*Privy Council Appeal No.* 21 *of* 1933.

**Ras Behari Lal and others** - - - - - - - *Appellants*

*v.*

**The King-Emperor** - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY, 1933.

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*Present at the Hearing*:

LORD ATKIN.
LORD THANKERTON.
SIR GEORGE LOWNDES.

[*Delivered by* LORD ATKIN.]

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This is an appeal by special leave. The appellants were tried by the Sessions Judge of Patna, sitting with a jury of seven. They were found guilty by a majority verdict of six to one on charges of murder and rioting. Appellants Nos. 1–7 were sentenced to death and No. 8 to transportation for life. They appealed to the High Court, but their appeal was dismissed. The sentences on appellants Nos. 2, 3, 6 and 7 were subsequently commuted by the Local Governor to transportation for life.

On their application for leave to appeal to His Majesty in Council it was asserted that one of the seven jurors did not understand English, the language in which some of the evidence appears to have been given, and in which the addresses of counsel were made and the charge of the Sessions Judge was delivered. This contention had been put forward on their behalf in their appeal to the High Court. It was originally supported by an affidavit upon which the learned Judges of that Court properly refused to rely. A second affidavit to the same effect of a more

reliable character was tendered on the last day of the hearing, but was rejected as too late, and the appeal was (as already stated) dismissed.

Under these circumstances an enquiry was by order of His Majesty in Council directed to be held by the High Court as to the truth of the allegations so made. The High Court reported that the juror in question did not know sufficient English to follow the address of the lawyers and the Judge's charge or the English evidence. It was after consideration of this report and upon this ground that special leave to appeal was granted.

On the appeal coming on for hearing before the Board counsel for the Crown has not impugned the correctness of the report and has admitted that on this finding the convictions cannot be maintained. In their Lordships' opinion, this is necessarily the correct view. They think that the effect of the incompetence of a juror is to deny to the accused an essential part of the protection accorded to him by law and that the result of the trial in the present case was a clear miscarriage of justice. They have no doubt that in these circumstances the conviction and sentence should not be allowed to stand. They think it was most unfortunate that this matter was not fully enquired into by the High Court when the appeal was before it. Had the learned Judges been satisfied then of the truth of the facts now established, it would have been open to them under the provisions of Section 423 of the Criminal Procedure Code, if they so thought fit, to have reversed the findings and sentences of the Sessions Judge and ordered the appellants to be re-tried, a course which, in their Lordships' opinion, would have fully met the ends of justice.

Since the hearing of the case their Lordships have had their attention directed to the case of *R.* v. *Thomas*, a decision of the Court of Criminal Appeal given on the very date upon which this present case was before their Lordships. Owing to the remarkable fact that there is no official shorthand note of judgments delivered by the Court of Criminal Appeal their Lordships might have been in a difficulty if they had not had the advantage of seeing an advance copy of the report to be published in the Criminal Appeal reports. In that case the appellant had been convicted at the Merioneth Quarter Sessions of sheepstealing. He appealed on the ground amongst others, that two of the jurors had not sufficient knowledge of the English language to enable them to follow the proceedings. His counsel sought to use affidavits by the jurors in question to that effect. The Court refused to receive the evidence and dismissed the appeal against the conviction, although on other grounds they reduced the sentence. It would appear from the report that the judgment was based in part upon the well established ground that for the purpose of setting aside the verdict evidence is not admissible by jurors to prove what discussions took place in the jury box or in the jury

room. It was further based upon the proposition that when a verdict is delivered in the sight and hearing of all the jury without protest their assent is conclusively inferred. The suggestion was made *arguendo*, but does not seem to have been decided that if a juror was disqualified by law the objection could not be entertained after verdict. If their Lordships agreed with all the grounds of this decision they would have had to consider whether, notwithstanding the lack of opposition by the prosecution they would have interfered with the decision of the High Court at Patna. But with the greatest respect for the learned members of the Court of Criminal Appeal they are unable to accept the reasons given for this decision. The question whether a juror is competent for physical or other reasons to understand the proceedings is not a question which invades the privacy of the discussions in the jury box or in the retiring room. It does not seek to inquire into the reasons for a verdict. If the alleged defect of the juror could be proved at all *aliunde* there seems to be no reason why the evidence of the juror himself should not be available either for or against the allegation. It would seem remarkable that if evidence of neighbours could be given that a juror did not understand English, it should not be open to the prosecution to produce the strongest evidence possible by calling the juror himself to show that he fully understood the proceedings. Similarly their Lordships are unable to accept the view that any presumption of assent by all the jurors to a verdict given in their presence is decisive of or indeed relevant to the question. The problem is whether the assent so given or inferred is of a competent juror, *i.e.*, in such a case as the present not so incapacitated from understanding the proceedings as to be unable to give a true verdict according to the evidence. The objection is not that he did not assent to the verdict, but that he so assented without being qualified to assent.

It is noteworthy that in the case of *Ellis* v. *Deheer* [1922], 2 K.B. 113, evidence was permitted to be given that some of the jurors though present in Court were not able to see or hear the foreman give their verdict, and that the evidence of the fact was the evidence of the jurors themselves. The judgments draw pointed attention to the distinction between evidence of what takes place in the jury box and jury room, and evidence of what takes place in open Court. Accepting the evidence the Court of Appeal granted a new trial. There is an interesting case of *Ex p. Morris*, 1907, 72, J.P. 5, where a rule for a *certiorari* was applied for to quash a conviction at quarter sessions on the ground that one of the jurors was intoxicated. The only evidence was that of a solicitor based on information. The Court, Phillimore and Walton, JJ., refused the rule on the ground that the evidence was insufficient, but gave leave to renew it, and said that if renewed there should be an affidavit as to the circumstances from one of the other jurymen.

So far as *R.* v. *Thomas* is a decision as to the admissibility of evidence of the juror himself it is true that it does not cover the present case, for in India there was evidence other than that of the jurors concerned, though at the inquiry some of the jurors impugned were in fact, called. Their Lordships have already stated their difficulty in accepting the view that the evidence even of the jurors was inadmissible. But so far as *R.* v. *Thomas* decides that no evidence is admissible after verdict to establish the inability of a juror to understand the proceedings their Lordships definitely disagree with it. A valuable contribution to the discussion is made in the case of *Mansell* v. *The Queen* (1857), 8 E. & B., at p. 80, by Lord Campbell delivering the judgment of the Court of Queen's Bench on a writ of error. The plaintiff in error had been convicted of murder, and one cause of error assigned was that the presiding Judge at the trial had directed a juror not to be sworn who had declared himself to have a conscientious objection to capital punishment; holding this to be no error Lord Campbell said :—

> " We are not now to define the limits of this authority ; but we cannot doubt that there may be cases, as if a juryman were completely deaf, or blind, or afflicted with bodily disease which rendered it impossible to continue in the jury box without danger to his life, or were insane, or drunk, or with his mind so occupied by the impending death of a near relation that he could not duly attend to the evidence, in which, although from their being no counsel employed on either side, or for some other reason, there is no objection made to the juryman being sworn, it would be the duty of the Judge to prevent the scandal and the perversion of justice which would arise from compelling or permitting such a juryman to be sworn, and to join in a verdict on the life or death of a fellow creature."

This duty has later been held to be a continuous duty throughout the trial. It would be remarkable indeed, if what may be " a scandal and perversion of justice " may be prevented during the trial, but after it has taken effect the Courts are powerless to interfere. Finality is a good thing, but justice is a better. According to ordinary procedure in criminal trials the accused has a right of challenge either peremptory, or for cause ; and it may very well be that if knowing the alleged defect he stands by and takes his chance of a verdict he is precluded from thereafter taking the objection. But if the cause of objection is in fact unknown to him, there appears to be no reason why the Court in a proper case should not give effect to it.

The result of upholding the objection is that there has been a mis-trial. In England the ordinary order would be in such circumstances to award a *venire de novo* as in the case of *R.* v. *Wakefield* [1918], 1 K.B., 216, where a person not qualified and not summoned, personated on the jury a man who was qualified and had been summoned. Their Lordships, however, think it desirable that any discretion as to any consequential order should be exercised by the High Court, and they content themselves, therefore, with humbly advising His Majesty that the appeal

should be allowed, that the dismissal of the appeal by the High Court should be reversed, and the convictions and sentences set aside, leaving the representatives of the Crown in India to take such steps in the matter of a re-trial as may be open to them there.

**In the Privy Council.**

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RAS BEHARI LAL AND OTHERS

*v.*

THE KING-EMPEROR.

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DELIVERED BY LORD ATKIN.

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