

1962 Present: Basnayake, C.J., and Abeyesundere, J.

RAMACHANDRAN, Appellant, and THE QUEEN, Respondent

S. C. 114/61—D. C. (Crim.) Colombo, 2038/18553

-) *Trial before District Court—Indictment—Withdrawal of a charge or charges therein not permissible—Criminal Procedure Code, ss. 202, 217 (1), 217 (3), 393.*
- .) *Criminal law—Offences where knowledge is an ingredient—Burden of proof—Forgery—Fabricating false evidence—Penal Code, ss. 190, 196, 403, 455, 459, 490.*

(i) In a criminal trial before a District Court there is no provision in Chapter 19 of the Criminal Procedure Code for the withdrawal of a charge or charges from the indictment.

Two accused were jointly indicted in a District Court on certain charges. Before the indictment was read and explained to the accused, Crown Counsel stated that the evidence against the 2nd accused did not justify the prosecution proceeding against him any further. The District Judge thereupon made the following order:—"I acquit and discharge the 2nd accused". Thereafter the trial proceeded against the 1st accused on amended charges.

Held, that the application not to proceed against the 2nd accused was not warranted by the provisions of section 202 of the Criminal Procedure Code. Section 202 only enables the prosecuting Counsel to withdraw the indictment as a whole.

(ii) The accused was charged under sections 455, 459, 190, 196, 403 and 490 of the Penal Code for using as genuine a forged Citizenship Certificate and for using that certificate for the purpose of obtaining a Passport.

Held, that knowledge was an essential ingredient of the charges against the accused and that the burden was on the prosecution to establish it.

APPEAL from a judgment of the District Court, Colombo.

S. Kanagaratnam, for Accused-Appellant.

E. H. C. Jayetilleke, Crown Counsel, for Attorney-General.

June 14, 1962. BASNAYAKE, C.J.—

The accused-appellant who was charged in these proceedings as the 1st accused along with another who was referred to as the 2nd accused was indicted on the following charges:—

"1. That you did between the 19th November 1959 and the 24th December 1959 at Colombo in the division of Colombo within the jurisdiction of this Court agree to commit or abet or act together with a common purpose for or in committing an offence, to wit, using as genuine a forged document, to wit, Ceylon Citizenship Certificate bearing No. 24635 and dated 24th November 1955 purporting to be a certificate issued under the provisions of section 16 (1) (b) of the Indian

and Pakistani Residents (Citizenship) Act No. 3 of 1949 which document you knew or had reason to believe to be a forged document and that you are thereby guilty of the offence of conspiracy to commit the said offence which said offence was committed in consequence of such conspiracy and that you have thereby committed an offence punishable under section 459 read with sections 455, 113B and 102 of the said Code.

“ 2. That at the time and place aforesaid and in the course of the same transaction you the 1st accused abovenamed did fraudulently use as genuine a forged document purporting to be a certificate made by a public servant in his official capacity under the provisions of section 16 (1) (b) of the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949, to wit, Ceylon Citizenship Certificate bearing No. 24635 and dated 24th November 1955, which you knew or had reason to believe to be a forged document and that you have thereby committed an offence punishable under section 459 read with section 455 of the Penal Code.

“ 3. That at the time and place aforesaid and in the course of the same transaction you the 2nd accused abovenamed did abet the commission of the offence set out in count 2 above which said offence was committed in consequence of such abetment and that you have thereby committed an offence punishable under section 459 read with sections 455 and 102 of the Penal Code.

“ 4. That at the time and place aforesaid and in the course of the same transaction you the 1st accused abovenamed did in a declaration made or subscribed by you and which declaration an Assistant Controller of Immigration and Emigration, a public servant, is authorised in law to receive, to wit, an application for a Ceylon Passport dated 21st December 1959 make the following statement touching points material to the object of obtaining a Ceylon Passport, to wit, that you were a Ceylonese by Registration and that your registration as a Ceylonese was by a Certificate of Registration bearing No. 24635 which statement you knew or believed to be false and that you have thereby committed an offence punishable under section 196 read with section 190 of the Penal Code.

“ 5. That on or about the 24th day of December 1959 at the same place aforesaid and in the course of the same transaction, you the 1st accused abovenamed did falsely represent to C. W. Siriwardene, Assistant Controller of Immigration and Emigration, that you were a Citizen of Ceylon by registration holding Ceylon Citizenship Certificate bearing No. 24635 dated 24th November 1955 and thereby fraudulently attempt to induce the said C. W. Siriwardene, Assistant Controller of Immigration and Emigration, to deliver to you a Ceylon Passport to enable you to travel to India and that you have thereby committed an offence punishable under section 490 read with section 403 of the Penal Code.

“ 6. That at the time and place aforesaid and in the course of the same transaction as set out in count 5 above you the 2nd accused abovenamed did abet the commission of the offence set out in count 5 above which said offence was committed in consequence of such abetment and that you have thereby committed an offence punishable under section 490 read with sections 403 and 102 of the Penal Code.”

The case came up for trial for the first time on 10th May 1961. On that day it was reported that the indictment had not been served on the 1st accused and that certain witnesses were absent. The Court thereupon made the following order:—“ Trial postponed for 21.6.61. Re-issue indictment on the 1st accused and surety undertake to produce the 1st accused on 21.6.61.” On 21st June 1961 when the case was called the Crown was represented by Crown Counsel and both accused by their respective counsel, but the trial was put off for 28th June as there was a partly heard criminal case which was likely to last the day. The case appears to have been postponed thereafter to 28th August 1961 and on that day the Crown was represented by Crown Counsel and the respective counsel for the 1st and 2nd accused entered their appearances. Before the indictment was read and explained to the accused, Crown Counsel stated that the evidence against the 2nd accused did not justify the prosecution proceeding against him any further. The learned District Judge thereupon made the following order:—“ I acquit and discharge the 2nd accused ”.

It is not clear under what provision of the Criminal Procedure Code both Crown Counsel and Judge acted. A right to do what the Crown Counsel did is not to be found in Chapter XIX, but a provision (s. 217 (1)) enabling the Attorney-General to exercise such a power in proceedings before the Supreme Court exists in Chapter XX. In effect Crown Counsel was seeking to enter a *nolle prosequi* which only the Attorney-General himself has power to do (s. 393). The Judge acted wrongly in making the order he did make.

Thereafter the minute on the record reads as follows:—

“ Mr. Crown Counsel withdraws counts 1, 3 and 6.

“ I allow the application.

“ The indictment is read over and explained to the 1st accused who pleads not guilty.

“ At this stage Mr. Crown Counsel moves to amend count 2 and count 5 by inserting the word ‘ October ’ in place of the word ‘ November ’ where it occurs in counts 2 and 5.

“ Mr. Crown Counsel moves to amend count 1 by inserting the words ‘ you 1 aced. did between the 19th of November 1959 and 24th December 1959 at Colombo in the division of Colombo within the jurisdiction

of this Court you the 1st accused did fraudulently ' at the commencement of the charge in count 2 and to delete the words commencing from the ' That ' in line 1 count 1 up to the word ' transaction '.

" There is no objection by the defence.

" Count 2 is amended accordingly and read and explained to 1st accd. who pleads not guilty."

Thereafter the trial proceeded against the 1st accused on the following charges :-

" (a) That between 19th November 1959 and 24th December 1959 at Colombo within the jurisdiction of this Court you the 1st accused abovenamed did fraudulently use as genuine a forged document purported to be a certificate made by a Public Servant in his official capacity under the provision of section 16 (1) (b) of the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949, to wit: Ceylon Citizenship Certificate bearing No. 24635 and dated 24th October 1955 which you knew or had reason to believe to be a forged document and that you have thereby committed an offence punishable under section 459 read with section 455 of the Penal Code.

" (b) That at the same time and place aforesaid and in the course of the same transaction you the 1st accused abovenamed did in a declaration made or subscribed by you and which declaration an Assistant Controller of Immigration and Emigration, a public servant authorised in law to receive, to wit: an application for a Ceylon Passport dated 21st December 1959 make the following statement touching points material to the object of obtaining a Ceylon Passport to wit that you were a Ceylonese by Registration and that your Registration as a Ceylonese was by a Certificate of Registration bearing No. 24635 which statement you knew or believed to be false and that you have thereby committed an offence punishable under section 196 read with section 190 of the Penal Code.

" (c) That on or about the 24th December 1959 at the same place aforesaid and in the course of the same transaction you the 1st accused abovenamed did falsely represent to C. W. Siriwardena, Asst. Controller of Immigration and Emigration to deliver to you a Ceylon Passport to enable you to travel to India and that you have thereby committed an offence punishable under section 490 read with section 403 of the Penal Code."

There being no other accused it is not clear why the words " 1st accused " were retained in the indictment after the 2nd accused had been discharged. The accused was at its conclusion found guilty on all the charges and sentenced to a term of six months' rigorous imprisonment on each of the counts, the sentences to run concurrently. On count 5 he was sentenced to a term of three months' rigorous imprisonment. This appeal is from those convictions.

Crown Counsel submits that the application not to proceed against the 2nd accused was an application made under section 202 of the Criminal Procedure Code. That section reads as follows :—

“ The Attorney-General may at any time before the verdict is recorded withdraw any indictment and the prosecuting counsel may also with the permission of the District Judge at any time before the verdict is recorded withdraw any indictment, and thereupon all proceedings thereon shall be stayed and the accused shall be discharged.”

If what learned Crown Counsel purported to do at the trial was to seek the permission of the Court and with its permission withdraw the indictment, then the learned District Judge should have made order staying all proceedings on the indictment and discharging both accused. There is no provision in proceedings under Chapter XIX of the Code for the withdrawal of a charge or charges as was done in this case. In trials under Chapter XX of the Code section 217 (3) provides that—

“ The prosecuting counsel may with the consent of the presiding Judge at any stage of the trial before the return of the verdict withdraw the indictment or any charge therein and thereupon all proceedings on such indictment or charge as the case may be against the accused shall be stayed and he shall be discharged of and from the same.”

The power conferred on prosecuting counsel by section 217 (3) of the Criminal Procedure Code to withdraw with the consent of the presiding Judge any charge is not conferred by section 202. The learned District Judge therefore acted wrongly in proceeding as he did. He had no power to grant permission to withdraw a charge in the indictment. The section only enables the prosecuting counsel to withdraw the indictment as a whole.

The main point argued by counsel for the appellant is that knowledge is an essential ingredient of the charge against the appellant and that the evidence for the prosecution failed to establish it. The document on which the prosecution relied for the purpose of establishing knowledge is P2 which is the Certificate of Registration and which is in English. There is no evidence that this document was explained to the accused-appellant by the Proctor who attested the document P1 which is an application for a Passport signed by the appellant. The appellant who gave evidence on his own behalf stated that he first met the 2nd accused casually at the trolley bus stand and in the course of conversation he gathered that he was able to help him to obtain Ceylon Citizenship and that he went to see him on a number of occasions, and that he signed some forms in consequence of which he received the document P2 which he used for the purpose of obtaining a Passport. The accused was not cross-examined in regard to this document. The ingredient of knowledge required for a conviction on a charge of which the appellant has been found guilty, in our opinion, has not been established. The charge against the appellant therefore fails.

There is nothing on the record to show why at the last moment the prosecution did not proceed against the 2nd accused against whom there is evidence in the record before us.

We quash the conviction and acquit the accused.

ABEYESUNDERE, J.—I agree.

Appeal allowed.
