

[ASSIZE COURT]

1966

Present : Manicavasagar, J.

THE QUEEN *v.* M. KARTHENIS DE SILVA and 3 others

S. C. 120/64—M. C. Galle, 12442

IN THE MATTER OF AN APPLICATION FOR WITHDRAWAL OF AN INDICTMENT
UNDER SECTION 217 (3) OF THE CRIMINAL PROCEDURE CODE

*Trial before Supreme Court—Withdrawal of indictment—Permissibility—Criminal
Procedure Code, s. 217 (3).*

In a prosecution before the Supreme Court, there were two abortive trials. At the commencement of the third trial, Crown Counsel satisfied the Court, upon the material before it, that the trial would inevitably result in a verdict of acquittal.

Held, that it was open to the prosecuting Counsel to apply, under section 217 (3) of the Criminal Procedure Code, for the withdrawal of the indictment before the return of the verdict.

APPPLICATION for the withdrawal of an indictment under section 217 (3) of the Criminal Procedure Code.

A. A. de Silva, Crown Counsel, for the Attorney-General.

Kaniska de Zoysa, with *R. D. de S. Nagahawatta* (assigned) for the Accused.

December 14, 1966. MANICAVASAGAR, J.—

Counsel for the Crown seeks my consent to withdraw the indictment against these four accused persons who are accused of having committed the offence of murder by causing the death of Peduru Handi Upasaka, *alias* Tailor Upasaka, on the 4th day of April, 1964.

The application is made under Section 217 (3) of the Criminal Procedure Code.

On 15th February, 1966, five accused persons were brought to trial before an English speaking jury ; after the trial had proceeded for several days, the Presiding Judge discharged the jury, consequent on an allegation made against a juror. The five accused persons were brought to trial for the second time on 6th May, 1966 ; at the closure of the case for the Crown, the jury on the direction of the Judge returned a verdict of not guilty against one of the accused persons on the ground that there was no evidence against him. At the conclusion of the trial, the jury were not ready to return a verdict, being divided 4 to 3, and the Judge discharged the jury and directed a fresh trial.

These accused persons are now before me facing a third trial, and Crown Counsel in supporting his application has given me a resume of the evidence at the two preceding trials, and also drawn my attention to certain infirmities in the evidence ; his submission is that this trial must necessarily end in a verdict of acquittal. Reference was made to the practice in England in the event of there being a third trial. The English practice is that where the jury are not agreed at the two previous trials, the Crown offers no evidence at the third trial, and the Judge thereupon directs the jury to return a verdict of not guilty. This practice, however, has no application to the instant case, for the reason that it was only at the second trial the jury were not able to return a verdict as required by law, the first trial not having reached the stage of a verdict by the jury.

The instant application must be decided on the construction of Section 217 (3) of the Criminal Procedure Code. This provision calls for the exercise of judicial discretion ; the guiding principle being that the Court should be satisfied that this is not an attempt to interfere with the course of justice for an improper and illegitimate purpose, and the Counsel for the Crown in exercising his executive functions is not acting improperly. The Court should also be satisfied in taking the matter away from the normal procedure of a trial, that the material before it does not provide even a reasonable chance of conviction. Bearing these principles in mind, I have examined the evidence given at the two previous trials in this Court, the depositions of the witnesses and the statements recorded by the Police, and my view is that not a moment should be spent in calling upon these men to face another trial, because I am convinced that upon the material before me the trial must inevitably result in a verdict of acquittal. No reasonable jury can find otherwise. On the evidence of the 2nd accused and his witnesses it has been indubitably established that he could not have been at the venue of the incident at the time Upasaka came by his death—I am not taking into consideration several other material infirmities arising on the evidence of Linton and Ematin—is sufficient to throw a reasonable doubt on the entire case for the Crown.

The application is granted and the accused persons are discharged.

Application for withdrawal of indictment granted.