deficiency of persons summoned, the number of persons required to complete the panel may be supplemented otherwise than by lottery from those persons present in Court. It, seems to us that if the proviso be so read and a full jury always so obtained, the occasion to utilize the provisions of Section 279(2) under which the Court may allow some not-summoned persons present in Court to serve on the jury, could hardly arise. With regard to S, 279, we consider it contemplates an ordinarily normal case of the jurors summoned attending, but by reason of challenges or other causes such as, for some of them being excused no summoned juror is left to take the place of the last challenged juror. In such an eventuality some other persons present in Court may be empanelled. In so far as Section 279(2) permits a person not chosen by lot to be empanelled, it certainly introduces an exception to the general rule, but this is only in the exceptional condition stated and in emergent circumstances.

14. The matter raised on these appeals is of very great importance and the view we have taken is in accordance with the opinion expressed in the case reported in *Bhola Nath Hazra v. Emperor* : AIR1927 Cal242 . We are aware that a different view has been taken in *Rahamat Sheikh v. Emperor* : AIR1927 Cal593 , but the learned judges in that case held that the facts of that particular case warranted them from departing from the view taken in *Bhola Nath Hazra v. Emperor*.

15. In view of what has been said above by us we are constrained to hold that there has been no proper trial in each of these cases and there is no other alternative left open to us, but to order trials of the accused in all the seven

appeals before us in accordance with law and we accordingly do so.

16. The accused or such of them as are on bail in the appeals other than appeals Nos. 185 and 366 of 1927 will be allowed to remain on the same bail, pending further orders of the learned Sessions Judge who will hold the retrials.

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