

country, or the Courts of the British Empire, that no case can be found in which the circumstances are such as existed in this case. If I grant the application, it will be competent for the Crown, indeed, that would be the ordinary course, to place the prisoner upon his trial, and the evidence which he gave upon the trials of Sifton could be used against him, and the jury might, upon that evidence, convict him. But Mr. Magee has intimated that the Crown, if the application be granted, will not take the course of further prosecuting this indictment; and the responsibility of taking that course is upon the Crown.

I am not at all questioning the propriety of that course, but it does seem to me almost a scandal that I should be called upon here solemnly to pronounce sentence of death on the plea of guilty of the accused, in a case in which the Crown says, if that plea were not there, they would permit the prisoner to go free. It is the most cogent circumstance that could be adduced in favour of my granting the application.

The circumstances are peculiar. The prisoner has not only confessed, but has twice under oath repeated the avowal of his guilt and the complicity of Gerald Sifton in the murder of Sifton. No doubt that is a very strong circumstance against the accused. But there is no theory that can be suggested by which Sifton could be innocent and the prisoner guilty. If it were possible that Herbert could be guilty and Sifton innocent, the case would present an altogether different aspect. The jury upon consideration of the whole case have pronounced Sifton not guilty. This being so, it seems to me that I should exercise my discretion in favour of permitting the accused to withdraw his plea.

It is not for me to suggest reasons why the accused should have pleaded guilty, if he was not guilty. One might think that in some cases a young man accused of a capital offence, might, especially if suggestion had come to him, have thought it best, though not guilty, to plead guilty expecting that the Crown, if he gave his testimony against his accomplices, would exercise its clemency in his favour. He did not suggest that this was so, but on looking at the circumstances the acquittal of Sifton was absolutely inconsistent with the guilt of the prisoner.

It would be entirely opposed to the whole policy of the English and Canadian law to permit the prisoner to be now sentenced to death upon his plea of guilty. It is more consistent with the traditions of the Court to be merciful to the accused. The responsibility for the course that was ultimately taken, whether it be to proceed with the trial or to offer no evidence, must rest upon those who were charged with the administration of criminal justice.

A tales jury having been empanelled and sworn, the Crown offered no evidence. They were thereupon instructed to acquit the prisoner, which having been done, Herbert was discharged.