

1935

Present: Drieberg J.

THE KING *v.* LUDOWYKE.

IN THE MATTER OF AN APPLICATION UNDER SECTIONS 47 AND
48 OF THE COURTS ORDINANCE, No. 1, OF 1889.

P. C. Galle, A 4,032.

Transfer of a sessions trial—Application for retransfer—Special jury—Accused charged with misappropriation of funds of a club—Interest of members—Fair and impartial trial not possible—Criminal Procedure Code, ss. 135, 262, 265, 274—Courts Ordinance, s. 47.

The accused was charged with criminal misappropriation of funds entrusted to him as Assistant Sweeps Secretary of the Galle Gymkhana Club and was committed for trial at the Supreme Court Criminal Sessions at Galle. The Attorney-General acting under section 47 of the Courts Ordinance by his *fiat* transferred the case to the Sessions of the Western Circuit to be held at Colombo.

The case was ordered to be tried by a special jury and the jury list at Galle consisted of one hundred and nine members of whom forty were members of the Galle Gymkhana Club.

Held, (on an application by the accused for a retransfer of the case to Galle) that, in the circumstances a fair and impartial trial cannot be held at Galle.

The rule that every offence must ordinarily be tried by a Court within the local limits of whose jurisdiction it was committed is enacted not only in the interests of and for the convenience of accused but also on grounds of public policy, and the necessity is greater in the case of trials by Judge and jury than in trials by a Judge alone. A departure from this rule should only be permitted in exceptional circumstances.

THIS was an application under section 47 of the Courts Ordinance.

H. V. Perera (with him *Amarasekere*), for the accused.

Obeysere, Deputy S.-G. (with him *Schokman, C.C.*), for the Crown.

February 15 1935. DRIEBERG J.—

The accused was committed for trial at the Supreme Court Sessions at Galle; the inquiry was by the Police Court of Galle. The Attorney-General, acting under section 47 of the Courts Ordinance, by his *fiat* transferred the case to the Sessions of the Western Circuit to be held at Colombo. The Attorney-General then moved under section 222 of the Criminal Procedure Code that a special Jury be summoned to try the case.

The accused applied, under the provisions of section 47 of the Courts Ordinance, for a retransfer of the case to the Southern Sessions to be held at Galle.

Both applications were dealt with on the same day.

Mr. H. V. Perera for the accused did not oppose the application for a special jury. The trial will involve the examination of accounts extending over several years, there are four hundred and eighty-nine documents listed on the indictment and I think it most desirable that a case of this nature should be tried by a special jury.

The accused applied for a transfer to Galle for several reasons. The first ground is the greater expense he would have to incur in bringing his witnesses to Colombo. The second is the greater cost of the services of his proctor and his junior counsel, who is a member of the Galle bar, if they had to appear in Colombo. The third is the state of his health. The fourth is that if he had to appear in Colombo, the trial is expected to take three weeks, he would lose a certain income which he could continue to draw during the trial if it is held at Galle. The fifth is that no sufficient reason was shown by the Crown why the trial should not be in Galle.

There is no substance in the first ground, for the batta of witnesses for the defence, if summons on them have been duly obtained, will be paid by the Crown.

As regards the second objection, if counsel from the Colombo bar is to lead for the defence, and it is suggested that this is so, his services can be secured at a lesser fee to appear in Colombo than at Galle and this saving would make up to an appreciable extent for the greater expense of the appearance at Colombo of the accused's junior counsel and proctor.

The third objection is one which deserves sympathetic consideration. The doctor states that his condition is such that he has been advised to take rest. While this may be a sufficient reason, if his condition is serious, for his not having to stand the strain of a trial, it is not very clear how he could stand a trial at Galle and not in Colombo; but there is the claim he makes that at Colombo he would not have the comforts which he has in his own home.

The fourth reason is not convincing. Though the Principal, the Rev. A. A. Sneath, thought he should not attend Richmond College, Galle, of which he is the Headmaster, while this charge was pending, he was allowed to draw his full salary on his providing a substitute at his expense, and he gave some boys of the school tuition at his bungalow. Mr. Sneath has filed an affidavit of these matters and he does not suggest in it that the allowance will be discontinued if the accused is away in Colombo for his trial.

Though the Attorney-General in his discretion can direct a transfer, the proviso to section 47 enables this Court to retransfer a case on good cause shown by an accused. The matter is open to the fullest examination. Every offence must ordinarily be tried by a Court within the local limits of whose jurisdiction it was committed—Criminal Procedure Code, section 135. This is enacted not only in the interests of and for the convenience of accused but also on grounds of public policy, and the necessity for this is even greater in the case of trials by Judge and jury than in trials by a Judge alone. A departure from this rule should only be permitted in exceptional circumstances.

The learned Deputy Solicitor-General submits an affidavit by Mr. Koelmeyer, an Assistant Superintendent of Police who prosecuted in the Police Court, in which he said that the accused is an old and well known resident of Galle, that the case had roused a great deal of public interest in Galle where the headquarters of the Galle Gymkhana Club are, and that a strong public opinion has been formed in the district regarding the case. He said that for that reason he believed that a fair and impartial trial could not be had at Galle.

A reason such as this calls for very close examination ; but there is one objection raised by the Crown to the trial in Galle which in my opinion concludes the matter.

The accused is charged with criminal misappropriation of certain monies entrusted to him as Assistant Sweeps Secretary of the Galle Gymkhana Club. These were monies in the nature of commission on lottery tickets which had to go to the credit of the club and become its property. This case is to be tried by a special jury. The jury list shows that there are one hundred and twelve persons on list 1 (Criminal Procedure Code, section 257), that is the English-speaking jury, who are qualified as special jurymen. Three have died since the making of the list and this reduces the number to one hundred and nine. Of these forty are members of the Galle Gymkhana Club. It is contended for the Crown that it is very undesirable that any of these should try this case. The accused was at that time an employee of theirs. Without going into the constitution of the club and considering whether it is a proprietary club or not, all its members must be regarded as having an interest in the funds of the club at any rate to the extent that the money, alleged to have been misappropriated, could, if available, be used for the benefit and improvement of the club and would therefore be to their advantage. It was also urged that considerations of maintaining the prestige of the club or a reluctance to recognize possible mismanagement might lead members away from a strict consideration of the matter before them as a jury. It is possible that there may be among them some whose interest in the club is so detached and remote that they will be wholly unconcerned with any consideration save that of arriving at the truth on the evidence before them, but as matters now stand and with such material as there is before me I must recognize the force of the objection to members of the club serving on the jury. There will thus be of the special jurymen forty who are members and sixty-nine who are not. In his affidavit, Assistant Superintendent Koelmeyer states that five of those who are not members are so closely connected with the parties in the case that it is undesirable that they should try it.

But not reckoning the five we are left with forty members and sixty-nine non-members. Mr. Perera would not admit that there was substance in the contention for the Crown, but he said that even if there was, that was no reason for the trial not being in Galle for it was possible to have a jury composed of those who are not members ; it was suggested that a large number might be summoned so as to allow of a sufficient residue of non-members from whom the jury could be drawn after those who are members had been asked to stand by on the suggestion of the prosecution under section 224 (5) of the Criminal Procedure Code. But the number of those who can be summoned to form a panel is limited by section 262 to fifteen and this number has to be drawn in the first instance ; a name which is drawn may be put aside and another drawn instead if it is known that the person first drawn is absent from the Colony or unable to attend from sickness or other good cause, but only fifteen can be summoned—section 265. If it is found that summons cannot be served on any of the fifteen, other names can be drawn in place of them under section 274 ; but no names once drawn can be put aside on the ground that it is undesirable

that the person should be selected for the panel. Any objection of this kind can only be considered in Court when the jury is drawn for the trial.

It follows that there is a possibility of so many of the fifteen being members of the club that it will not be possible to make up the requisite number, or the number of the non-members may be such that the requisite number cannot be obtained if the right of challenge is exercised by the accused. If the number proves inadequate the jury will have to be made up by calling on some of the bystanders in Court to serve. This is the last resort which it sometimes becomes necessary to adopt, but I cannot direct a trial to take place under conditions when there is reasonable possibility of this happening and especially so in a case of this nature.

I allow the application of the Crown for a special jury and I disallow the application of the accused for a transfer of the case to the Galle Sessions.

Application refused.
