

**(1929) 05 CAL CK 0030****Calcutta High Court****Case No:** None

Amir Khan and Others

APPELLANT

Vs

Emperor

RESPONDENT

**Date of Decision:** May 31, 1929**Acts Referred:**

- Criminal Procedure Code, 1898 (CrPC) - Section 274, 326
- Penal Code, 1860 (IPC) - Section 302

**Citation:** 122 Ind. Cas. 557**Hon'ble Judges:** Pearson, J; Mallik, J**Bench:** Division Bench**Judgement**

1. In this matter the point that has been taken arises upon the procedure adopted for the constitution of the Jury. The original charge was u/s 302 of the Indian Penal Code. The order-sheet of the Sessions Judge, dated the 30th of October, 1928, runs thus: "Cards of the Jurors summoned are put in a bag. As the names are called out by lot, five Jurors are found absent. Seven other Jurors named on the reverse are selected by lot without any objection by the accused and Pleader." We have ascertained that the number of Jurors actually summoned were fourteen in number. The position then was that of these fourteen Jurors five were found absent leaving, therefore, nine. Thus the seven other Jurors named on the reverse were selected by lot and the Jury so empanelled formed the Jury for the trial.

2. It is contended that the trial is vitiated because the Jury has not been properly constituted under the existing provisions of the law. This contention rests on the construction to be placed on the proviso to Section 274, Criminal Procedure Code and the language of Section 326. The latter section provides for the summoning of the Jurors under a procedure by which the District Magistrate is to summon " as many persons...as seem to the Sessions Judge to be needed for trials by Jury...at the said Sessions, the number to be summoned not being less than double the number

required for any such trial." Then the proviso to Section 274 runs thus: "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."

3. It is then contended that the joint effect of these provisions is that where the trial is for an offence punishable with death, as in the present case before us, eighteen persons should have been summoned in the first instance; and further that in the present case after the seven Jurors had been chosen, there still remained two of the original fourteen, and there is nothing to show that they could not have been also empanelled, or in other words, nothing to show that it was impracticable to have a Jury consisting of nine persons. In answer to this it is argued that the proviso to Section 274 is mandatory only in so far as it lays down that the minimum number of persons is to be seven, and the provision requiring nine persons if practicable, is only directory : so that when Section 326 speaks of summoning not less than double the number required it refers only to the mandatory portion fixing the minimum of seven, and not to the latter directory portion. We think that it is not possible to accept this construction or to say that the provision that the Jury shall consist of nine persons is in any way less mandatory than the provision that it shall consist of not less than seven. The only difference is that the provision as to the nine persons only becomes operative on fulfilment of the condition that it is practicable to have that number; whereas the provision as to not less than seven persons is absolute in character. Since, then, the Jury is to consist of nine persons if practicable, we think that at the time of summoning Jurors, nine is to be regarded as the " number required for such trial " within the meaning of Section 326, and, therefore, under that section the number summoned should be not less than double that number. These considerations coupled with the fact that in this case a Jury of only seven persons was in fact empanelled, lead us to conclude that the Jury was not properly constituted, and to agree with the recent decision in Kailashpati Upadhyaya and Another Vs. Gopi Koeri.

4. We accordingly allow the appeal, set aside the conviction and sentence and direct that the case be retried in accordance with law.