[COURT OF CRIMINAL APPEAL]

1940 *Present :* **Howard C.J. (President), Hearne and Keuneman JJ.**

THE KING *v.* EMANIS.

64—M. C. Colombo, 33,253.

Indictment—Three counts—Withdrawal of two counts—Power of Attorney-General to frame fresh charge on the count withdrawn—Criminal Procedure Code, s. 172 (1).

The words "alter an indictment" in sub-section (1) of section 172 of the Criminal Procedure Code include the withdrawal of a count in an indictment.

Where a charge is withdrawn in pursuance of the Court exercising its power under the section, the Attorney-General has no right to frame a fresh indictment in respect of the charge. If it is desired to place the accused person on his trial in respect of a charge so withdrawn, magisterial proceedings must be commenced *de novo*.

THE accused-appellant was indicted on three counts before Cannon J. on June 5, 1940. Before the indictment was read Crown Counsel withdrew with the consent of the presiding Judge count (3) of the indictment under section 217 of the Criminal Procedure Code. He next moved to amend the indictment by the deletion of count (1) with the reservation of the right to proceed against the appellant on count (1) if the charge on count (2) failed or if the Attorney-General so desired. Counsel for the appellant objected to the Crown reserving any right to frame another indictment if the present one failed. The presiding Judge allowed the motion of the Crown Counsel and proceeded with count (2). The appellant was convicted and sentenced to twelve years' rigorous imprisonment. On August 19, 1940, an indictment containing count (1) of the original indictment was presented by the Attorney-General against the appellant. Counsel for the appellant moved to quash the indictment on the ground that the Crown had no legal right to present the indictment at this stage. The presiding Judge overruled the objection and proceeded to trial. The appellant was convicted of culpable homicide not amounting to murded and was sentenced to a term of five years' rigorous imprisonment. He appealed from the conviction.

C. S. Barr-Kumarakulasingham (with him *M. M. Kumarakulasingham*), for the accused, appellant.—The word "alter" in section 172 (1) of the Criminal Procedure Code does not mean "withdrawal". An extended meaning is given to that word by sub-section (3) of that section. It is clear from this that the Legislature did not want to extend the meaning further so as to include a withdrawal of a charge. The corresponding Indian section is 227. It is different from our section in that there are the words "alter or add" instead of alter, and there is no sub-section (3). Hence the interpretation given in India will not apply. Withdrawal under section 217 would entail fresh non-summary proceedings before the Attorney-General could present an indictment on the charge so withdrawn. In the present case the Court had deleted a charge. The Attorney-General cannot take any steps whatsoever on the deleted charge not even the initiation of non-summary proceedings.

The Attorney-General's powers are to be found in the Criminal Procedure Code. He has no inherent powers. He has in this case exercised whatever power is given to him by section 165F "to present an indictment" when he presented the first indictment. Having thus exhausted his powers it is not open to him now to present this indictment.

It cannot be argued that what Cannon J. really did in this case was to order separate trials. Separation of trials is provided for under section 5 of the Indictments Act. Under that section the Court before ordering a separation of trials should be satisfied that the accused would be prejudiced by a joint trial. In the present case the Court was neither called upon to avoid prejudice to the accused nor did it in fact consider that question at all.

The joinder of charges is provided for in sections 179 and 180. In England the corresponding provisions are in the Indictment Act, 1915. The provisions are slightly different. *R. v. Tayler*[1] and *R. v. Davies*[2] do not prohibit the joinder of charges. They lay down the principle that where the evidence is separable it is desirable to have separate trials. Indictment is explained in *Latham v. The Queen*[3].

An accused person giving evidence on his own behalf is not a "witness" under section 122 and therefore he cannot be cross-examined regarding any statement he may have made under section 122, Criminal Procedure Code, in the course of investigation. See *King v. Kiriwasthu*[4] and *Cooray v. Perera*[5].

On the evidence the statement of the accused amounts to a confession as in *King v. Kalu Banda*[6]. It is therefore barred by section 25 of the Code. The word confession is defined in section 17 of the Evidence Ordinance.

J. W. R. Ilangakoon, K.C., Attorney-General (with him *Nihal Gunasekera, C.C.*), for the Crown—Section 172 (3) of the Criminal Procedure Code is not exhaustive of the meaning of "alter". The deletion of a count from an indictment is an alteration. A fresh indictment can be presented in respect of the count so deleted. The accused has not pleaded to the deleted charge.

An accused charged with a non-summary offence can be tried after a committal or by criminal information under section 385 of the Criminal Procedure Code. A non-summary inquiry has been held in this case and the accused committed for trial. It is open to the Attorney-General under section 165F of the Criminal Procedure Code to present more than one indictment against an accused on the same committal. When a Magistrate commits an accused on several charges the committals are several and distinct. See *R. v. Phillips and Quayle*[7]. His powers are not exhausted by presenting one indictment. There is no time limit within which indictments may be presented. If the Attorney-General considers before the trial that it would be more appropriate to indict an accused in a form different to that in which an indictment has already been presented a fresh indictment may be presented.

[HOWARD C.J.—Have you any reserve powers other than those in the Code ?]

[1] *18 Cr. A. R. 25.*
[2] *(1937) 3 All. E. R. 537.*
[3] *5 B. & S. 635.*
[4] *(1939) 14 C. L. W. 25.*
[5] *(1937) 8 C. L. W. 65.*
[6] *15 N. L. R. 422.*
[7] *26 Cr. A. R. 208.*

No. It cannot be said that the Attorney-General has no power to present two indictments in respect of the same charge but differently worded and to take up one of them at the trial.

[KEUNEMAN J.—Should not there be a fresh committal ?]

No, in view of the fact that the accused has not been discharged.

There is nothing to prevent a Police officer from giving oral evidence of statements made to him to contradict or corroborate a witness.

[HEARNE J.—Can he use it to contradict the accused ?]

He can so long as it is not a confession. Section 122 of the Criminal Procedure Code prohibits production of the recorded statement. See *King v. Attygalle*[1]. The effect of *King v. Kalu Banda*[2] has been whittled down by *King v. Cooray*[3].

C. S. Barr Kumarakulasingham, in reply.—*Rex v. Fernando*[4] held that the statement of accused could not be used to contradict him.

There is no power under section 165F of the Criminal Procedure Code to present more than one indictment. The word "an" in that section suggests this view.

Under section 172 the Court orders the alteration and if the Attorney-General presents a fresh indictment, he appears to go behind the order of Court.

Cur. adv. vult.

October 7, 1940. HOWARD C.J.—

This appeal is based on the following grounds :—

(*a*) That the Attorney-General had no power to present the indictment on which the appellant was convicted.

(*b*) That in the course of the trial the learned Judge allowed Crown Counsel to confront the appellant with a statement alleged to have been made by him to the Police Inspector under section 122 of the Criminal Procedure Code. That such use of this statement was not authorised by law, that the statement was wrongly admitted in evidence by the learned Judge and thereby amounted to such misdirection as would vitiate the conviction.

If ground (*a*) is successful the conviction cannot be sustained and the necessity for the consideration of ground (*b*) does not arise. The facts with regard to the presentment of this indictment against the appellant are that on June 5, 1940, before Cannon J. and a Jury the appellant was charged by the Attorney-General on an indictment containing three counts. The first count contained the same charge as was presented to the Jury by the Attorney-General in this case, the second was a further charge of the murder of one Leina Hamy, and the third was a charge of attempted murder. Before the indictment was read to the appellant Crown Counsel made an application under section 217 (3) of the Criminal Procedure Code to withdraw count (3) of the indictment. He also stated that it had been the practice in England and also that the Court of Criminal Appeal in England had commented on the fact that in an indictment for murder there should be only one count. In view of this reason Crown Counsel made an application under section 172 of the Criminal Procedure Code to amend the indictment by deleting count (1) and proceeding

[1] *37 N. L. R. 60.*
[2] *15 N. L. R. 422.*
[3] *28 N. L. R. 74 at 82.*
[4] *(1939) 16 C. L. W. 10.*

against the appellant on count (2). He, however, submitted that the Court should reserve him the right to proceed against the appellant on count (1) if the charge on count (2) failed or if the Attorney-General so desired. Counsel for the appellant stated that he had no objection to the amendment, but he objected to the Crown reserving any right to frame another indictment against the appellant if the present one failed. There was further argument and the learned Judge in making his order stated as follows:—

> "In my view, however, the amendment of the counts of the indictment in respect of count (1), the object being for the reason stated by Crown Counsel, will not preclude the Crown from framing another indictment under count (1), should it think it necessary in the interests of justice. The amendment will be as follows: Count (1) to be deleted and count (3) of the indictment withdrawn".

Counsel for the appellant then stated that he was prepared to go to trial on counts (1) and (2) rather than on count (2) alone. The Judge then said that the amendment must stand as it is.

On August 19, 1940, an indictment containing count (1) of the original indictment was presented by the Attorney-General against the appellant before de Kretser J. and a Jury. Before this indictment was read to the Jury, Counsel for the appellant raised an objection and sought to have the indictment quashed on the ground that the Crown had no legal right to present the indictment at this stage. Counsel for the appellant employed the same arguments as were submitted to Cannon J. de Kretser J. held that the objection could not be upheld and made the following order:—

> "The position now is this: the Crown did not withdraw the charge under section 217 of the Criminal Procedure Code. In effect what the Court did was to order separate trials, following the suggestion made by the Court of Criminal Appeal in *Davies* (*1937, 26 Criminal Appeal Reports, p. 95*). The Lord Chief Justice said there that the proper course was to charge for each murder separately in a separate indictment. Mr. Justice Cannon feeling the force of that observation and seeing the Crown was pursuing a right course confined the trial to one charge, and it could be confined to one charge only by deleting the other. This procedure was adopted in the interests of the accused. Quite clearly, therefore, the accused had not been convicted or acquitted on the first count; the charge against him has not been withdrawn, and he still remains liable to be tried for that offence. I, therefore, think that the objection cannot be upheld and the case must go to trial".

The case then proceeded to trial and the appellant was convicted of the offence of culpable homicide not amounting to murder and sentenced to five years' rigorous imprisonment.

Counsel for the appellant in submitting that the trial and conviction of the latter on the second indictment was bad contends as follows: (*a*) That the withdrawal of count (1) in the first indictment was not an alteration of the indictment within the ambit of section 172 (1) of the Criminal Procedure Code, and (*b*) that, if it is conceded that such withdrawal was an amendment under section 172 of the Criminal Procedure Code, the Attorney-General had no power to present the second indictment. With

regard to (*a*) Counsel for the appellant relied on the phraseology of sub-section (3) of section 172 which limited an amendment under sub-section (1) to the substitution of one charge for another in an indictment or the addition of a new charge and did not authorise the withdrawal of a charge. The Attorney-General maintained that section 172 (3) was not exhaustive as contended by Counsel for the appellant. On this point we are in agreement with the Attorney-General and are of opinion that the words "alter any indictment" in sub-section (1) includes the "withdrawal" of a count in an indictment.

The effect of the withdrawal of a count in an indictment is another matter and raises a point of considerable difficulty. The Attorney-General contends that, under section 165F of the Criminal Procedure Code he is at liberty to present against an accused person any number of indictments provided they are founded on facts disclosed in the record of inquiry on which the Magistrate has committed. This power is subject to the limitations with regard to joinder of charges prescribed by sections 178-181 of the Code. With regard to count (1) of the first indictment he maintains that there has been no verdict of discharge, but merely withdrawal of a count in that indictment. In these circumstances the committal of the Magistrate in respect of the facts on which this indictment is founded remains and it is open to the Attorney-General to present another indictment.

The charge against the appellant being a criminal one the law must be strictly construed and powers not vested in the Attorney-General by law cannot be assumed or implied. Section 165F read with section 186 provides for the presentment of indictments against an accused person by the Attorney-General. Part IX. (Chapter XXXV.) of the Code vests in the Attorney-General certain supplementary powers including the power to exhibit to the Supreme Court informations for all purposes for which His Majesty's Attorney-General for England may exhibit informations on behalf of the Crown in the High Court of Judicature. Section 217 provides for the entering by the Attorney-General of a *nolle prosequi*. Section 172 merely empowers the Court to alter a charge or indictment. In connection with the powers of the Attorney-General it will be observed that de Kretser J. in disallowing the objection to the indictment made by Counsel for the appellant held that what in effect the Court did was to order separate trials following the suggestion made by the Court of Criminal Appeal in *R. v. Davis*[1]. The Attorney-General was unable to accept such a position or to agree with de Kretser J. that this was the effect of Cannon J.'s order. Following the judgment of the English Court of Criminal Appeal in *R. v. Davis* it was of course within the power of the Court in proper circumstances to have made such an order. Such an order can, however, be made only as a matter of judicial discretion and to ensure that an accused is not by the joinder of more than one charge in the indictment prejudiced in his defence. In this connection reference is also made to the judgment of Wood Renton C.J. in *The King v. Senanayake*[2]. Cannon J. in this case did not purport to exercise a judicial discretion in the interests of the accused. In fact Counsel for the accused opposed the withdrawal of the charge and maintained he was

[1] *16 Cr. A. R. 95.*

[2] *20 N. L. R. 83.*

prejudiced thereby. We are, therefore, of opinion that the suggestion that in allowing the amendment Cannon J. was merely ordering separate trials is untenable.

On a strict interpretation of section 172 we are of opinion that its provisions merely authorise the Court to permit an alteration of the charge. Those provisions do not vest in the Attorney-General a power to frame a fresh indictment in respect of a charge withdrawn in pursuance of the Court exercising its powers of amendment under the section. Nor can we discover in the Criminal Procedure Code or in the inherent powers of the Attorney-General that in such circumstances he is vested with any such power. If it is desired to place the accused person on his trial in respect of a charge so withdrawn, magisterial proceedings must be commenced "de novo".

For the reasons given the appeal is allowed and the appellant discharged.

Appeal allowed.