

CRIMINAL REVISION.

Before Newbould and Suhrawardy JJ.

MAKBUL AHMAD

v.

ALLEN.*

1923

March 14.

European British Subject—Right of trial by jury—Waiver of right—Subsequent cancellation of waiver—Criminal Procedure Code (Act V of 1898), ss. 451 (2) and 454.

An European British subject, who has waived his right of trial by jury, may reconsider and cancel the waiver, in a warrant case, before he has been called upon for his defence under s. 256 of the Criminal Procedure Code.

Emperor v. Sullivan (1) followed.

Section 454 of the Code does not in express terms deal with the case of a claim made but subsequently withdrawn. It applies only where no claim has been made which would be valid under s. 451.

ON the 14th September 1922, the petitioner filed a complaint, under s. 297 of the Penal Code, against the accused, A. J. Allen, before the Police Magistrate of Sealdah who transferred it for disposal to Mr. J. P. Das, a Sub-Deputy Magistrate. The accused claimed his rights as an European British subject before the latter who, after enquiry, admitted the claim, and submitted the case to the District Magistrate of the Twenty-four Parganas. On the 11th November the case was taken up for hearing by Mr. D. K. Mitter, the Additional District Magistrate, to whom the case had been made over for trial, and the accused declined the right of

* Criminal Revision No. 59 of 1923, against the order of D. K. Mitter, Additional District Magistrate, 24-Parganas, dated Jan. 8, 1923.

(1) (1902) I. L. R. 24 All. 511.

1923
 ———
 MAKBUL
 AHMAD
 v.
 ALLEN.

trial by jury. The examination-in-chief of the prosecution witnesses was concluded on the 13th instant: a charge was framed, and the case adjourned to the 6th January 1923 for cross-examination. On this date the accused applied for trial by jury and the application was allowed. The petitioner filed a petition, on the 8th, for the cancellation of the order for trial by jury, which was rejected. He then obtained the present Rule.

Mr. K. N. Chaudhuri (with him *Moulvie A. S. M. Akram*), for the petitioner. When the accused has once waived his right, s. 454 bars him raising the claim subsequently. Refers to *In the Matter of Quiros* (1), *Barindra Kumar Ghose v. Emperor* (2), and the Bombay and Madras cases cited therein. S. 451 applies where there has been no previous waiver. The case of *Emperor v. Sullivan* (3) makes no reference to s. 454.

Babu Birbhusan Dutt, for the opposite party. S. 454 must be read with s. 451. The accused has the right of trial by jury at any time before he is called upon for the defence: *Emperor v. Sullivan* (3).

NEWBOULD J. On the complaint of the petitioner the opposite party, Mr. A. J. L. Allen, was summoned to answer a charge of having committed an offence punishable under section 297 of the Indian Penal Code. The case was on the file of Mr. J. P. Das, Sub-Deputy Magistrate. Before him, on the 24th October, before any evidence was taken, the opposite party claimed to be tried by an European Judge. He was required to adduce evidence that he was an European

(1) (1880) I. L. R. 6 Calc. 83. (2) (1909) I. L. R. 37 Calc. 467.

(3) (1902) I. L. R. 24 All. 511.

British subject. On the 4th November he satisfied the trying Magistrate on this point, and the records were submitted to the District Magistrate. On the 11th November the case came up for hearing before Mr. D. K. Mitter, Additional District Magistrate, and the opposite party then said that he did not want to be tried by a jury. Prosecution witnesses were examined in chief on different dates. On the 13th December the accused was examined and a charge framed, and the case adjourned to the 6th January for cross-examination of prosecution witnesses. On that date the charge was slightly amended, and the opposite party claimed to be tried by jury. The case was, therefore, adjourned, and jurors were summoned for the 2nd February. On the 8th January the petitioner objected to the opposite party being allowed to exercise the right of claiming trial by jury. This objection was overruled, and it is against this order that the petitioner has obtained the present Rule.

On behalf of the petitioner reliance is placed on the provisions of section 454 of the Criminal Procedure Code. The portion of the section relevant to this contention runs as follows:—"If an European British subject does not claim to be dealt with as such by the Magistrate before whom he is tried...he shall be held to have relinquished his right to be dealt with as such European British subject, and shall not assert it in any subsequent stage of the same case". It is contended that the opposite party having expressly waived his right to be dealt with as an European British subject, on the 11th November, is prevented by the provisions of this section from claiming this right at a subsequent stage of the case on the 6th January. For the opposite party it is contended that section 454 of the Criminal Procedure Code must be read with section 451, clause (2), which provides for a warrant

1923

MAHEUL
ARMAD
v.
ALLEN.
NEWBOULD
J.

1923
 ———
 MAKBUL
 AHMAD
 v.
 ALLEN.
 ———
 NEWBOULD
 J.

case like the present. "If a claim is made under sub-section (1) at the time when the Magistrate calls "upon the accused under section 256 to enter upon his defence, the Magistrate shall forthwith issue the "necessary orders for trial by jury as aforesaid". It is urged that this gives an accused European British subject the right to claim trial by jury any time before he is called on to enter upon his defence. Under section 256 of the Criminal Procedure Code he cannot be called on to enter upon his defence until after all the prosecution witnesses have been examined, cross-examined and re-examined. The opposite party's claim on the 11th November was, therefore, made within the time provided by law, and was rightly allowed by the Magistrate. We hold that this contention on behalf of the opposite party should prevail. Section 454 of the Criminal Procedure Code does not in express terms deal with a case like the present where the claim has been made but subsequently withdrawn. The section clearly applies to the case where no claim has been made which would be valid under section 451 of the Criminal Procedure Code. When the law allows an accused to reserve his claim until he is called on to make his defence, we see no reason why he should not be allowed to reconsider and cancel a previous waiver, provided he does so within the time allowed. On behalf of the petitioner several rulings were cited, but none of them have any bearing on the only point that arises in this Rule, the right of an accused European British subject to cancel a waiver. The opposite party's contention is, however, supported by a decision of the Allahabad High Court in *Emperor v. Sullivan* (1). We, therefore, hold that the Magistrate's order was right, and discharge this Rule.

(1) (1902) I. L. R. 24 All. 511.

SUHWARDY J. I agree. Reading sections 451 and 454 of the Criminal Procedure Code, together, it seems to me that the latter section is an explanatory corollary to the former. Their joint import may be thus expressed:—An European British subject may claim to be tried by a jury at any time before he enters on his defence, but if he does not do so, he must be considered to have relinquished such right, and shall not be allowed to assert it again. The latter provision may be deduced from the wording of section 451 itself, but the Legislature by enacting section 454 intended to make *ex cautela* the meaning of this special legislation clear by saying that the right, personal to the accused, would be lost if not asserted before a certain point of time. There is no express provision of law that the right once waived cannot be asserted at any time before the accused is called upon to enter on his defence, but what the Code lays down is that once he has allowed that opportunity to pass, he cannot avail himself of the privilege again. I am fortified in my view by the provisions of clause (3) of section 451. If the accused asserts the right at any earlier stage of the proceedings, *i. e.*, before he enters on his defence, the Magistrate shall adopt the special procedure if he finds that there will be a sufficient case to go before a jury. If express waiver at an earlier stage was intended to be irrevocable there should have been some corresponding procedure laid down. But the law is silent about express waiver, and it has been found necessary to determine judicially that the right may be expressly waived: *Barindra Kumar Ghose v. Emperor* (1), and *Queen-Empress v. Bartlett* (2). I agree in discharging this Rule.

E. H. M.

Rule discharged.

(1) (1909) I. L. R. 37 Calc. 467.

(2) (1892) I. L. R. 16 Mad. 302.

1923
 MAKBUL
 AHMAD
 &
 ALLEN.
 SUHRA-
 WARDY J.