1952 *Present :* **Gratiaen J. and L. M. D. de Silva J.**

L. T. F. RODRIGO, Appellant, *and* THE QUEEN, Respondent

S. C. 23—D. C. (Criminal) Colombo, N 1,639

Conspiracy—Accomplishment of the offence agreed upon—Proper indictment to bring in such circumstances—Penal Code, s. 113A.

Indictment—Amendment of it by Court—Proper procedure.

Criminal Procedure Code, s. 347 (b) (ii)—Alteration of verdict on appeal—Scope of—Abetment—Different types of abetment—Penal Code, ss. 100–103.

It is undesirable to include a charge of conspiracy in an indictment which alleges the actual commission of the offence in respect of which the conspiracy was formed.

The primary responsibility for the accuracy and suitability of an indictment rests with counsel for the prosecution, and not on the court. The court may, however, decide to amend the indictment on its own responsibility, but before such a decision in made, both the prosecution and the defence should be given an opportunity of making their submissions on the point.

The power vested in the Supreme Court under section 347 (*b*) (ii) of the Criminal Procedure Code to alter a verdict to a conviction on an amended charge which the appellant had not specifically been called upon to meet at any stage of the trial must be used with discretion, and only if the accused was not misled by the form of the charge and there is not any chance of injustice being done. The conviction for abetment under section 103 of the Penal Code could not therefore, in the circumstances of the present case, be altered to a conviction for abetment under section 102 read with section 101, Explanation 3, without injustice to the appellant.

APPEAL from a judgment of the District Court, Colombo.

H. V. Perera, Q.C., with *E. R. S. R. Coomaraswamy*, for the 2nd accused appellant.

Boyd Jayasuriya, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

November 21, 1952. GRATIAEN J.—

The appellant, who was the Assistant Storekeeper of the firm of Brown & Co., Ltd., and another accused named McHeyzer were jointly tried before the Additional District Judge of Colombo in connection with a serious fraud which is alleged to have been practised on the Company. The indictment contains three counts which may be summarised as follows :—

(1) In the first count both accused are charged with having between 26th January, 1950, and 8th February, 1950, conspired to cheat the Chief Engineer of the Company by falsely representing to him that a large quantity of copper scrap had been delivered to the Company's Stores by a trader named Shanmugarajah, so as to induce the Chief Engineer to issue a cheque for Rs. 4,005 in favour of Shanmugarajah as consideration for what was in truth a fictitious sale ;

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(2) In the second count McHeyzer alone was charged, as the principal offender, with having " at the time and place aforesaid and in the course of the same transaction " cheated the Chief Engineer in the manner alleged in the first count of the indictment ;

(3) In the third count, the appellant was charged with having " at the time and place aforesaid and in the course of the same transaction " *abetted McHeyzer " in the commission of the said offence, which offence was committed in consequence of such abetment* ".

McHeyzer and the appellant severally pleaded not guilty to these charges. The case for the Crown which these two accused persons were called upon to meet had been specified in the indictment with commendable particularity—namely, that they had combined to abuse their trust as employees by practising a fraud on the Company ; that their common plan had been successfully carried into execution by McHeyzer ; and that the appellant had himself abetted the planned commission of McHeyzer's offence by active participation so as to facilitate its execution. In effect, the Crown had rejected the position which McHeyzer even before the commencement of the non-summary proceedings had taken up to the effect that if there was a fraud, he had merely acted as an innocent agent in the transaction.

The evidence on which the Crown relied in support of the charge of conspiracy was none other than the evidence intended to be submitted as proof of the commission of the actual offences of cheating and abetment. In such a situation it has been considered undesirable and improper by the English Courts to charge the accused persons only with conspiracy or to include a charge of conspiracy in an indictment alleging the commission of the offences themselves—*R. v. Cooper and Compton* [1] and *R. v. West and others* [2]. The practice " renders admissible evidence of what one prisoner says in the absence of the other "—*R. v. Luberg* [3], and such a course is " manifestly calculated to operate unfairly and unjustly against the persons accused "—*R. v. Boulton* [4]. I have not been able to discover why the prosecuting authorities in this country have not discontinued this practice locally. In the present case, for instance, " there was no necessity from any point of view for the insertion of any charge of conspiracy "—per Humphreys J. in *Cooper's case* (supra).

The trial took an unexpected turn during its closing stages. After the defences of both McHeyzer and the appellant had been closed, the learned Judge decided, " entirely on (his) own responsibility ", to amend (by substitution) the third count in the indictment to read as follows :—

" That at the time and place aforesaid and in the course of the same transaction, you, L. T. F. Rodrigo the 2nd accused abovenamed, in the commission of the offence set out in count 2 above and which act was committed in consequence of such abetment but with a different knowledge or intention from that of the abettor, to wit : with knowledge on the part of the first accused that the 2 tons 5 cwt. of copper had

[1] *(1947) 32 Cr. App. Rep. 102.*
[2] *(1948) 1 K.B. 709.*
[3] *(1926) 19 Cr. App. Rep. 133.*
[4] *(1871) 12 Cox C. C. 87 at 93.*

not been purchased for and on behalf of Brown & Co., Ltd., and that it had not been delivered at the Stores of the said Brown & Co., Ltd., and that you thereby committed an offence punishable under Section 103 read with Section 403 of the Penal Code."

This decision appears to have been made by the learned District Judge because he had by this time formed the impression upon the evidence that McHeyzer was in truth only an innocent agent in the perpetration of the fraud on the Company. Even if that be the explanation, the language of the amendment is clearly inappropriate. It is indeed unfortunate that the desirability of amending the indictment at this stage, and, if so, the form which it should take, were not considered after giving both the prosecution and the defence an opportunity of making their submissions on the point. Had this been done, some of the difficulties which have now presented themselves might certainly have been avoided. It is sufficient in this context to quote the observations of the Court of Criminal Appeal in *R. v. West* (supra) at page 717. "No application for leave to amend had been made by either side. The learned Judge was . . . . entitled to exercise his discretion in directing the amendment, but he clearly should have invited the parties, and in particular the defence, to express their views on the matter before deciding to do so. That opportunity was not given. In fact, the Crown did not desire any amendment and the defence would have strongly objected to the amendment if they had been given the opportunity of doing so." It is important to note in this connection that the primary responsibility for the accuracy and suitability of an indictment rests with counsel for the prosecution, and not on the Court—*R. v. Pople*[1]. Humphreys J. remarked in that case that "there may well be amendments which could properly be made at the beginning of the trial which would be oppressive and embarrassing to the accused if made at the close of the case for the prosecution". How much more pertinent would this observation be to an amendment directed by the presiding Judge, and not even at the instance of the Crown, after the defence has also been concluded!

The appellant pleaded not guilty to the amended charge, and his counsel declined the opportunity of having the witnesses (including, presumably, the appellant's co-accused McHeyzer) tendered for further cross-examination. Indeed, learned Counsel protested that his client's defence had been gravely prejudiced by his being called upon at the end of the trial to meet a case which was substantially different from that which the Crown had earlier presented against him and from which the Crown had never retracted.

The learned Judge then proceeded to pronounce his judgment. He held that the complicity of McHeyzer in a conspiracy or in the perpetration of the fraud had not been established beyond reasonable doubt, and McHeyzer was accordingly acquitted on both the counts which affected him. The acquittal of the appellant on the count of conspiracy followed as a necessary consequence, but he was convicted on the third

[1] *(1951) 1 K.B. 53.*

count (as amended) on the basis of the learned Judge's finding that he had abetted McHeyzer in the sense that he had *instigated* that gentleman, who was his innocent agent, to deceive the Chief Engineer in the manner specified in the earlier counts of the indictment. In other words, McHeyzer had not committed any offence but had nevertheless committed acts which, if accompanied by the requisite criminal intention, would have constituted the offence of cheating; and the appellant, by dishonestly *instigating* those acts, was guilty of abetment. The present appeal is from this conviction.

Learned Crown Counsel concedes, and I am satisfied, that the third count of the indictment (as amended) is entirely inappropriate to a set of circumstances such as, in the learned Judge's opinion, had actually taken place. Section 103 of the Penal Code relates only to a situation where the principal offender, though guilty, has committed the act abetted with a different criminal intention to that which actuated the abettor. In that event the abettor's criminal intention, and not that of the person abetted, must be the measure of his own guilt. If, however, the true position is that the person abetted had not, for one reason or another, committed an offence at all, Section 101 of the Code applies and Section 102 prescribes the punishment. As Explanation 3 to Section 101 lays down, " it is not necessary that the person abetted should have . . . . *any* guilty intention or knowledge." This is precisely what happened in the present case if the learned Judge's findings of fact be regarded as correct.

It is common ground that the conviction in its present form cannot stand, but Mr. Jayasuriya contends that this is an appropriate case for the exercise of this Court's jurisdiction under Section 347 (*b*) (ii) of the Criminal Procedure Code to " alter the verdict " by finding the appellant guilty of an offence of abetment materially different to that which had been set out in the indictment even in its amended form.

That this Court has the power to alter a verdict in the manner suggested by Mr. Jayasuriya is beyond question. But, as Lord Porter pointed out in *Thakur Shah v. The Emperor*[1], " the power must be used with discretion. If there is any chance of injustice being done or of the accused having been prevented from giving or of his having failed to give evidence material to his defence by reason of the amendment of the charge, the Court should at least make him the offer of a new trial on the charge as amended. But it is not always necessary to do so . . . . More particularly it is not necessary where it does not appear that any fresh evidence could be given on behalf of the person convicted." Lord Porter proceeded to cite with approval the ruling of the High Court of Patna that an appropriate amendment of the charge by the Appellate Court was justified in that particular case because " it cannot be said that the accused was misled by the form of the charge ".

There are three alternatives available to us, sitting as an Appellate Court, where the language of the indictment on which an accused person has been convicted at the trial below is inappropriate to the actual findings of the presiding Judge. One alternative is to direct a fresh trial

[1] *A. I. R. (1943) P.C. 193 at 195.*

upon an altered indictment—*Section 177 (1) of the Criminal Procedure Code.* Another alternative is, without directing a fresh trial, to alter the verdict under the provisions of *Section 347 (b)* (ii). If both these alternatives be inappropriate, the proper course is to quash the conviction and acquit the accused.

It has not been suggested by the Crown that the appellant should be re-tried on an altered count charging him with abetment. If the offence was committed at all, it was committed very nearly three years ago, and it would offend one's sense of justice to expose a person at this stage to the anxiety and expense of meeting a fresh charge alleging facts which differ so widely from the case which the Crown had chosen to present against him and his co-accused at the earlier trial.

There remains for consideration the proposed alternative of altering the verdict to a conviction on an amended charge which the appellant had not specifically been called upon to meet at any stage of the trial.

Section 100 of the Penal Code contemplates that abetment can take the form *either* of instigation *or* of prior conspiracy *or* of " intentionally aiding " the commission of the act abetted. In the first and second of these cases, the " abetment " would necessarily precede the contemplated action of the person abetted. The third case, on the other hand, seems to involve some contemporaneous activity on the part of the abettor. I do not doubt that there may well be situations in which the prosecution is not in a position to particularise in advance the form which the alleged abetment had taken, nor do I dispute the proposition that, in an appropriate case, a Court may without causing any prejudice convict an appellant, on the basis of the proved facts, of abetment of the appropriate kind falling within the definition of that offence.

We are here concerned, however, with a very different situation. The language of the original as well as of the amended count of abetment, coupled as they are with the preceding counts of conspiracy and of cheating (alleged to have been committed by McHeyzer in pursuance of that conspiracy) clearly indicated that the appellant had not been called upon to defend himself at the trial against an allegation of abetment involving prior instigation of any acts which would, if committed by McHeyzer, have formed an ingredient of a criminal offence. The distinction becomes apparent if one realises that a man who first instigates and later " intentionally aids " the doing of an act does in truth commit not one but two abetments.

The appellant and the lawyers who defended him must necessarily have shaped the defence (I do not use this phrase in any sinister form) so as to concentrate upon the particular case which he and McHeyzer had been called upon to meet. Can it then be said that there is not " any chance of injustice being done " if this Court were now to find him guilty of a different species of abetment, namely, the instigation of an innocent man to commit an act (not an offence) which would result in the deception of the Chief Engineer to the latter's prejudice ? Can it be asserted with confidence that he was not " misled by the form of the charge " ? I do not think so.

*——J. N. B 28724 (8/53)

Decisions to the effect that, in a given set of circumstances, a particular accused person had not been prejudiced by an alteration of the charge against him can only offer us limited assistance in deciding the present problem. Putting this case at the very lowest, I am content to say that if the accused had been tried alone to meet a charge of abetment alleging facts which are in conformity with the view which the learned trial Judge had ultimately taken of his conduct, I am not convinced that the same adverse conclusion would without doubt have been justified. Nor am I satisfied that, had the appellant received proper notice of the fresh charge, he could not, to use the words of Lord Porter, have set up any further defence " without stultifying himself ". I would therefore hold that an alteration of the charge at this stage should not be ordered by this Court.

I would quash the conviction of the appellant and make order acquitting him. It is but fair to him to state that the appeal was argued on the hypothetical assumption that the findings of the learned Judge were justified upon the evidence led at the trial. In the view which I have taken, it is unnecessary to decide whether that assumption is justified.

L. M. D. DE SILVA J.—I agree.

Appeal allowed.