

CRIMINAL REVISION.*Before Cuming and Graham JJ.*

CARMEN

v.

O'BRIEN.*

1927

March 23.

European British Subject—Claim to be dealt with as such—Time of making the claim—Right of trial by first class Magistrate—Waiver—Revival of the claim—Criminal Procedure Code (Act V of 1898), ss. 29A and 528A, 528B.

In a case falling within the provisions of s. 528A of the Criminal Procedure Code, the claim to be tried as a European British subject under s. 29A, must be made before the trial or inquiry has actually commenced. Where no such claim is made before the trial Magistrate, at that stage of the case, it cannot be made subsequently.

Quære : whether a European British subject, who has once waived his right, can revive the claim to be tried as such.

ON the 18th October, 1926 Miss Carmen filed a complaint, before the Police Magistrate of Alipore, against the accused, Michael O'Brien, under section 406 of the Penal Code, and a warrant was issued. On the 9th November, the Magistrate transferred the case to Mr S. C. Gupta, a second class Magistrate, for disposal. The latter took up the case on the same day and the complainant was partly examined-in-chief.

No claim was made by the accused to be tried under section 29A, as a European British subject, by a first class Magistrate. On the next day three prosecution witnesses were examined, but no such claim made. On the 22nd November the accused was

* Criminal Revision No. 105 of 1927, against the order of J. R. Blair, Additional District Magistrate, 24-Parganas, dated Jan. 10, 1927.

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examined and a charge framed to which he pleaded not guilty. The Magistrate then asked him whether he claimed to be tried as a European British subject, and he replied in the negative. His pleader, however, filed a petition claiming the right to be tried as such, but later in the day his counsel stated to the Court that he had waived his claim.

The complainant was cross-examined on the 24th and the three prosecution witnesses were cross-examined the next day. On the 27th the complainant was further cross-examined, and two more prosecution witnesses were examined. On the 14th December the cross-examination of the complainant and the five prosecution witnesses concluded, and two more prosecution witnesses were examined-in-chief and one of them cross-examined. On the 21st December an application was filed by the accused's pleader claiming the right to be tried by a first class Magistrate, as a European British subject, but it was rejected.

The accused then made an application to the District Magistrate for a transfer, and on the 10th January 1927 the latter withdrew the case and transferred it to Mr. A. Bose, first class Magistrate, holding that the accused had the right to revive his claim at any time before judgment.

Mr. Swinhoe (with him *Babu Bir Bhusan Dutt* and *Babu Sudhirendra Nath Bose*), for the petitioner. Under section 528 A of the Code the claim to be dealt with as a European British subject must be made before the trial commences. If it can be made at any time before judgment, the result would be that the trial would have to commence *de novo*. Under section 451 A of the Code of 1882, a European British subject could claim a trial by Jury, in a warrant case, before he entered on his defence under section 256. This

limitation appears in section 443, but not in section 528 A. Refers to *Queen-Empress v. Grant* (1). The District Magistrate was wrong in acting under section 528: the case really came before him under section 438.

Mr. S. K. Sen (with him *Babu Debendra Nath Bhattacharya*), for the opposite party. The words "brought before" in section 528 A only indicate the Magistrate. In sub-section (3) of the same section and in section 528 B the words are "is tried", and mean that the claim may be made at any time during the trial: see *Emperor v. Harendra Chandra Chakravarty* (2). The repealed section 451 A fixed a time limit, but there is none in the present section 528 A. Cites *Clark v. Beane* (3). The claim under the section can be revived after waiver: *Emperor v. Sullivan* (4); *Makbul Ahmad v. Allen* (5).

CUMING J. The facts of the case out of which this Rule arises are briefly as follows. On the 18th of October the petitioner in this Rule obtained a warrant against the opposite party under section 406 of the Indian Penal Code in the Court of the Police Magistrate at Alipur. On the 9th November the case was made over by the Police Magistrate, Mr. Mahmood Ali, to Mr. S. C. Gupta for disposal. Mr. S. C. Gupta is a Magistrate exercising the powers of a Magistrate of the second class. Mr. Gupta began the trial on the 9th November, when he examined one prosecution witness and adjourned the case till the 10th, when three more prosecution witnesses were examined. The trial proceeded also on the 22nd November, when the accused was questioned and the charge was

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(1) (1888) I. L. R. 12 Bom. 561. (2) (1924) I. L. R. 51 Calc. 989, 981.

(3) (1866) 5 W. R. Cr. 53.

(4) (1902) I. L. R. 24 All. 511.

(5) (1923) I. L. R. 50 Calc. 639.

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framed. The learned Magistrate then asked the accused if he claimed trial as a European British subject. The learned Magistrate was apparently under the impression that he was obliged to ask an accused, who apparently was a European British subject, whether he claimed to be tried as such. I may point out here that such a procedure is no longer necessary, so far as a case which comes within Chapter XLIVA of the Criminal Procedure Code is concerned. The accused apparently then stated that he did not desire to be so tried. His counsel then filled a petition claiming to be tried as a European British subject. Apparently he subsequently waived this claim and stated that he desired to cross-examine the complainant next day, and his client would waive his right to be dealt with as a European British subject. The case was then continued on the 24th November, when more witnesses were examined and cross-examined, and the case was continued on the 25th and 27th of November and 4th and 21st of December. On the 21st of December the accused once more claimed the right to be dealt with as a European British subject. The learned Magistrate holding that he had already been asked whether he claimed this right and had waived this right, rejected the application.

The accused then asked for time to move the District Magistrate or the Appellate Court for a decision on the point. This, however, was refused and the case was continued. The accused then seems to have moved the Additional District Magistrate for a transfer of the case to the file of a first class Magistrate, the contention of the accused being that as a European British subject under section 29A of the Criminal Procedure Code he was entitled to be tried by a Magistrate of the first class. The complainant,

opposite party, contended before Mr. Blair, the Additional District Magistrate, that as the accused had waived his right to be so tried he could not now re-assert it. Mr Blair, however, held that the right might be exercised by the accused any time up to the time when the Court was going to pass judgment in the case. He further held that it was open to him to revive his claim even though he specifically abandoned it. In this view of the law he withdrew the case from the file of Mr. S. C. Gupta and made it over to Mr Alfred Bose, a Magistrate exercising first class powers.

The complainant has moved this Court, and she contends first of all that the claim to be dealt with as a European British subject, in other words, in this particular case, that the case should be heard by a first class Magistrate, must be made before the trial actually began; and secondly she contends that once the accused has waived his right to be dealt with as a European British subject or, in other words, to have his case tried by a Magistrate of first class powers, he cannot revive his right.

The rule has been granted on four grounds, first that the learned Additional District Magistrate is wrong in holding that the claim to be tried as a European British subject, in a case contemplated by sections 29A, 528A and 528B of the Criminal Procedure Code, could be made at any time before judgment is delivered: secondly that the learned Additional District Magistrate acted without jurisdiction in using the provisions of section 528 of the Criminal Procedure Code, for the purpose of getting over an order which under the Code he could not do before the final orders in the case were passed: thirdly that the learned Additional District Magistrate should have held that a claim to be tried as a European

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British subject, under sections 29A, 528A and 528B of the Criminal Procedure Code, had to be made at the very beginning of the trial, and if the claim so made was disallowed by the trial Court the remedy against the order disallowing the claim lay before the Court which would hear the appeal after a conviction or other order in the said case had been passed: and lastly that the accused having once waived his right, the learned Additional District Magistrate should have held that the accused having once waived his right could not re-assert it in a later stage of the same case.

The decision of this Rule turns upon the interpretation to be put upon sections 528A and 528B of the Criminal Procedure Code. These sections are new, and hitherto have not formed the subject matter of judicial interpretation. Hence the question may be considered as one of more or less of first impression. Section 29A provides that "no Magistrate of the second or third class shall inquire into or try any offence which is punishable otherwise than with fine not exceeding fifty rupees where the accused is a European British subject who claims to be tried as such". The point is, as I have already said, when that claim is to be made. Section 528A provides that "where, in any case to which the provisions of Chapter 33 do not apply, any person claims to be dealt with as a European or Indian British subject, or where any person claims to be dealt with as a European (other than a European British subject) or an American, he shall state the grounds of such claim to the Magistrate before whom he is brought for the purpose of the inquiry or trial and such Magistrate shall inquire into the truth of such statement. . . .". Mr. Swinhoe, who has argued this case on behalf of the petitioner, has contended

that these words make it quite clear that the accused must exercise his option to claim the privilege under section 29A of the Criminal Procedure Code before the trial actually commenced. Mr. Sen, who has appeared for the opposite party, on the other hand contends, looking at the analogy of section 451A, that the accused may apply at any time before the judgment is pronounced by the Magistrate. He points out that under the old Code, under section 451A, this privilege might be claimed in a summons case at any time before the accused was heard in defence or in a warrant case before he entered on his defence, and the learned counsel's argument is that, as no such limitations are put down in the present section 528 A, the Legislature intended that the privilege might be claimed at any time before the judgment is pronounced.

Apart from the manifest inconvenience which must follow, if Mr Sen's contention is correct, I think it is quite clear, reading the sections as we have them, that the Legislature intended that the claim should be made before the trial or inquiry actually commenced. The words used are "he shall state the grounds of such claim to the Magistrate before whom he is brought for the purpose of the inquiry or trial". I understand these words to mean that he should make his claim as soon as he is brought before the Magistrate for the inquiry or trial, that is to say, before the inquiry or trial is commenced. Mr. Sen argues from section 528B that the claim may be made at any time during the trial, because we find in that section the following expression: "If in any such case a European or Indian British subject or a European (other than a European British subject) or an American does not claim to be dealt with as such by the Magistrate before whom he is tried or by

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“whom he is committed”, and Mr. Sen argues from that that the claim may be made at any time during the trial before the Magistrate. I do not think that these words really support Mr. Sen's contention. I am inclined to think, reading the section as a whole, that these words refer to the case of a person who has been tried or whose case has been inquired into, but who has not claimed the privilege. 528B deals, I think, with the case of a person whose case has reached either the appellate stage or the trial in the Court to which he has been committed.

I do not think that any useful purpose will be served by considering the sections as they stood in the various Acts at various times. The sections are, I think, by themselves reasonably clear. There is no doubt that the claim must be made before the inquiry or trial actually begins so far as a case which falls within Chapter XLIVA is concerned.

That being so, it is unnecessary for us to determine whether the accused, having once waived his right to so claim, can revive that claim and be ordered to be tried as a European British subject. In the present case, not having made his claim when he was first brought before the Magistrate for the purpose of trial or inquiry, it was not open to revive or make it at any subsequent stage. In this case admittedly he made no claim at that stage.

The Rule is, therefore, made absolute. The order of the learned Additional District Magistrate is set aside, and the case will be re-transferred to the file of Mr. S. C. Gupta to be continued from that point where the learned Magistrate left off the trial of the case, and the case disposed of without any further delay.

GRAHAM J. I agree with my learned brother. One of the points for decision is as to the stage when

the claim to be dealt with as a European British subject should be made. The learned counsel on behalf of the opposite party argued that that claim could be made at any time up to the delivery of judgment, and in support of his argument referred to the previous history of the Criminal Procedure Code and to certain authorities.

It appears to me that, unless the sections of the Code as it now stands are held to be obscure, we should not be justified in referring to the previous legislation. In my opinion on a proper construction of the sections of the Code, as it now stands, and in particular sections 528A and 528B, it seems to be clear that the intention is that the claim shall be made at the commencement of the inquiry or trial as the case may be, and that if it is not then made it cannot be asserted at any subsequent stage. The question of status involves the mode or venue of trial, and it is in accordance with the fitness of things that the claim should be made at the outset.

The authorities to which reference has been made relate to the former Code, and in particular to section 451 of the old Criminal Procedure Code which has now been repealed. They do not, therefore, give us any assistance.

In my judgment there was a failure in this case to make the claim at the time contemplated by the Code, possibly due to the fact that the provisions of the new Code on the subject were not at the time appreciated.

I concur in the order which my learned brother proposes to make, and agree that the Rule should be made absolute.

E. H. M.

Rule absolute.

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