

1936 Present : Hon. Mr. de Kretser, Commissioner of Assize.

THE KING *v.* THENIS SILVA *et al.*

*P. C. Kalutara, 23,863.*

[No. 1—WESTERN CIRCUIT.]

*Transfer of criminal case—Application for transfer on the ground that a fair and impartial trial cannot be had—Powers of Supreme Court—Courts Ordinance, Nos. 46 and 47—Criminal Procedure Code, s. 422.*

The Supreme Court has no power to transfer a criminal case pending before it from one Court to another on the ground that a fair impartial trial cannot be had in any particular place.

Section 46 of the Courts Ordinance has been repealed so far as it relates to the transfer of criminal cases.

THIS was an application for the transfer of a case from Kalutara to Colombo in the same circuit.

*Sri Nissanka*, for the applicant.

*Kariapper C.C.*, for the Attorney-General.

December 3, 1936—

*Order.*

This is an application by the second accused for the transfer of the above case from Kalutara to Colombo in the same circuit on the ground that the case has aroused so much local interest that the accused fears he may not obtain an impartial trial at Kalutara. The first and third accused appeared by Counsel assigned to defend them and raised no objection to the transfer applied for. Application had been made to the Attorney-General that he should exercise his powers under section 47 of the Courts Ordinance, and he had not acceded to that application. I understand Crown Counsel to object to the present application.

The scene of the offence is alleged to be some 13 miles from Kalutara and it is not likely that jurors attending here will be more informed of the facts of the case than they will be when the case is opened in any Court, and it ought to be possible to take steps to see that any juror possessed of any special knowledge of the facts of the case informs the Court and does not sit to try the case. On the merits it is, therefore, at least doubtful whether there is any foundation for the fear of the accused.

But the first question for decision is whether this Court has the power to order the transfer now applied for. Such transfers have been made previously, but it is conceded that the Court purported to act in each case under the provisions of section 46 of the Courts Ordinance, No. 1 of 1889, that is where it did not act on the application of the Attorney-General under section 47. Section 46 of the Courts Ordinance was repealed by Ordinance No. 1 of 1900 so far as it provided for the transfer of criminal cases, and the reason for the repeal was that section 422 of the Criminal Procedure Code made sufficient provision. But this repeal seems to have been lost sight of in some instances. Provision for the transfer of criminal cases had been made by Ordinance No. 11 of 1868 and later by Ordinance No. 3 of 1883 which existed side by side with section 46 of the Courts Ordinance. These earlier Ordinances recognized

as a reason for transfer the fact that it appeared that a fair and impartial trial could not be held in any particular Court or that it was expedient on any other ground. With these provisions before it the Legislature enacted section 422 of the Criminal Procedure Code and repealed the provisions of section 46 of the Courts Ordinance. It must be presumed that the alteration was deliberately made.

The Indian Criminal Procedure Code of 1898, section 526, provides for a transfer on the ground that a fair and impartial trial cannot be had in any Criminal Court subordinate to a High Court. In India a Sessions Court may be subordinate to the High Court in view of the scheme of judicature there observed, but in Ceylon the position is different. The Indian Code was subsequently amended in 1923, 1925, 1926, and 1927. The report of the Select Committee shows that they considered it would be a mistake to amend the section by providing for the transfer of a case when the accused has reasonable grounds for apprehending that he would not get a fair and impartial trial. (Vide The Code of Criminal Procedure by *Dinesh Ch. Roy*, p. 1217.)

Our Code gives the same grounds for transfer as the Indian Code, and as I said before, deliberately departed from the earlier provisions of a wider nature. It was apparently thought sufficient to entrust the duty to the Attorney-General, at whose instance, for example, the Talpe murder case and the Ludowyke case were transferred.

Mr. Nissanka, for the applicant, sought to bring himself under clause (a) of section 422, but that clause refers to a subordinate Court, and obviously this Court is not subordinate to itself.

He has also argued that the Court ought to have the power, but that is quite another matter. The Court has no powers other than those which the law has expressly given it.

I invited him to consider clause (a) but he did not think he would come under it. He was given time till to-day to discover any authority bearing on the point, or any definition of "convenience" which would help him, but he informs the Court that he has not been able to discover any in spite of diligent search. There is, besides, the fact that provision has been made for a case where a fair and impartial trial cannot be had, but this is limited to subordinate Courts.

In these circumstances I must hold that this Court has no power to allow the application and it must therefore be dismissed.

*Dismissed.*

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