1963 *Present :* **Sansoni, J. (President), H. N. G. Fernando, J., and L. B. de Silva, J.**

THE QUEEN *v.* D. J. F. D. LIYANAGE and others

TRIAL AT BAR NO. 2 OF 1962

Trial-at-Bar—Procedure—Material necessary for preparation of defence—Right of defendants to have information about it before trial—Penal Code, ss. 114, 115—Criminal Procedure Code, ss. 6, 186 (2), 385—Sub-sections (5), (6) and (7) of Section 440A of Criminal Procedure Code as enacted by the Criminal Law Act, No. 31 of 1962.

In a criminal case tried in the Supreme Court on Information filed by the Attorney-General under section 440A of the Criminal Procedure Code as enacted by the Criminal Law Act, No. 31 of 1962—

Held, that the defendants were entitled to the following information before they tendered their general plea and prior to the commencement of the trial proper :—

(*a*) Lists of the prosecution witnesses and documents ;

(*b*) Copies of the statements which were made to the investigating officers by the prosecution witnesses or the defendants and which the Attorney-General intended to produce in evidence ;

(*c*) Copies of the documents on which the prosecution relied.

Held further, that although in England the procedure by way of Information is restricted to misdemeanours, under our law there has been no such restriction since 1915.

ORDER made in the course of a Trial at Bar held under the provisions of the Criminal Law Act, No. 31 of 1962.

Counsel heard : For the Defence :—*G. G. Ponnambalam, Q.C., H. W. Jayewardene, Q.C., A. H. C. de Silva, Q.C.*, and *R. A. Kannangara.*

For the Crown :—*D. St. C. B. Jansze, Q.C.*, and *V. S. A. Pullenayegum.*

Cur. adv. vult.

ORDER

February 28, 1963. [*Read by* L. B. DE SILVA, J.]—

Counsel for the defence applied for—

(*a*) Lists of the prosecution witnesses and documents.

(*b*) Copies of the statements made by all such witnesses and of all such documents.

(*c*) Copies of statements made by all the defendants.

(*d*) Inspection of documents.

They argued that the defence was entitled to this information before the defendants tendered their general plea to the Information and well in advance of the commencement of the trial proper.

The Attorney-General opposed this application on the ground that the trial by Information was summary.

2—R. 13961—1,855(11/63)

Under our law, Criminal Cases may be tried in the Supreme Court either on Indictment by the Attorney-General after preliminary non-summary proceedings before a Magistrate as provided in Chapter XVI or on Information filed by him under sections 385 or 440(A) of the Criminal Procedure Code. In trials on Information, there are no judicial proceedings of any kind before the Information is exhibited in this Court. It necessarily follows that the defendants to an Information will have no knowledge of the evidence that will be led against them at the trial. They are in the same position in this respect as accused persons in summary Criminal trials before a Magistrate under our law. Trial on Information is extremely rare in our Courts.

Counsel for the defence have not referred us to any provisions of our law or the Law in England to which we may resort under section 6 of our Criminal Procedure Code, which would entitle the defendants to the information asked for.

Under the Indictments Act, 1915, s. 8 (3) of England the provisions of that Act applying to Indictments apply to Criminal Informations in the High Court with such modifications as may be made by rules under the Act. (See Archbold : " Criminal Pleading, Evidence and Practice " para 312, 34th edition.) Under section 186 (2) of our Criminal Procedure Code, every Indictment shall contain a list of prosecution witnesses and documents.

In view of the above provisions, we direct the Attorney-General to file a list of witnesses whom he intends to call and a list of all documents he intends to produce at the trial. The defendants are entitled to copies of such lists.

There is, however, nothing in our law or that of England or in the practice of the Courts of either country, brought to our notice to support the argument that the defendants are entitled, as of right, to copies of the statements made by the prosecution witnesses or the defendants to the investigating officers or to copies of the documents on which the prosecution relies, to enable them to prepare for their defence.

In the trial-at-bar in *The Queen v. Gunawardena* [1] the Court stated, " Section 440A made a fundamental change in the law in that it empowered the Governor and now the Minister of Justice, to take away from an accused person appearing before the Supreme Court for trial on Indictment or Information both his right to a trial by Jury and *his right not to be tried summarily and without prior notice of the evidence against him for any offence punishable by death or by rigorous imprisonment for three years or upwards* ".

As a result, in comparison to persons who stand their trial on Indictment, the defendants in this case will be placed in a position of considerable disadvantage. In the case of trial on Indictment, by the very nature of the proceedings, the accused persons are aware of all the evidence, oral and

[1] *(1954) 56 N. L. R. at 204.*

documentary, led by the prosecution in the Inquiring Magistrate's Court. They are furnished with a certified copy of such proceedings before the trial. They are thus aware, before the trial, of practically all the evidence that will be led against them at the trial.

Under our normal Criminal Procedure, offences of a more serious nature were tried by the Supreme Court or District Courts upon indictment after non-summary proceedings in the Magistrate's Court. The less serious offences were triable summarily in the Magistrate's Court. The policy of our law under the normal procedure, was to put an accused person on trial for the more serious offences upon indictment when he would know before-hand all the evidence that may be led against him.

Under Section 440A enacted in 1915, offences punishable with death may be tried before the Supreme Court at Bar on Information by the Attorney-General on a direction by the Governor (and later by the Minister) in cases of Civil Commotion, disturbance of Public feeling or any other similar cause. Now all offences under sections 114 and 115 of the Penal Code which are punishable with death, are so triable by the Supreme Court on Information.

It offends our sense of justice that persons should be put on their trial on Capital offences in a summary manner without even knowing what evidence is proposed to be led against them in proof of the charges against them. We are satisfied that they will be hampered in their defence by this mode of trial. An innocent man may find it difficult to vindicate his innocence under such circumstances.

The purpose of the Legislature in providing for trial by Information before the Supreme Court instead of trial on Indictment, was clearly and solely to expedite the trial. It cannot be conceived that the Legislature intended in such cases, to deprive the defendants of a fair trial and of a reasonable opportunity to vindicate their innocence, if they are innocent.

Section 440A (5) of the Criminal Procedure Code (as enacted by Act 31 of 1962) provides: "A trial before the Supreme Court under this section shall proceed as nearly as possible in the manner provided for other trials before the Supreme Court, subject to such modifications as may be ordered by the Court or as may be prescribed by rules made under the Courts Ordinance".

It may be mentioned that a provision, more or less similar, existed in the original section 440(A) (3) as enacted by Section 2 of Ordinance 18 of 1915.

The " other trials before the Supreme Court ", referred to in this sub-section, clearly refer to trials before the Supreme Court on Indictment—under Chapter XX of the Criminal Procedure Code. As such trials are by a jury, before a Judge, all the provisions in that chapter relating to the jury, will have no application to a trial at Bar without a jury and must be deleted or modified.

We invited argument on behalf of the Attorney-General whether this Court is not entitled under this sub-section to direct the Attorney-General to furnish the defendants with copies of the statements of the witnesses

and of the documents to enable them to prepare more fully for their defence. Mr. Pullenayegum C.C. argued that this sub-section only enabled this Court to regulate the proceedings of the actual trial. He said that the Court may modify any provision of the Criminal Procedure Code which becomes inapplicable to a trial without a jury. He also argued that if we made such an order, we would virtually be converting this case to a trial on Indictment after non-summary proceedings.

As pointed out earlier, on a trial upon Indictment, by the very essence of the pre-trial procedure, an accused person becomes aware of all the evidence relied upon by the Crown in support of the Indictment and which the Crown intends to place against him at the trial. He is entitled in law to know such evidence before he is called upon to plead to the Indictment. It is a right of his, inherent in that procedure.

Acting in accord with the broad principles of Justice, if this trial by information is to proceed as nearly as possible, in the manner provided for trials on indictment, the defendants should not be deprived of so important a right necessary to fully formulate their defence, when their very lives are at stake.

On grounds of practical exigency a summary trial may be justified for offences which are not of a very serious nature and where the facts and issues are not complicated. The present case is for capital offences and the evidence to establish the charges of Conspiracy will undoubtedly be of a complicated nature. It will be very difficult for Counsel to do justice by their clients in a case of this nature if they do not have a full picture of the evidence in the possession of the Crown.

It is clear from section 440A (7) that the word " trial " is used in a wide sense. It states, " At any trial before the Supreme Court under this section, the Court, or the presiding judge thereof, may give directions for the summoning, arrest, custody and bail of all persons charged before the Court by information exhibited under this section ".

The issue of summons or warrant on the persons charged, must undoubtedly precede the actual hearing of the case or the trial strictly so-called. If sub-section (7) could use the word "trial" in this broad sense to include all proceedings taken on the Information to bring the defendants to justice, there is no reason to restrict the meaning of that word in sub-section (5) to the actual hearing of the cause.

In our view, it is a modification of the procedure of the *trial* (using the term " trial " in a strict sense), if the legislature were to enact that no witness should be called at a summary trial, before the defence is given a copy of the statements made by all the prosecution witnesses. It will no doubt be a far-reaching change from the existing summary procedure but nevertheless it will be a change in the procedure in conducting the trial.

What the legislature is entitled to do to change or modify the procedure, this Court is entitled to effect by Order under sub-section 5 of section 440A. This Court would be acting within the limits of the legislative powers delegated to it under this sub-section.

In the interests of justice and with a view to affording the defendants a fair trial in this case, this Court orders under section 440A (5) that the defendants be furnished by the Attorney-General with copies of the statements of all witnesses he intends to call and copies of all documents and statements of defendants which he intends to produce in evidence.

We were informed by the Attorney-General that copies of the statements of 11 principal witnesses were available for issue to the defendants if so directed.

We direct that these copies and the copies of the statements of any other witnesses which have since been made be issued to the defendants forthwith. The copies of other statements and documents should be issued to them as soon as they are ready. The Attorney-General should endeavour to hand over copies of the statements of all witnesses he intends to call and of the documents and statements of the defendants on which he intends to rely within three weeks from today. If in the course of the trial, he makes up his mind to call other witnesses or to produce other documents or statements of defendants, he will inform the Court immediately of such intention and the Court will make appropriate orders about such evidence and the issue of copies of such statements and documents to the defendants.

Nothing in this Order is to affect the right of the Attorney-General to use statements or documents to cross-examine the defendants or defence witnesses for the purpose of discrediting their evidence.

Counsel for the defendants tendered seven special pleas on behalf of the defendants they represent. It is not necessary to reproduce them in this order, but we shall now deal with them.

The first plea is in effect a plea that the Information exhibited by the Attorney-General is not a valid Information. Mr. Ponnambalam's argument was that nothing can be an Information which does not relate solely to misdemeanours and he cited English authorities in support of his argument. We are not, however, governed by the English law on this matter. Section 440A of the Criminal Procedure Code (as amended by the Criminal Law Act No. 31 of 1962) expressly empowers the Attorney-General to exhibit to the Supreme Court informations in respect of any offences under Chapter 6 of the Penal Code. Although in England the procedure by way of information is restricted to misdemeanours, under our law there has been no such restriction since 1915.

The second plea is that the Attorney-General should have satisfied this Court that he had good reason for proceeding by way of information instead of by indictment. The answer to this is that Section 440A (6) empowers the Attorney-General to exhibit Informations in respect of the offences now charged against these defendants, and the section contains no conditions as to how the Attorney-General should exercise his discretion. Nor do we think we have the power to question the exercise of the Attorney-General's discretion in this matter.

Mr. Ponnambalam urged the same arguments in relation to the pleas numbered 3 to 6. In respect of plea No. 7, he urged that Acts Nos. 1 and 31 of 1962 were bad, because they were directed particularly against these defendants, and were enacted after the date of the alleged commission of the offences. He also urged that the power to make laws for the peace, order and good government of the country does not include the power to enact laws such as these. This plea does not seem to us to raise any matter which we have not already dealt with in our order on the plea to jurisdiction.

Mr. Kannangara pressed plea No. 4, and urged that the defendants should not be called upon to plead or stand their trial until they were informed in full of the case against them. We have already dealt with this matter earlier in this order. The prejudice that Mr. Kannangara urged the defendants would suffer if they were not informed of the case against them will not arise, because of the direction we have already given.

(Sgd.) M. C. SANSONI,
Puisne Justice.

(Sgd.) H. N. G. FERNANDO,
Puisne Justice.

(Sgd.) L. B. DE SILVA,
Puisne Justice.

Applications granted.