

**(1923) 03 CAL CK 0007****Calcutta High Court****Case No:** Criminal Rev. No. 59 of 1923

Makbul Ahmed

APPELLANT

Vs

A.J.L. Allen

RESPONDENT

**Date of Decision:** March 14, 1923**Judgement**

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 S. 297, I.P.C. The case was on the file of Babu J.P. Dass, Sub-Deputy Magistrate. Before him on the 24th October, before any evidence was taken, the Opposite Party claimed to be tried by a European Judge. He was required to adduce evidence that he was a European 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 there 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 a jury. The case was therefore adjourned and (sic) 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.

2. On behalf of the Petitioner reliance is placed on the provisions of S. 454, Cr. P.C. The portion of the section relevant to this contention runs as follows:♦ "If a 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 a 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.

3. For the Opposite Party it is contended that S. 454, Cr. P.C., must be read with S. 451, cl. (a) which provides for a warrant case like the present. "If a claim is made under sub-section (1)" at the time when the Magistrate calls upon the accused under sec. 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 S. 256, Cr. P.C., 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. S. 454, Cr. P.C. 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 S. 451, Cr. P.C. Where 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, Emperor v. Sullivan [1902] 24 All. 511.

4. We, therefore, hold that the Magistrate's order was right and discharge this rule.

Suhrawardy, J.

5. I agree. Reading sections, 451 and 454, Cr. P.C. together, it seems to me that the latter section is an explanatory corollary to the former. Their joint import may be thus expressed:♦A 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 S. 451 itself but the Legislature by enacting S. 454 intended to make *excautela* 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 cl. (3) of S. 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 [1909] 37 Cal. 467 - 14 C.W.N. 1114 - 11 Cr. L.J. 453 - 7 I.C. 359 and Queen-Empress v. Bartlett [1892] 16 Mad. 308. I agree in discharging this role.