

[ORIGINAL CRIMINAL JURISDICTION.]

1876.
July 22.

REG. v. LALUBHAI GOPALDASS AND OTHERS.

*High Court Criminal Procedure Act (X. of 1875), Sections 32 to 37—Hindu prisoner
—Constitution of jury.*

A prisoner not being a European British subject, who is not charged jointly with a European British subject, is not entitled, under the provisions of the High Court Criminal Procedure Act (X. of 1875), to be tried by a jury of which, at least, five persons shall not be Europeans or Americans.

THE four prisoners, who were all Hindus, were charged at the Criminal Sessions, at which Green, J., presided, in July 1876, with having given false evidence in a judicial proceeding and with abetment of that offence, and were jointly tried by a common jury. After the prisoners had claimed to be tried, and before the names of any of the jury had been called, *Inverarity*, who appeared for the defence, applied that the jury should be so constituted that, at least, five persons should not be Europeans or Americans. He contended that Section 37 of the High Court Criminal Procedure Act (X. of 1875) impliedly conferred on a prisoner, not being a European British subject, the right to have the jury so constituted.

GREEN, J., refused the application, holding that the section referred to conferred no such right as was contended for, unless, perhaps, in the case of a person who was not a European British subject being charged jointly with one who was, and directed that the jury should be selected in the mode ordinarily observed in the case of the trial of Hindu prisoners.

This was accordingly done by the Clerk of the Crown drawing five names from a box containing the names of those who had been summoned as Europeans and Americans, and one name from each of four other boxes, which contained, respectively, the names of those who had been summoned as Portuguese and Indo-Britons, Hindus, Muhammadans, and Parsis. This is the mode which has been observed since the coming into force of Act X. of 1875. Before that time the practice was regulated by Rule XII. of the Crown Office Rules (Mackenzie's Rules of the Supreme Court, p. 155, para. 522) which was as follows:—"The name of each man

who shall be summoned for the Petit-Jury, with his place of abode and addition, shall be written and delivered to the Clerk of the Crown as aforesaid, and placed in a box, and the said names shall be drawn as aforesaid, and the twelve persons whose names shall be first drawn, of whom six shall be British subjects, that shall appear and shall not be challenged, or set aside or excused, shall form the Petit-Jury on each trial; provided also that, on the trial of any person who professes the Christian religion, the twelve persons professing that religion whose names shall be first drawn, that shall appear, and shall not be challenged, or set aside or excused, shall form the Petit-Jury on such trial." The mode in which that rule has been usually carried into effect in the Supreme and High Courts, for at least the last quarter of a century, has been to draw six names from a box containing names of Europeans, three from a box containing names of Hindus, and one each from three boxes containing, respectively, names of Portuguese, Muhammadans, and Parsis. The jury of nine, constituted in the manner above described, were unanimous in finding all the prisoners guilty. After verdict, and before the prisoners were called upon to answer why sentence should not be passed upon them, *Inverarity* applied, under Section 101 of the High Court Criminal Procedure Act (X. of 1875), and Clause XXV. of the Letters Patent of 1865, to have reserved the question whether the jury had been properly constituted, having regard to his previous application, that the prisoners might be tried by a jury of which, at least, five persons should not be Europeans or Americans, or both Europeans and Americans, under Section 37 of the same Act. He also at the same time moved in arrest of judgment.

GREEN, J., reserved the question as to the constitution of the jury, but refused the motion in arrest of judgment, and sentenced the prisoners, respectively, to two years' rigorous imprisonment.

The question so reserved, was accordingly considered by a Full Bench consisting of WESTROPP, C. J., SARGENT and GREEN, JJ., on 22nd July 1876.

Inverarity for the prisoners :—Sections 32 to 37, both inclusive, of Act X. of 1875 are those which apply to the present case. From these sections it appears to have been the intention of the

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Legislature that the majority of the jury in every case, and certainly in the case of a prisoner not being a European British subject, shall be other than Europeans or Americans. Section 35 even seems to show that the intention was that the whole jury shall ordinarily be composed of persons other than Europeans or Americans, and that it is only in the case of the prisoner being a European British subject, and claiming to be tried by a mixed jury, that Europeans and Americans may be introduced into the jury.

[SARGENT, J. :—Look at Section 33. That shows that the jury is ordinarily to be chosen by lot, in which case it might happen that they would be all Europeans, or all persons other than Europeans or Americans. Then Section 35 is enacted apparently to insure a prisoner who is a European British subject, being tried, if he so wishes, by a mixed jury, the majority of which shall be Europeans or Americans or both.]

[WESTROPP, C.J. :—Section 35 is a provision for the obtaining of a particular majority in a particular case. Any other case must be governed by the provisions of the Act and the old practice of the Court so far as it is consistent with those provisions.]

From the right conferred by Section 35 on a European British subject to be tried by a mixed jury, of which the majority shall be Europeans or Americans or both, it is to be inferred that a prisoner, not being a European British subject, has an equivalent right to be tried by a mixed jury, the majority of which shall not be Europeans or Americans or both. The old practice was to try a person, not being a European British subject, by a mixed jury consisting of six Europeans and six Hindus, Portuguese, Muhammadans, and Parsis. This is important, as showing that, before the passing of this Act, a prisoner, not being a European British subject, was not tried by a majority of Europeans.

[WESTROPP, C. J. :—He might have been. The rule prescribed that there should be six British subjects on each jury of twelve persons, but did not contain any direction as to the nationality or creed of the other six, when the accused was not a Christian. The usual practice, indeed, in such a case was only to have six Europeans, unless there was a scarcity of other jurors caused by challenge or otherwise.]

No new rules have yet been made on this point under Section 49 of the High Court Criminal Procedure Act, and, therefore, the old practice before the passing of this Act ought to be considered. The presiding Judge refused the application at the time of the trial, and the result was that a jury was sworn, of which the majority were Europeans.

Purcell (who with *Lang* appeared for the Crown), in reply to a question by the Court, stated that there was no decided case on the point yet reported. He was not called on to support the conviction.

WESTROPP, C.J. :—We think that, even if the Legislature intended what Mr. Inverarity contends it did, it has not expressed that intention, and this would be a case of *quod voluit non dixit*. We also think, however, that it had no such intention. Where it wished to make a rule about the selection of jurors for the trial of European British subjects, we find it doing so in express terms in Section 35. If Mr. Inverarity's contention were well founded, that the Legislature did intend that a prisoner not being a European British subject should be tried by a jury, of which the majority should be other than Europeans or Americans or both, we should have expected, after reading Section 35, to find another section expressly conferring an equivalent right on persons not being European British subjects. There being no such section, it seems to us that the contrary inference to that for which Mr. Inverarity contends is the one that should be drawn from the express provisions of the Act. The concluding passage in Section 36 shows that, even after a European British subject has claimed the right given to him by Section 35 to be tried by a jury, of which the majority shall be Europeans or Americans or both, the person who is accused jointly with him, though not a European British subject, may yet be tried together with him, and, therefore, of course, by the same jury. Lastly, Section 37 provides that if the European British subject claims his right under Section 35, and the other desires a separate trial, he may have it. But that is an express provision for that particular case. If the Legislature intended that that provision should have a more general application it has not said so, and by making this particular provision has excluded its application to other cases, according to the rule

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expressio unius est exclusio alterius. What is the scope of the direction in Section 33, that the nine persons shall be drawn by lot, or, in other words; whether the names of all jurors should be in one box, or may be distributed into several boxes according to the communities to which the jurors belong, is a point on which we are not now required to give any opinion, and we give none, but we think that, if not inconsistent with the Act, the mode of selection from different boxes is the more convenient, as it insures the selection of a mixed jury consisting of persons of different creeds and nationalities. On the question referred to us we must refuse to disturb the conviction and sentence.

SARGENT, J. :—I am of the same opinion. Section 34 shows that the jury chosen under Section 33, however composed, may try any one whatever be his nationality. Section 35 is a particular provision to meet an exceptional case. If the European British subject wishes to insure his being tried by a jury, of which the majority shall be Europeans or Americans or both, he may, under that section, claim the right to be so tried. If he does not claim that right he will be tried by a jury chosen under Section 33. Section 37 is also a particular provision to meet another special case, but the right thereby conferred on a person not being a European British subject, to be tried by a jury, the majority of which shall not be Europeans or Americans or both, only arises in the event of the European British subject, who is accused jointly with him, choosing to avail himself of the privilege conferred on him by Section 35. I, therefore, think the conviction and sentence must stand.

GREEN, J., concurred.