

1939

*Present : Soertsz S.P.J.*THE KING *v.* FERNANDO.22—*M. C. Panadure, 1,937.*

Supreme Court—Power of Court to order transfer of trial from one Court to another—Courts Ordinance, s. 42 (Cap. 6).

Under section 42 of Chapter 6 of the revised edition of the Legislative Enactments, which re-enacts the repealed section 46 of the Courts Ordinance, No. 1 of 1889, the Supreme Court has authority to transfer a criminal case pending before it from one circuit to another or to any other place in the same circuit.

THIS was an application for the transfer of a criminal case from the Kalutara Assizes to the Colombo Assizes.

D. D. Athulathmudali (with him *A. C. Gooneratne*), for the accused, petitioner.

C. S. Barr Kumarakulasingham, C.C., for the Attorney-General.

November 23, 1939. SOERTSZ S.P.J.—

This is an application by an accused person for the transfer of the case pending against him in the Assize Court presently sitting at Kalutara, to the Assize Court in Colombo in the same Circuit.

The application is based on the allegation made by the petitioner that he fears that he will not have a fair trial “before a jury selected from the

residents of Kalutara", because "the Kalutara District is predominantly Buddhist and seventy-five per cent. of the jurors are Buddhists", and because the "witnesses for the prosecution allege that the accused cut down a bo-tree on the evening prior to the date of the incident".

Mr. Athulathmudali, while appearing in support of this application, submitted that in view of the ruling by de Kretser J. in the case of *The King v. Thenis Silva*¹, he had to concede that 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 and impartial trial cannot be had in any particular Court or place, and that, for that reason, he had nothing more to say in regard to the application. He referred to the case of *The King v. Grenier*, and he seemed to suggest that in view of the ruling in the case of *The King v. Thenis Silva* I acted without jurisdiction, when a few days ago I allowed a transfer on this ground, on an application made by the accused in the case of *The King v. Grenier*, on the Attorney-General consenting to the transfer of that case.

Now, the case of *The King v. Thenis Silva* and others came before de Kretser J. in the year 1936, and in refusing the application he pointed out that section 46 of the Courts Ordinance was repealed by Ordinance No. 1 of 1900, in so far as it related to the transfer of cases. Section 46 enacted that, "whenever it shall appear to the Supreme Court or to a Judge thereof, at Colombo or elsewhere that a fair and impartial trial cannot be had in any particular Court or place . . . the said Court or such Judge thereof as aforesaid may make order upon such terms as to payment of costs or otherwise . . . for the transfer of any prosecution, matter or thing depending before the Supreme Court in its original jurisdiction from any Circuit to any other Circuit, or to any other place in the same Circuit . . ."

As pointed out by de Kretser J. once that section was repealed there was no express provision authorising the Supreme Court upon an application made by a person other than the Attorney-General to transfer a case on the ground that a fair and impartial trial could not be had in any particular Court or place, and if I may respectfully say so, de Kretser J. rightly refused the application made to him by the accused in that case. Section 422 (1) (a) of the Criminal Procedure Code is of no avail because that section is limited to inquiries or trials pending before any Criminal Court subordinate to the Supreme Court.

But, we are now in the year 1939, and it seems to me that the position has altered, although in a strange and unexpected manner, and the Supreme Court is once again vested with the power that section 46 of the Courts Ordinance gave it. In the Legislative Enactments of Ceylon (Revised Edition), 1938, I find Chapter 6, Vol. I., is an Ordinance "to amend and consolidate the laws relating to Courts and their powers and Jurisdiction", and section 42 of this Ordinance is identical with section 46 of Ordinance No. 1 of 1889, which the Ordinance No. 1 of 1900 repealed to the extent I have indicated.

So far as I have been able to discover there is no legislative enactment between the year 1900 and the issue of the Revised Edition of Legislative Enactments, 1938, which re-enacts the repealed section 46 of Ordinance

¹ 38 N. L. R. 332.

No. 1 of 1889. The re-introduction of section 46 into the Statute Book as section 42 of Chapter 6 of the revised edition appears to be the act of the Commissioner appointed for the purpose of preparing the new and revised edition of the Legislative Enactments.

The Commissioner is given certain powers by Ordinance No. 19 of 1937 (Chapter 1 of the Revised Edition of the Legislative Enactments). I have examined these powers carefully, but I do not find any power or authority conferred on the Commissioner to re-introduce a repealed law. Nevertheless, it seems to me that section 42, although put upon the Statute Book without any apparent authority, must be regarded as an existing part of our Statute Law. The requirements of section 10 (1) and 10 (2) have been complied with, and by virtue of section 10 (3), this Revised Edition must now "be deemed to be and shall be without any question whatsoever in our Courts of justice and for all purposes whatsoever the sole and only proper Statute Book of Ceylon in respect of the Legislative Enactments therein contained" When the State Council passed the resolution referred to in section 10 (2) and the Governor in accordance with that resolution made this proclamation, section 42 of Chapter 6 of the Revised Edition became part and parcel of the Statute Law of this Island.

In my view, therefore, the Supreme Court has, at present, authority to order a transfer of a case pending before it in the manner the accused in this case asks for it to be transferred, and the application by the accused in *The King v. Grenier (supra)* was properly allowed. But I refuse the application in this case now before me because I am not at all satisfied that the reasons given by the accused for alleging that he fears that a fair and impartial trial cannot be had in Kalutara, are good or sufficient reasons for ordering the transfer of this case.

Application refused.

