

## SPECIAL BENCH (CRIMINAL).

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Mya Bu, and  
Mr. Justice Baguley.

1934

Dec. 13.

H. W. SCOTT *v.* KING-EMPEROR.\*

*Appeal—Conviction at Sessions Trial by High Court—Right of Trial under Chapter 33, Criminal Procedure Code—Claim of trial to be made specifically by accused—Investigation and Finding by magistrate essential—Omission of magistrate to inform accused of his rights—Criminal Procedure Code (Act V of 1898), ss. 418, 443, 447, 449 (1) (a), 534.*

The right of appeal under s. 449 (1) (a) of the Code of Criminal Procedure depends, not upon whether in certain circumstances the accused might have been tried under the provisions of Chapter 33 of the Code, but whether he was in fact so tried.

Unless under s. 443 (1) (a) a claim has duly been made and determined by the magistrate before the accused is committed for trial or, in case of rejection by the magistrate by the Sessions Judge, the right of the accused to be tried under the provisions of Chapter 33 does not accrue.

The omission by the magistrate to inform the accused of his rights under Chapter 33 does not affect the validity of the proceedings (s. 534). No appeal lies from the verdict and judgment in a trial held at the Sessions of the High Court under the provisions of s. 418 of the Criminal Procedure Code.

*U Zagariya v. King-Emperor*, I.L.R. 3 Ran. 220—*referred to and overruled pro tanto.*

The accused was tried at the Sessions of the High Court upon a charge of murder. The jury unanimously found him guilty, and he was sentenced to death. The accused preferred an appeal under s. 449 of the Criminal Procedure Code, and claimed that he had been tried under the provisions of Chapter 33 of the Code. Neither in the Court of the magistrate nor at the trial before the High Court did the accused make a claim under s. 443. No enquiry was made by the committing magistrate as to the status of the accused or of the complainant, nor did the magistrate record any finding that the case ought or ought not to be tried under the provisions of Chapter 33. The accused relied on an entry in the committing magistrate's diary that he was an European British subject, that the first information report was signed in hindi by the person lodging it, that the trial was held in accordance with the provisions of s. 275 of the Code, that the majority of the jurors were Europeans, and that the accused was not informed by the committing magistrate of his rights under Chapter 33.

*Held*, that the accused was not tried by a jury in the High Court under the provisions of Chapter 33.

\* Criminal Appeal No. 1710 of 1934 from the order of this Court in Sessions Trial No. 42 of 1934.

*McDonnell* (with him *Williams*) for the appellant. The first information report in the present case was signed by an Indian. The accused is an European British subject and is entitled to the benefit of the provisions of Chapter 33 of the Code of Criminal Procedure. Even though no specific claim was in fact advanced as required by s. 443 of the Code the accused has been tried by a majority of European jurors, and the committing magistrate has also certified that the accused is an European British subject. Moreover, under s. 447 the committing magistrate was under an obligation to inform the accused of his rights under this Chapter, and he did not do so.

1934  
SCOTT  
v.  
KING-  
EMPEROR

[PAGE, C.J. But see s. 534 of the Code.]

S. 449 of the Code confers a general right of appeal, and where the provisions of the Chapter have been impliedly complied with the accused should not be deprived of his valuable right of appeal. Though s. 449 (1) contains a reference to trials under that Chapter there is no special procedure prescribed for such trials.

*Martindale v. Emperor* (1); *A. H. Turner v. Emperor* (2); *Gallagher v. Emperor* (3); *U Zagariya v. King-Emperor* (4).

PAGE, C.J.—Henry Wall Scott was tried at the November Sessions of the High Court before Dunkley J. and a jury upon a charge of murder under section 302 of the Indian Penal Code. The jury by a unanimous verdict found the accused guilty, and he was sentenced to death.

On his behalf an appeal against the verdict and the sentence passed upon him at the trial has been

(1) I.L.R. 52 Cal. 347.

(3) I.L.R. 54 Cal. 52.

(2) I.L.R. 52 Cal. 636.

(4) I.L.R. 3 Ran. 220.

1934

SCOTT

v.

KING-  
EMPEROR.

PAGE, C.J.

preferred to the High Court under section 449 of the Criminal Procedure Code (Act V of 1898 as amended). Under section 449 (1) (a) it is provided that

“ where a case is tried by a jury in a High Court or Court of Session under the provisions of this Chapter ; then notwithstanding anything contained in section 418 or section 423, sub-section (2), or in the Letters Patent of any High Court, an appeal may lie to the High Court on a matter of fact as well as on a matter of law.”

The application now before the Court is for the admission of the appeal, and the question to be determined is whether in the circumstances of the present case an appeal lies under section 449 of the Criminal Procedure Code. Now, under section 443 it is provided that

“(1) where in the course of the trial outside a presidency-town of any offence punishable with imprisonment, the accused person, at any time before he is committed for trial under section 213 or is asked to show cause under section 242 or enters on his defence under section 256, as the case may be, claims that the case ought to be tried under the provisions of this Chapter, the magistrate inquiring into or trying the case, after making such inquiry as he thinks necessary, and after allowing the accused person reasonable time within which to adduce evidence in support of his claim, shall, if he is satisfied—

- (a) that the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects, or
- (b) that in view of the connection with the case of both an European British subject and an Indian British subject, it is expedient for the ends of justice that the case should be tried under the provisions of this Chapter,

record a finding that the case is a case which ought to be tried under the provisions of this Chapter, or, if he is not so satisfied, record a finding that it is not such a case.

(2) where the magistrate rejects the claim, the person by whom it was made may appeal to the Sessions Judge, and the decision of the Sessions Judge thereupon shall be final and shall not be questioned in any Court in appeal or revision."

Under section 444 it is provided that

"for the purposes of section 443, 'complainant' means any person making a complaint, or in relation to any case of which cognizance is taken under clause (b) of section 190, sub-section (1), any person who has given information relating to the commission of the offence within the meaning of section 154."

In other words, the "complainant" (subject to the proviso to section 444), means either a person who has given information of the offence to a magistrate, or a person who has lodged what is commonly known as the first information report to the police. [S. 4 (1) (h); s. 154.]

Now, in the present case the learned advocate who appeared on behalf of the appellant stated and conceded that neither in the Court of the magistrate before the accused was committed to trial, nor in the course of the trial, nor at any other time was a claim made by the accused under section 443 that the case ought to be tried under the provisions of Chapter 33. It was further stated and conceded that no enquiry was made by the committing magistrate as to the status of the accused or of the person who made the first information report, and that the magistrate did not record a finding that the case was one which ought or ought not to be tried under the provisions of Chapter 33. Nevertheless, it was contended that an appeal lay under section 449 (1) (a).

In support of his contention Mr. McDonnell referred to an entry in the diary of the 3rd of September 1934, purporting to have been made on

1934  
 SCOTT  
 v.  
 KING-  
 EMPEROR.  
 PAGE, C.J.

the day upon which the accused was committed for trial before the High Court, in which the magistrate certified "that Mr. H. W. Scott is an European British subject under the Code."

The learned advocate then stated that, as it appeared that the first information report had been made by one Ramsaiwat on the 23rd of June 1934, and that the report was signed by Ramsaiwat in hindi, he hoped to satisfy the Court that the complainant was an Indian British subject.

He added that at the commencement of the trial at the Sessions before Dunkley J. an oral application was made by Mr. Williams, the learned advocate who was then appearing for the accused, that the trial should be held in accordance with the provisions of section 275 of the Code, and that, the application being granted, the majority of the jury who tried the accused were European British subjects.

Lastly, he pointed out that the committing magistrate did not at any stage of the enquiry before him "inform the accused person of his rights under this Chapter." (S. 447.)

In these circumstances the learned advocate for the appellant contended that the accused had been tried by a jury in the High Court "under the provisions of Chapter 33 of the Code."

Now, it is well to point out that the right of appeal under section 449 (I) (a) depends, not upon whether in certain circumstances the accused might have been tried under the provisions of Chapter 33, but whether he was in fact so tried; and as regards any question as to whether the trial was rendered invalid by reason of the alleged failure of the committing magistrate to comply with the provisions of section 447, it is

enough to say that the matter is concluded against the appellant by section 534 of the Code [*U Zagariya and three others v. King-Emperor* (1)].

Further, it is to be borne in mind that merely because an accused person is tried in accordance with the provisions of section 275 it does not follow that the accused was tried under Chapter 33, because a claim to be tried under section 275 can validly be made whether the complainant and the accused are both European or Indian British subjects, or one is an European and the other an Indian British subject. As regards the main contention urged on behalf of the appellant I am clearly of opinion that, before it can be held that there has been a trial by a jury in the High Court under the provisions of Chapter 33 within the meaning of section 449 (1) (a), it is incumbent upon the appellant to satisfy the Court that he had duly preferred a claim before the magistrate that the case ought to be tried under the provisions of Chapter 33 before he was committed for trial, and that upon such claim having been made the magistrate, after making such enquiry as he deemed necessary and being satisfied that the status of the complainant and the accused respectively were such as to entitle the accused to a trial under Chapter 33, had recorded a finding that the case was one which ought to be tried under the provisions of that Chapter ; or that the magistrate on the claim having duly been made to him in that behalf had rejected the claim, but that on appeal to the Sessions Judge the claim of the accused to be tried under Chapter 33 had been granted. In my opinion the Legislature plainly intended and

1934  
SCOTT  
V.  
KING-  
EMPEROR.  
PAGE, C.J.

1934  
 SCOTT  
 v.  
 KING-  
 EMPEROR.  
 PAGE, C.J.

enacted that before a trial could be held under the provisions of Chapter 33 the question whether the complainant and the accused possessed different nationalities should be investigated and determined by the magistrate as a preliminary issue in the case before the accused was committed to trial, and that unless the claim was duly made and had been determined by the magistrate or by the Sessions Judge as the case might be the right of the accused to be tried in accordance with the provisions of Chapter 33 did not accrue.

In the present case the nationality of the person who made the first information report has never been investigated, and there is no finding on the record as to what his nationality is. It is further conceded, as I have stated, that no claim was made in the committal Court or at any time that the trial should be held under the provisions of Chapter 33; and that no finding was recorded by the magistrate that the case was one that ought to be tried under the provisions of this Chapter. Mr. McDonnell contended that the appellant would be able to satisfy the Court, if the appeal was heard, that the status of "the complainant" and of "the accused" necessary for the purpose of entitling the accused to a trial under the provisions of Chapter 33 existed at the time of the trial. It matters not; because, as it is neither contended nor pretended that the condition precedent to the accrual of a right to be tried under the provisions of Chapter 33 was fulfilled, namely, that a claim to be tried under that Chapter had been made, investigated, and determined as therein provided, in my opinion it necessarily follows and must be held that the accused was not tried by a jury in the High Court under the provisions of Chapter 33.

The decisions in *Martindale v. Emperor* (1) and *Turner v. Emperor* (2) are not in point, for these cases turned on the construction of section 449 (1) (c), which gives rise to different considerations.

1934  
SCOTT  
v.  
KING-  
EMPEROR.  
PAGE, C.J.

It is desirable that we should add, with all due respect, that we do not agree with the judgment of Robinson C.J. and Maung Gyi J. in *U Zagariya and three others v. King-Emperor* (3), in so far as it was therein suggested or laid down that an appeal from the verdict and judgment in a trial held at the Sessions of the High Court would lie under the provisions of section 418 of the Code. To that extent *U Zagariya and three others v. King-Emperor* (3) is overruled.

For these reasons, in my opinion, the appeal is misconceived, and it is dismissed.

MYA BU, J.—I agree that the appellant has no right of appeal in this case. This right is sought under section 449 (1) of the Criminal Procedure Code which runs as follows :

“Where a case is tried by jury in a High Court or Court of Session under the provisions of this Chapter, then, notwithstanding anything contained in section 418 or section 423, sub-section (2) or in the Letters Patent of any High Court, an appeal may lie to the High Court on a matter of fact as well as on a matter of law.”

Now, in order to bring the case within the purview of this section the trial by jury must have been a trial under the provisions of Chapter 33 of the Code. Under section 443 an accused person may, at any time before he is committed for trial under section 213, or is asked to show cause under section 242, or enters upon his defence under section 256,

(1) (1924) I.L.R. 52 Cal. 347.

(2) (1925) I.L.R. 52 Cal. 636.

(3) (1925) I.L.R. 3 Ran. 220.



1934  
 SCOTT  
 v.  
 KING-  
 EMPEROR.  
 MYA BU. J.

claim that the case ought to be tried under the provisions of this Chapter ; and if such a claim is made the magistrate enquiring into or trying the case, after making such enquiry as he thinks necessary, has to come to certain findings as to the nationality of the complainant and that of the accused, and upon such findings depends the decision as to whether a case should or should not be tried under the provisions of this Chapter. If the magistrate decides that the case ought to be tried under the provisions of Chapter 33, or if the Sessions Judge, upon appeal against the magistrate's rejection of the accused's claim, so decides, (1) where the case is a summons case, it is to be dealt with according to the procedure prescribed in section 445, or (2) where the case is a warrant case, the magistrate enquiring into or trying the case shall, if he does not discharge the accused under section 209 or 253, commit the case for trial to the Court of Session whether the case is or is not exclusively triable by that Court. Therefore, even if a case be one which is ordinarily triable by a magistrate, if it is a warrant case and if the claim of the accused is upheld, the case must be committed to the Court of Session, whether the case is or is not exclusively triable by that Court. When the case has been committed under this rule, and if the trial is by jury, the Court trying the case must follow the provisions of section 275 the first sub-section of which provides :

“ In a trial by jury before the High Court or Court of Session of a person who has been found under the provisions of this Code to be an European or Indian British subject, a majority of the jury shall, if such person before the first juror is called and accepted so requires, consist, in the case of an European British subject, of persons, who are Europeans or Americans and, in the case of an Indian British subject, of Indians.”

It must here be noted that for the validity of the requisition under section 275 (1), the accused must "have been found under the provisions of this Code to be an European or Indian British subject."

In the present case the accused did not make a claim to have the case tried under the provisions of Chapter 33 when the case was in the Court of the magistrate or at any time afterwards. It is however stated at the Bar that the learned advocate defending him at the trial before Dunkley J. invoked the aid of section 275 (1) by asking on behalf of the accused that the majority of the jury should consist of European British subjects, and the majority of the jury ~~did~~ consist of European British subjects. It is urged on behalf of the accused that although a claim to have the case dealt with under Chapter 33 had not been made before the magistrate as provided by section 443, the requisition under section 275 (1) of the Code of Criminal Procedure was sufficient to convert the trial by jury before the High Court into a trial under the provisions of Chapter 33. This contention, in my opinion, cannot be maintained. It is, to my mind, clear that in order that a trial by jury before a High Court or Court of Session may validly be regarded as a trial under the provisions of Chapter 33 a claim for trial under the provisions of that Chapter must have been made and upheld under section 443, before the case is committed by the magistrate; and, therefore, for the purpose in hand it appears to me that it is essential to the validity of the requisition under section 275 (1) that a claim to be tried under the provisions of Chapter 33 must have been made and upheld under section 443. Otherwise, the words "who has been found under the provisions of this Code" in section 275 (1) would bear no meaning

1934  
SCOTT  
v.  
KING-  
EMPEROR.  
MYA BU, J.

1934  
 SCOTT  
 v.  
 KING-  
 EMPEROR.  
 MYA BU, J.

whatever; for the only provisions of this Code under which an enquiry and a finding as to the nationality of an accused person are made are section 443 and section 528 (A), and the latter section is expressly meant for cases to which the provisions of Chapter 33 do not apply. Therefore, it is obvious that for the validity of a requisition under section 275 (1) as one made in a trial under the provisions of Chapter 33 there must have been a claim under section 443 of the Code, which is absent in this case. Another reason why a trial before the Court of Session in which neither a claim nor an enquiry has been made under section 443 cannot be deemed to be a trial under the provisions of Chapter 33 is that if the case happened to be a warrant case but not exclusively triable by the Court of Session and therefore was one ordinarily within the competence of a magistrate to try and if the magistrate in the absence of any such claim under section 443 were to have tried the case and convicted the accused person, the accused person would not be in a position to challenge the validity of the trial after he has been convicted. For the above reasons, it is clear, in my opinion, that the trial of the appellant was not a trial under the provisions of Chapter 33 of the Code of Criminal Procedure, and therefore the appellant cannot invoke the aid of the provisions of section 449 (1) of the Code.

BAGULEY, J.—I agree that this appeal must be dismissed, but I should like to sum up the position in a few words. The appeal is filed under section 449 of the Criminal Procedure Code. Section 449 gives a right of appeal in cases tried under Chapter 33. Section 443 says that for a trial to be under Chapter 33 at a certain early stage of the

proceedings the accused has got to make a claim that owing to certain facts the trial shall be under Chapter 33. If the Court allows the claim after investigation, then the trial is under Chapter 33. It is admitted in the present case that no such claim was ever made. There was no investigation and no finding that for any reasons Chapter 33 should apply. This being the case, the trial was, like all ordinary trials, under Chapter 23 and under Chapter 23 there is no right of appeal under section 449.

This appeal under section 449 must therefore be rejected.

1934  
SCOTT  
v.  
KING-  
EMPEROR.  
EAGULEY, J.

## CRIMINAL REFERENCE.

*Before Mr. Justice Ba U, and Mr. Justice Mackney.*

### KING-EMPEROR v. ABDUL MAN.\*

1934  
Aug. 27.

*Whipping—Offence punishable with imprisonment and fine—Addition of whipping—Whipping in lieu of imprisonment—Penal Code (Act XLV of 1860), s. 325—Whipping (Burma Amendment) Act (Burma Act VIII of 1927), s. 3.*

Under the provisions of s. 3 of the Whipping (Burma Amendment) Act, 1927, it is lawful to add whipping to a sentence of imprisonment alone, or to a sentence of imprisonment and fine for an offence under s. 325 of the Penal Code. Imprisonment is imperative under the section, whilst fine, in addition to imprisonment, is optional. Fine alone cannot be imposed, and whipping added in lieu of imprisonment.

*Emperor v. Kishen Singh*, I.L.R. 46 All. 174; *King-Emperor v. Tha Kin*, 5 L.B.R. 22; *Nassir v. Chunder*, 9 W.R. (Cr.) 41; *Queen v. Peshagur*, 2 W.R. (Cr.) 32; *Queen-Empress v. Da'gadu*, I.L.R. 16 Bom. 357; *Varadarajulu v. Emperor*, A.I.R. (1925) Mad. 183—referred to.

The following order of reference was made by

MOSELY, J.—The respondent was convicted of causing grievous hurt, an offence under section 325, Indian Penal Code, and

\* Criminal Reference No. 61 of 1934 arising out of Criminal Revision No. 104A of 1934 of this Court.