

Present: Mr. Justice Wendt.

1906.
November 7.

WEERESOORIYA v. MARIANU BAAS.

P. C., Galle, 34,697.

Disturbing the repose of inhabitants—Abetment—Noise made by the servants of the accused—Ordinance No. 16 of 1865, s. 90—Ceylon Penal Code, s. 107.

A person who, although aware of the fact that his servants are disturbing the repose of the inhabitants of the neighbourhood by packing and cooping plumbago barrels for his benefit, does not forbid or prevent it, is guilty of abetment of an offence under section 90 of Ordinance No. 16 of 1865.

Bell v. Senanayaka (1) distinguished.

APPEAL by the Attorney-General from an acquittal. The facts sufficiently appear in the judgment.

H. J. C. Pereira, for complainant, appellant.

Van Langenberg, for accused, respondent.

Cur. adv. vult.

7th November, 1906. WENDT J.—

The appellant was charged with (1) making a noise in the night so as to disturb the repose of the inhabitants (Ordinance No. 16 of 1865, section 90), and (2) abetting the commission of that offence. The Magistrate, at the close of the case for the prosecution, discharged the accused without calling upon him for a defence, and the complainant appeals with the sanction of the Attorney-General. The evidence laid before the Police Court proved that the accused carried on, at a house in Kumbalwella in the town of Galle, the business of curing and packing plumbago. This plumbago was packed in barrels made and coopered on the premises, and the packing and cooping was attended with considerable noise. Recently it had become the practice to carry on this work at night, and the noise seriously disturbed the repose of the inhabitants of the neighbourhood, which is thickly populated. The accused lives on the premises, and there is good reason for concluding that he was cognizant of the noise made by his agents and workmen. The complainant deposes that he has heard the noise of the accused directing the workmen, while the noise was going on at night.

Under these circumstances, the Magistrate held, following the decision in the case of *Bell v. Senanayaka* (1), that the accused could

(1) (1904) 7 N. L. R. 126.

1906. not be convicted of a breach of section 90 of " The Police Ordinance,
 November 7. 1865, " because he had not himself made the noise complained of.
 WENDT J. The case referred to supports the Magistrate in so holding. " I can
 find nothing in that section, " said Layard C.J., " which renders a
 person liable to prosecution for causing other persons to make such
 a noise as to disturb the repose of the inhabitants of the locality." The
 accused in that case was not charged, as the present accused
 is, with abetting the offence of those who did make the noise. He
 had not been present at the commission of their offence, and could
 not therefore have been convicted as a principal under section 107
 of the Penal Code. The attention of the learned Chief Justice there-
 fore was not directed to the provisions of the Penal Code as to abet-
 ment. The Magistrate has overlooked the existence in the present
 case of the charge of abetment (*cf. Cadirevelu v. Suppaiya*) (1).

I am of opinion that the prosecution has made out a *prima facie*
 case of abetment against the accused. The offence aimed at by
 section 90 of the Ordinance is habitually committed by the servants
 of the accused, over whom the accused personally has the control
 usually possessed by a master or employer, and the accused has
 countenanced their acts and taken the advantage accruing there-
 from. So far as appears, he, though fully cognizant of their
 breach of the law, has never forbidden it or sought to prevent it.
 His conduct amounts to abetment. The Magistrate was wrong in
 not proceeding with the trial and not calling upon the accused for
 his defence.

I therefore set aside the order of discharge and send the case back
 to be proceeded with in due course. It is unnecessary to consider
 the large class of cases canvassed at the Bar, in which the question
 was whether a master could, in the absence of *mens rea*, be
 convicted of doing an act forbidden by a statute, when that act
 had been done by a servant and was an isolated act, with no sugges-
 tion of such complicity on the master's part as would be indicated
 by his approval of a course of business which included the habitual
 doing of similar acts.

Appeal allowed; case remitted.