

## APPELLATE CRIMINAL.

1902  
June 18.*Before Mr. Justice Aikman.*

EMPEROR v. C. J. SULLIVAN.\*

*Criminal Procedure Code, section 451 (1)—European British subject—Right of European British subject to be tried by a jury—Such right claimable at any time before accused has entered upon his defence notwithstanding previous waiver.*

One Sullivan was sent for trial to the District Magistrate of Meerut, the offence alleged against him being one under section 354 of the Indian Penal Code, *i. e.*, a warrant-case. At the outset of the proceedings the accused was asked whether he wished to be tried by a jury, and replied in the negative. A charge was framed against the accused, and at his request certain witnesses who had been examined for the prosecution were ordered to be recalled for cross-examination. After the charge was framed, but before the accused had entered upon his defence, an application for a jury was presented on behalf of the accused. The Magistrate disallowed this application.

*Held*, that the fact that the accused, before the trial had begun, had stated that he did not wish for a jury, did not prevent him from afterwards claiming a jury within the time allowed by section 451 (1) of the Code of Criminal Procedure, and that the Magistrate was wrong in disallowing the application.

ONE C. J. Sullivan was sent for trial to the District Magistrate of Meerut, the offence alleged against him being one under section 354 of the Indian Penal Code, *i. e.*, a warrant case. At the outset of the proceedings the Magistrate formally asked the accused whether he wished to be tried as an European British subject, and formally recorded the answer of the accused that he did not. The trial was then proceeded with and a charge was framed against the accused, and at his request certain witnesses who had been examined for the prosecution were recalled for cross-examination. About this stage of the trial, before a date had been fixed for the re-appearance of the prosecution witnesses asked for by the accused, an application was presented on behalf of the accused asking that he might be tried by a jury. The Magistrate rejected this application as having been made too late, and, continuing the trial, found the accused guilty and sentenced him accordingly. Against this conviction and sentence the accused first applied in revision to the High Court, but, after the finding of the Court that by reason of section 439(5) no application in revision could be entertained, the

\* Criminal Appeal No. 434 of 1902.

1902

---

 EMPEROR  
 v.  
 C. J.  
 SULLIVAN.

present appeal was filed. The sole contention argued (though the appeal was on the merits) was that the Magistrate was wrong in refusing the appellant's application for a jury.

Mr. *C. Dillon*, for the appellant.

The Government Pleader (*Maulvi Ghulam Mujtaba*), for the Crown.

AIKMAN, J.—This is an appeal on behalf of one C. J. Sullivan, who has been convicted by the District Magistrate of Meerut of an offence punishable under section 354 of the Indian Penal Code, and sentenced to six months' rigorous imprisonment. The appeal is on the merits. But a preliminary objection is also taken in the petition of appeal to the legality of the proceedings of the District Magistrate.

Without entering into the merits of the case, I am of opinion that this appeal must be disposed of on the legal objection referred to. The appellant is an European British subject. The offence with which he was charged is an warrant case within the meaning of the Code of Criminal Procedure. By the provisions of section 451, sub-section (1) of the Code, an European British subject, in a trial before a District Magistrate in a warrant case may, "before he enters on his defence under section 256, claim that the trial shall be by jury." It appears that, in the present case, at the outset of the proceedings, the accused was asked if he wished to be tried by a jury, and replied in the negative. A charge was framed against the accused, and at his request certain witnesses who had been examined for the prosecution were ordered to be re-called for cross-examination. In his judgment the Magistrate observes:—"After the charge-sheet had been framed, an application for a jury was presented on his (the accused's) behalf. But it was then too late to accede to such a request." This application, it appears, was made by the accused's counsel on the 22nd of April, before the date fixed for the re-appearance of the witnesses for the prosecution. The language of section 256 shows that the application thus made was made before the accused entered on his defence. It was refused by the District Magistrate who dealt with the case himself. The sole question which I have to determine is, whether the fact that the accused, before the trial had begun,

1902

EMPEROR  
v.  
C. J.  
SULLIVAN.

stated that he did not wish for a jury, prevented him altering his mind afterwards, and claiming a jury within the time allowed by section 451, sub-section (1). I am clearly of opinion that there was nothing to prevent the accused, when he had heard the evidence for the prosecution, altering his mind and availing himself of the privilege allowed him by law. His refusal to claim that privilege at the outset of the proceedings can in no way estop him from afterwards asserting his right, provided he does so before he has entered on his defence. After that it would be too late. It may well be that an accused, before he has heard the evidence for the prosecution, may think the case had better be disposed of by the Magistrate himself, and that after he has heard the evidence he may see that it would be for his benefit to have the evidence submitted to a jury. I therefore hold that the Magistrate's opinion that it was too late on the 22nd of April to accede to the accused's request is erroneous. That request ought to have been granted, and after it was made, the Magistrate had no power to dispose of the case himself.

For this reason I quash the conviction and sentence, and direct that the Magistrate take up the case from the stage it had reached when the request was made, that he grant that request, and thereafter deal with the case according to law. If the accused was on bail during the trial he ought to be admitted to the same bail. If not, he will be detained as an under-trial prisoner until the conclusion of the trial or until further orders. I note that at the conclusion of his judgment the learned District Magistrate says that he would have committed the case to the Court of Session if it had not been for the prisoner's youth, and the season of the year. If the accused or his counsel wishes the case to be committed, then, in my opinion, the District Magistrate would do well to accede to that wish.