

(1924) 05 CAL CK 0062

Calcutta High Court

Case No: None

Emperor

APPELLANT

Vs

Harendra Chandra  
ChakravartyRESPONDENT

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**Date of Decision:** May 12, 1924**Acts Referred:**

- Criminal Procedure Code, 1898 (CrPC) - Section 275, 6

**Citation:** (1924) ILR (Cal) 980**Hon'ble Judges:** Mukerji, J**Bench:** Single Bench

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**Judgement**

Mukerji, J.

In the present trial, before the first juror was called, Mr. H.M. Bose, appearing on behalf of the prisoner, claimed that a majority of the jury should be Indians on the ground that the prisoner is an Indian British subject, and based his claim upon the mandatory provisions of Section 275 of the Code of Criminal Procedure. Mr. A.K. Basu, appearing on behalf of the Crown, opposed the application on the ground that the claim was not entertainable in view of the fact that it was not put forward before the committing Magistrate. A similar application made on behalf of the prisoner, at the commencement of the trial which has just now proved abortive, was refused by me; but, as on that occasion I did not give my reasons for the order that I then passed, I have allowed the prisoner to raise the point again, and have considered the matter further; but I do not find any reason to alter the opinion which I then formed.

2. At the outset I may say at once that I quite agree with the contention put forward by Mr. H.M. Bose that the High Court exercising Original Criminal Jurisdiction is not a Court of Session within the meaning of the Code of Criminal Procedure. u/s 6 of the Criminal Procedure Code, Courts of Session belong to a class of Courts different from the High Courts. u/s 9 the Local Government has powers to establish a Court of Session for every

sessions division as defined in Section 7, Sub-section (1), and under Sub-section (2) of Section 9 the Local Government may, by general or special order if the Official Gazette, direct at what place or places the Court of Session so established shall hold its sittings. The expression "Court of Session," wherever it is used in the Code of Criminal Procedure, means a Court established as aforesaid. "High Court" has been defined in the Code of Criminal Procedure, Section 4(j), as meaning, in reference to proceedings against European British subjects, or persons jointly charged with European British subjects, the High Courts of Judicature at Fort William, Madras, Bombay, Allahabad, Patna, Lahore and Rangoon, and the Courts of the Judicial Commissioners of the Central Provinces, Oudh and Sind, and, in other cases, as meaning the highest Court of Criminal Appeal or Revision in any local area, or, where no such Court is established under any law for the time being in force, such officer as the Governor-General in Council may appoint in that behalf. In Section 266 of the Criminal Procedure Code it is provided that the expression "High Court" in Chapter XVIII and in Chapter XXIII of the Code, except in Sections 276 and 307, means a High Court of Judicature established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and includes the Courts of the Judicial Commissioners of the Central Provinces, Oudh and Sind and the Chief Court of Lower Burma and such other Courts as the Governor-General in Council may, by notification in the Gazette of India, declare to be High Courts for the purposes of the said two Chapters.

3. Where, in the Code of Criminal Procedure, the expression "High Court" is used, it bears the one or the other of the aforesaid meanings. The Original Criminal Jurisdiction which the High Court of Judicature at Fort William in Bengal, established under the Indian High Courts Act, 1861, exercises, it does by virtue of Clause 22 of the Letters Patent of December 28, 1865. Section 267 of the Criminal Procedure Code provides that all trials under Chapter XXIII of the Code before a High Court shall be by a jury, and it further provides that, notwithstanding anything contained in the said Code, in all criminal cases transferred to a High Court under the Criminal Procedure Code, or under the Letters Patent of any High Court established, under the Indian High Courts Act, 1861, or the Government of India Act, 1915, the trial may, if the High Court so directs, be by jury. The time and place of holding sittings of the High Court for the exercise of its Original Criminal Jurisdiction are regulated according to the provisions of Sections 334 and 335 of the Criminal Procedure Code.

4. An examination of the provisions of the Code discloses that its scheme recognizes, and is based upon, a distinction between the "High Courts" and "Courts of Session", and the said distinction is maintained throughout. It is necessary for this purpose to refer only to such provisions as relate to the powers vested in the Courts of Session or High Courts for the exercise of their Original Criminal Jurisdiction, and the provisions dealing with the appellate or revisional powers need not be taken into account. Sections 29, 31, 193, 194 and 206, Clauses (1) and (2), and more particularly the latter clause, Sections 217, 218, 226 and 227, the very heading of Chapter XXIII, and many of the sections to be found in

that Chapter, and the special provisions mentioned in Part L of that Chapter, as also Sections 339A, 347, 448, 449 and 469 and other sections, which need not be specifically referred to, show beyond doubt that the scheme of the Code is to regard the High Court exercising Original Criminal Jurisdiction as being a Court of an entirely different class and character from a Court of Session, and the two expressions as used in the Code are not interchangeable. To that extent, therefore, I agree with Mr. Bose's contention.

5. Mr. Bose has next contended that, as this is so, Section 528A or 528B cannot possibly apply to a case which is inquired into by a Presidency Magistrate and committed to the High Court. In support of this argument he has relied upon the expression "Court of Session" as used in Sub-section (2) of Section 528A; and his contention is to the effect that, as that subsection clearly cannot apply to such a case, and as Sub-section (3) also cannot apply to the High Court, inasmuch as no appeal lies from a sentence or order passed on such trial by the High Court, except, of course, in cases dealt with in Section 449, Sub-section (1) of Section 528A will not also apply; and if that is so, it will follow that Section 528B will also have no application. Once it is held that these two sections do not apply to such a case, it should be held that there is no other provision of the Code under which a claim need be put forward to be dealt with as an Indian British subject. Consequently, there being no bar to the claim made u/s 275 of the Criminal Procedure Code to be tried by jury, the majority of whom should be Indians, the claim must succeed.

6. I confess that at first sight Mr. Bose's contention seems plausible. Some confusion arises from the grouping and numbering of the sections, and from the fact that the relevant provisions are scattered over several, at least three, Chapters of the Code, I mean Chapters XXIII, XXXIII and XLIVA, which again are to be found in different parts of the Code. The difficulty perhaps could not be avoided by reason of the piece-meal amendments that were made. On a close examination of the relevant provisions, however I am convinced that Mr. Bose's argument, though specious, is not sound. It is unnecessary to refer to the Code of 1898 for the amendments effected by Act XII of 1923 and Act XVIII of 1923 have been far too large, and are based upon principles which were wholly foreign to the former Code. The avowed intention of the Legislature in making the amendments was to secure equal rights for European British subjects and Indian British subjects, not forgetting the rights of Europeans who are not European British subjects and of Americans. How far this equality has been secured is not a matter for me to discuss. I propose only to examine the relevant provisions in order to decide the questions which arise, and the answers, in my opinion, emerge with sufficient clearness from such examination.

7. Chapter XXXIII deals with special provisions relating to cases in which European British subjects and Indian British subjects are concerned. By Section 443, to which Sections 444, 445 and 446 refer, the provisions are applicable to a trial outside a Presidency Town. Section 447 enjoins on a Magistrate to forthwith inform the accused of his rights under this Chapter whenever it may appear to him that the case is, or might be, held to be one which ought to be tried under the provisions of this Chapter. Section 448

relates to references made in a trial in Rangoon, and Section 449 makes certain special provisions relating to appeals. The special procedure laid down in this Chapter will be available to the accused if the trial is held outside a Presidency Town, in respect of offences punishable with imprisonment, and if the condition mentioned in Clause (a) or Clause (6) of Section 143(1) is satisfied, and a claim to be tried under the provisions of this Chapter is put forward by the accused, either at his own instance or on being apprised of his rights by the Magistrate as aforesaid. If this claim is rejected by the Magistrate, the person making the claim 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. The stage at which this claim is to be preferred is specifically mentioned in Sub-section (1) of Section 443, where it is put forward by the accused on his own initiative, but there does not appear to be any restriction in this behalf in a case where the Magistrate informs him about them, which, the law enjoins, the Magistrate shall forthwith do at any stage of an enquiry or trial at which the case appears to him to be of such a nature. The claim to be tried under the provisions of this Chapter, it should be observed, is wholly different from a claim to be tried as a European British subject, or an Indian British subject or a European not being a European British subject or an American. So far as the former claim is concerned the question of the status of the claimant does not always arise, and it is not a sine qua non that one should establish that he is a European British subject or an Indian British subject, for, u/s 443(1)(b), it would be enough if one can show the connection of his case with both a European British subject and an Indian British subject.

8. The latter claim is dealt with in Chapter XLIVA of the Code. Sub-section (1) of Section 528 A of that Chapter expressly takes cases, to which Chapter XXXIII applies, out of its scope. It provides that such a claim must be put forward by the claimant stating the grounds of such claim to the Magistrate before whom he is brought for the purpose of the enquiry or trial, and also lays down that such Magistrate shall hold an enquiry and decide whether the claimant has established his status, and shall deal with him accordingly. There is nothing in the wording of this sub-section to show that it should not apply to enquiries or trials before Presidency Magistrates. Broadly stated, this sub-section is applicable to all cases before all Magistrates either in Presidency Towns or in the mufassal, to which the special provisions of Chapter XXXIII do not apply. Sub-section (2) contemplates such cases only in which the Magistrate commits the claimant to trial to the Court of Session after rejection of the claim, in which cases the claimant, whose claim has been rejected by the Magistrate and who has thereafter been committed to the Court of Session, may repeat his claim there, and the said Court shall after such further enquiry, if any, as it thinks fit, decide the claim and shall deal with such person accordingly. Sub-section (3) applies to all Courts in which trials (not enquiries) are held of the claimant after rejection of his claim, and it states that the decision on such claim shall form a ground of appeal from the sentence or order passed in such trial. Section 528B by its very terms relates to "any such case," which expression must mean any case to which Section 528A(1) is applicable. There is no difficulty on this score for the word "case" does not

even occur in Sub-section (2) or (3) of Section 528A. It, therefore, applies to all cases to which the provisions of Chapter XXXIII do not apply, that is to say, to all cases before all Magistrates either in Presidency Towns or in the mufassal to which the special provisions of that Chapter are not applicable. So far as a committing Court is concerned, if the claim is not made before that Court, or if it is made and rejected by that Court, and not repeated before the Court to which he is committed, (and here it should be remarked that the law has made a provision for such repetition only before the Court of Session and not before the High Court in the exercise of its Original Criminal Jurisdiction on a commitment made to it), it shall be held that the claimant has relinquished his right, and the claimant shall not assert his right in any subsequent stage of the case.

9. It must be remembered that the claim to be tried as an Indian British subject is again a different and distinct one from the claim to be tried by a majority of Indian jury as mentioned in Section 275, though it can only be put forward by a person who has, in the language of that section, been found under the provisions of the Code to be an Indian British subject; and the section further requires that such a claim has to be expressly put forward before the first juror is called and accepted, so that it may be listened to.

10. So far, therefore, we find three distinct kinds of claims dealt with in these chapters. First, a claim to be dealt with according to the provisions of Chapter XXXIII; we shall not refer to it again as the present case is not one to which that Chapter has been applied or can be held to be applicable Secondly, a claim to be dealt with as an Indian British subject to which Section 528A and Section 528B apply; and, thirdly, a further claim to be tried by majority of Indian jury such as is referred to in Section 275.

11. From a consideration of the aforementioned provisions, and leaving out of account cases to which Chapter XXXIII applies, the following propositions amongst others may be deduced:

(a) An Indian British subject claiming to be dealt with as such must put in his claim before the Magistrate before whom he is brought for the purpose of enquiry or trial. This applies to Presidency Magistrates as well as Magistrates in the mufassal.

(b) If the Magistrate rejects the claim and tries him, the decision shall form a ground of appeal from the sentence or order passed in such appeal. This applies to Presidency Magistrates as well as to Magistrates in the mufassal.

(c) If the Magistrate rejects the claim and commits him to the Court of Session, he may repeat the claim before the said Court. Such repetition may only be made in a Court of Session and not the High Court exercising Original Criminal Jurisdiction.

(d) If the Court of Session rejects the claim and tries him, the decision shall form a ground of appeal from the sentence or order passed in such trial.

(e) It necessarily follows that if a claim is made before a Presidency Magistrate and rejected by him, and the accused is committed to the High Court, there is no provision for repetition of the claim before the High Court, and the accused will not be entitled to put in, u/s 275 of the Criminal Procedure Code, before the High Court, a further claim for being tried by a jury the majority of whom should be Indians. It may be asked, is the decision of a Presidency Magistrate thus final when the decision of a Magistrate in the mufassal is open to reversal on a reconsideration of the claim by a Court of Session when the same is repeated before that Court? The answer is that not only in this matter but in matters of sentences too, there is a wide difference between the powers of the two classes of Magistrates. No provision, however, has been made for curtailing the revisional powers of the High Court over such a decision of the Presidency Magistrate such as is found in Section 413, Sub-section (2) with regard to a claim to be dealt with under the special procedure prescribed in Chapter XXXIII.

(f) Where, as in the present case, no such claim was put forward before a Magistrate, there being no provision for repetition of the claim before the High Court, Section 528B is a bar to the assertion of the same in any subsequent stage of the case.

12. In my judgment, therefore, the prisoner is not entitled to claim to be tried by a jury the majority of whom should be Indians.

13. There remains a farther question, viz., as to the stage at which the claim on the ground of status has to be put forward before a committing Magistrate. The question has been raised by Mr. Bose, but it really does not arise in the present case, as in the present case no such claim was put forward before the committing Magistrate at any stage. The law, undoubtedly, is not very clear in this respect. Speaking for myself, I am not prepared to read into the words of Section 528A, the provisions made in Section 443(1). From the wording of Sub-section (1) of Section 528A, it would appear that the privilege has to be claimed before the Magistrate before whom the accused is brought for the purpose of enquiry or trial, while Sub-section (2) which evidently deals with such a claim put forward in a particular class of cases, suggests that it may be made at any time, and in fact makes provision for a repetition, and Section 528B again speaks generally of the claim being put forward without mentioning any particular point of time or restricting the stage of such claim in any way. Acting on the principle of interpretation that in the case of a statutory enactment made for the benefit of an accused a construction favourable to him has always got to be accepted, I am disposed to take the view that the claim may be made at any time, in a case of this nature, up till the time when the commitment is made. The committing Court becomes *functus officio*, and loses all jurisdiction over the case after the commitment, and special provisions have been made in Sections 216 to 219 to enable the Court to retain jurisdiction only in respect of some matters. Such a beneficial construction will not, on the one hand, strain the language so as to include cases plainly omitted from the natural meaning of the words, and will, on the other hand, give effect to the presumption that the Legislature never intends what is inconvenient or unreasonable.