KING *v.* HENDRIC SINHO.

1903.
August 24.

Murder—Acquittal of prisoner on charge of murder—Prosecution for abetment of murder—Plea of autre fois acquit—*Criminal Procedure Code, s. 181 and s. 330, sub-section (1).*

Where A, having been acquitted of a charge of murder, was indicted for abetment of murder,—

Held that, in a case coming within section 181 of the Criminal Procedure Code, a charge of murder and a charge of abetment of murder against the same person may be joined, and that even without a separate charge of abetment, the accused may be convicted of abetment of murder on the charge of murder.

Held also, that as at the previous trial the accused was acquitted of murder, and the jury did not pronounce him guilty of abetment of murder, the plea of *autre fois acquit* raised by the accused must prevail.

AT its second Criminal Session of 1903 for the Western Circuit the Supreme Court tried one Suwa, Hendric Sinho, and Abraham for the murder of Gunaratne Terunnanse. The jury found Suwa guilty of murder, and brought in a verdict of acquittal as regards Hendric Sinho and Abraham.

In the following session of the Supreme Court Hendric Sinho and Abraham, being indicted for abetting Suwa in the murder of Gunaratne Terunnanse, pleaded *autre fois acquit*.

Dornhorst, K.C., for the accused.

Rámanáthan, S.-G., for the Crown.

The arguments of counsel appear in the following judgment of the learned Commissioner of Assize (Mr. T. E. Sampayo, K.C.).

Cur. adv. vult.

24th August, 1903. Mr. Commissioner SAMPAYO—

The charge made against the two accused in this case is that on or about the 17th November, 1902, at Hunupola in Avissawella, one Dambadeniya-achige Suwaris *alias* Suwa committed murder by causing the death of one Talwalgoda Gunaratne Terunnanse, and that the accused aided and abetted the said Dambadeniya-achige Suwaris *alias* Suwa in the commission of the said offence of murder, which was committed in consequence of the said abetment, and that they thereby committed an offence punishable under sections 102 and 296 of the Ceylon Penal Code.

To this charge the accused pleaded a previous acquittal in case No. 16 of the second Criminal Session of 1903 for the Western Circuit, wherein, it has been proved, the said Suwaris alias Suwa

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and the present first and second accused were charged with and duly tried for the murder of the said Gunaratne Terunnanse, with the result that Suwaris *alias* Suwa was convicted of murder and the present accused were acquitted altogether.

Section 330, sub-section (1), of "The Criminal Procedure Code, 1898," provides that a person who has once been tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall not be liable to be tried again on the same facts for any other offence for which a different charge might have been made under section 181, or for which he might have been convicted under section 182. Secttion 181 provides that, if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with all or any one or more of such offences, and any number of such charges may be included in one and the same indictment; and section 182 provides that, if in the case mentioned in the preceding section, the accused is charged with one offence and it appears in evidence that he committed a different offence, for which he might have been charged under the provisions of section 181, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

At the argument of the questions raised by the plea the learned Solicitor-General informed me that he relied on the same facts as were put before the jury at the previous trial, but that in the present case he would develop them, that is to say, as he explained his meaning, he would put them more prominently before the jury in reference to the specific charge of abetment. The depositions transmitted to this court on the former trial and also those on the present charge have been put in evidence. I find that the facts intended to be placed before the jury in proof of the present charge are the same as those put forward at the previous trial, the only question being as to whether these facts would establish the offence of murder or the offence of abetment of murder. If upon these facts the accused be held to have been "present" when Suwaris *alias* Suwa committed the murder, they also would be guilty of murder under section 107 of the Penal Code, but if they be held to have been "absent" they would be guilty of abetment of murder only. It is thus a case where it was doubtful whether the facts which could be proved as regards the present accused would constitute the offence of murder or of abetment of murder, and it is therefore a case in which the accused might in the former trial have been charged under section 181 both with the offence of murder and with the offence of abetment of murder, or with the

latter offence only, and in which they might in the former trial have been convicted under section 182 of the offence of abetment even without a separate charge of abetment.

The Solicitor-General, however, argued that a charge of murder and a charge of abetment of murder against the same person could not be joined in the same indictment, and that on an indictment for murder an accused could not be found guilty of abetment of murder, and he cited in support of his contention the case of *Reg. v. Chand Nur* (*11, Bombay, H.C.R. 240*). I do not think that case quite applies. That case decided that abetment is not a "minor offence" in reference to the offence abetted within the meaning of the section of the Indian Code corresponding to section 180 of our Code, and that, therefore, on a charge of murder the accused could not be convicted of abetment without an amendment of the charge. It may be granted that abetment is not a minor offence in that sense, but the decision does not profess to consider the bearing on such a case as the present of the sections 236 and 237 of the Indian Code corresponding to the sections 181 and 182 of our Code, and probably the circumstances of that case did not allow of its being brought within these sections, and it was brought merely to justify the conviction in that case under the section of the Indian Code corresponding to section 180 of our Code. I am not disposed to follow this decision in the present case, as I am of opinion that in a case coming within section 181 of our Code a charge of murder and a charge of abetment of murder against the same person may be joined, and that even without a separate charge of abetment the accused person may be convicted of abetment of murder on the charge of murder. I find that this view is quite in accordance with the more recent and more authoritative decision of the Bombay High Court on the very sections of the Indian Code corresponding to sections 181 and 182 of our Code. I refer to the case of *Queen-Empress v. Appasubhana Mendre* (*I.L.R. 8, Bomb. 200*), in which not only were charges of murder and of abetment, so joined, but it was held that, even without a separate charge for abetment, a conviction for such offence would be good on the charge of murder.

In my opinion section 330, sub-section (1), of the Criminal Procedure Code applies to this case, and I uphold the accused's plea of previous acquittal.