[COURT OF CRIMINAL APPEAL.]

1944 *Present :* **Moseley S.P.J., Hearne and Jayetileke JJ.**

THE KING *v.* A. A. KITCHILAN *et al.*

56—M. C. Matara, 43,107.

Alternative charges—Charges of murder and abetment of murder—No misjoinder of charges—Power of Court of Criminal Appeal to disregard misjoinder of charges—Where there is no prejudice to accused—Criminal Procedure Code, ss. 181 and 425.

The five accused were charged jointly with the murder of one H; in the alternative, that they abetted the said murder.

The facts which the prosecution expected to be able to prove were that shortly before his death the accused had been conducted to a barrack room in Matara Police Station, where he was told by the fourth accused to undress and lean against a pillar; that the second and fifth accused held his hands behind the pillar; that the fourth accused struck him on the chest, whereupon he fell to the ground; that while in that position the third accused stamped upon his chest; that the second, third, fourth, and fifth accused struck him with their fists; that the first accused then came into the room and ordered the deceased to be assaulted; and that there followed an assault in which all took part including the first accused.

[1] *(1935) 1 K. B. 354.*

It was not disputed that the death of the deceased was the direct result of this series of attacks upon him but the prosecution was unable to say that it was the result of the act of any one or more of the accused. There was evidence that whoever it was that struck the fatal blow, the others by their acts aided the doing of it.

Held, by Moseley S.P.J. and Jayetileke J. (Hearne J. *dissentiente*) that the joinder of alternative charges was not obnoxious to section 181 of the Criminal Procedure Code.

Per HEARNE J.—Section 181 is applicable only when the acts of an accused are of such a nature that legal difficulty arises on the question of which one of several offences the sum total of facts will constitute. It is not applicable when the fact of intention on the part of an accused is in doubt.

Held, further, that even if there had been a misjoinder of charges, the Court would have dismissed the appeal as no embarrassment or prejudice had been caused to the accused.

In such a case the Court of Criminal Appeal has a wider discretion than that conferred upon an Appellate Court under section 425 of the Criminal Procedure Code.

The proper time at which an objection of the nature should be taken is before the accused has pleaded.

It is proper that Counsel should notify his appearance as soon as the case is called and before the accused is called upon to plead.

APPEAL against a conviction by a Judge and Jury before the Fourth Western Circuit, 1943.

M. T. de S. Amerasekere, K.C. (with him *M. M. Kumarakulasingham* and *G. Samarawickreme*), for first accused.

C. S. Barr Kumarakulasingam (with him *Vernon Wijetunge*), for second accused.

Mackenzie Pereira (with him *J. Weeraratne*), for third accused.

H. W. Jayewardene (with him *J. Fernandopulle*), for fourth accused.

T. Kanapathipillai, for fifth accused.

E. H. T. Gunasekera, C.C., for the Crown.

Cur. adv. vult.

January 17, 1944. MOSELEY S.P.J.—

The five accused were charged jointly with the murder of one Hinni Appu; in the alternative, that they abetted the said murder. The last four were convicted of voluntarily causing grievous hurt; the first, of abetting that offence. The point is taken in appeal that there was a misjoinder of charges.

Section 178 of the Criminal Procedure Code provides that for every distinct offence there shall be a separate charge and that every such charge shall be tried separately except in the cases mentioned in sections 179, 180, 181, and 184. The prosecution, in framing the charges now under consideration, relied upon the provisions of section 181 which is as follows:—

"181. 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 tried at one trial and in a trial before the Supreme Court or a District Court may be included in one and the same indictment; or he may be charged with having committed one of the said offences without specifying which one.

Illustration.

A is accused of an act which may amount to theft or receiving stolen property or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust, and cheating, or he may be charged with "having committed one of the following offences, to wit, theft, receiving stolen property, criminal breach of trust, and cheating."

The facts which the prosecution expected to be able to prove were that the deceased died owing to a rupture of the right auricle of the heart probably due to compression caused by direct violence, that shortly before his death he had been conducted to a barrack room in Matara Police Station, where he was told by the fourth accused to undress and lean against a pillar; that the second and fifth accused held his hands behind the pillar; that the fourth accused struck him on the chest, whereupon he fell to the ground; that while in that position the third accused stamped upon his chest; that the second, third, fourth, and fifth accused struck him with their fists; that the first accused then came into the room and ordered that the deceased be assaulted; and that there followed an assault by the second, third, fourth, and fifth accused in which the first accused took part.

It is not disputed that the death of the deceased was the direct result of this series of attacks upon him, but the prosecution were quite unable to say that it was the result of the act of any one or more of the accused. There was ample evidence that, whoever it was who struck the fatal blow, the others, by their acts, aided the doing of it. The charge of abetment of murder was framed upon the footing that those of the accused who aided that one whose act caused the death of the deceased knew that the act thus abetted was likely to cause that effect. Section 106 of the Penal Code provides for such a case and it would seem that the facts set out above clearly constitute the offence of abetment of murder.

The position taken up by Counsel for the first accused was that, in view of section 107 of the Penal Code, upon the facts which the prosecution expected to be able to prove, one of which was that the first accused was present for at least part of the time during which the offence was committed and that the others were present for the whole of the time, a charge of murder lay against them all. While the words of the section are that in such circumstances an accused person "shall be *deemed* to have committed such act or offence" it has been held by the Privy Council in *Barendra Kumar Ghosh* [1] that "the section is evidentiary, not punitory. Because participation *de facto* may sometimes be obscure in detail, it is established by the presumption *juris et de jure* that actual presence plus *prior* abetment can mean nothing else but participation. The presumption raised by section 114 (*i.e.*, Ceylon 107) brings the case within the

[1] *(1925) A. I. R. (P. C.) 1.*

ambit of section 34 (Ceylon 32).'' I have stressed the word '' prior '' in the above quotation from Lord Sumner's judgment, because it has been generally held that '' abetment to come under the section must be one which is prior to the commission of the offence and complete by itself, and not an abetment which is done immediately before or at the time of the commission of the offence.'' *Sital v. Emperor* [1]. The facts of the present case do not, therefore, appear to come within the scope of section 107, and the citation by Counsel for the first accused of these authorities seem to us to weaken his argument that the prosecution were in a position to frame a charge of murder against all the accused persons. That, however, was the position taken up by him and he argued that, since the above-mentioned facts left the prosecution in no doubt but that the offence of murder had been committed, the provisions of section 181 of the Criminal Procedure Code did not apply, and that the addition of a charge in the alternative offended section 178.

It would seem, however, that the prosecution, being satisfied no doubt that the offence of abetment of murder was constituted by the facts, were satisfied that the offence of murder was also constituted, assuming that from those facts it can be inferred that a common intention existed on the part of the accused. Crown Counsel contended that, upon the facts disclosed, the innocence of the accused was excluded, and that from those facts there were two possible inferences.

Numerous authorities have been brought to our notice, notably the case of *Ganesh Krishna v. Emperor* [2] which was cited by Counsel for the first accused and relied upon by Counsel for the Crown. In that case section 236 of the Indian Criminal Procedure Code, which corresponds with our section 181, was under consideration. Pratt J.C., after referring to section 403 (our section 330) arrived at the result '' that an alternative charge cannot be framed in respect of distinct offences, nor even in respect of cognate offences when the difference is one of degree, *i.e.*, as to the intention imputed to the accused or as to some circumstance of aggravation ''. That is to say, if I may with respect further amplify the learned J.C.'s explanation in regard to cognate offences, alternative charges of murder and of grievous hurt may not be framed, nor alternative charges of stealing as a servant and of stealing. Pratt J.C. continued: '' In what cases then, is it permissible to frame an alternative charge ? . . . . It (section 236) applies only in those rare cases in which the prosecution cannot establish exclusively any one offence but are able on the facts which can be proved to exclude the innocence of the accused and to show that he must have committed one of two or more offences ''. This extract from the judgment of Pratt J.C. was cited with approval in *Mahomed Rafiq v. Emperor* [3].

In the same case Crouch A.J.C. referred to the two classes of doubts which the prosecution has to anticipate in most cases '' firstly, whether the evidence . . . . will be believed; secondly, that inferences will be drawn from the evidence, if believed . . . . It is clear from the opening words of section 236 that the doubts for which it seeks to provide are of the second class. The doubt which of several offences

[1] *36 Cr. L. J. 1151.* [2] *XII Cr. L. J. p. 224.*
[3] *33 Cr. L. J. p. 41 at p. 42.*

the facts proved will constitute must arise from the very nature of the acts of which it is intended to offer evidence. The doubt is as to the inference which will be drawn by the Court ".

Now it seems to me that in the present case the prosecution was faced by a genuine doubt as to the inference which would be drawn by the Court. It was not difficult to foresee that the inference might be drawn that each of the accused had abetted the murder of Hinni Appu; or, equally, that a common murderous intention existed. But can it be said that either of these possible inferences exclude the other? The offences which are constituted by the inference from the facts are cognate; the difference between them is not one of degree, but depends upon the nature of the intention which can be inferred. That being so, the charges seem to me to come within the ambit of Pratt J.C.'s " rare cases ". In the view of the majority of the Court the charges were properly joined.

In view of the fact that the members of the Court have been unable to arrive at complete agreement, and of the further fact that it appears to be conceded that an alternative charge should be framed only in rare cases it may be as well to express our view that, had we been of opinion that the point should be decided in favour of the appellants, we would have held that no miscarriage of justice has occurred and that the appeals should be dismissed. Assuming that there was a misjoinder of charges, their Lordships of the Privy Council in *Subramania Ayyar v. King-Emperor* [1] were unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity and one which could be cured by section 537 (Ceylon 425) of the Criminal Procedure Code. That section permits an appellate Court to ignore, *inter alia*, certain irregularities, unless a failure of justice has been thereby occasioned. The powers conferred upon this Court by the Court of Criminal Appeal Ordinance (No 23 of 1938), section 5 (1) proviso, allow in those circumstances the dismissal of an appeal unless a ***substantial*** miscarriage of justice has actually occurred. We would seem to have a discretion somewhat wider than that conferred upon an appellate Court by section 425 of the Criminal Procedure Code. Even in India it was held by Napier J. in *The Public Prosecutor v. Kottaparambath Maliyakkal Kadiri Koya Haji* [2] that the decision of the Privy Council did not go so far as to compel an appellate Court to hold that in no case could a misjoinder of charges or a failure to try charges separately be an irregularity within the meaning of section 537.

There are numerous English cases which reveal no reluctance on the part of the Court to apply the proviso to cases where no actual miscarriage of justice has occurred, such as where, on a charge of sodomy, the trial Judge did not warn the jury as to the manner in which they should treat the evidence of an accomplice *Rex v. Charles Cratchley* [3], and where an indictment for stealing omitted the words " take and carry away ". *Rex v. John Harris* [4]. Again in *Rex v. Henry Beecham* [5] in which questions in cross-examination had been improperly allowed and there had been an unsatisfactory summing up the appeal was dismissed by

[1] *25 Mad. 61.*
[2] *16 Cr. L. J. 593 (F. B)*
[3] *IX. G. A. R. 232.*
[4] *V. Cr. A. R. 285.*
[5] *XVI. Cr. A. R. 26.*

virtue of the proviso. In *Rex v. Arthur Edwards* and *Alfred Gilbert*[1] the proviso was not applied because the objection (to improper joinder) had been taken in the Court below. In that case, however, there were other reasons which influenced the Court in quashing the conviction. In regard to the time at which an objection of this nature should be taken we think that the proper time is before the accused has pleaded. In the case before us the objection was taken after the jury had been sworn. Counsel for the first accused sought to justify this procedure on the ground that he wished the jury to be in retirement while he was addressing the Court on the point and he claimed, moreover, that it has not been the custom in our Courts for Counsel to notify their appearances until after the accused has pleaded. There is no substance in the former contention since the whole panel of jurors might have been sent out of Court. In regard to the second point, there is no logical reason why Counsel should not notify his appearance as soon as the case is called and before the accused has been called upon to plead. We think it proper that he should do so. For the purpose of this case, however, we are assuming that objection was made at the earliest opportunity.

The question of the application of the proviso was also considered in *Rex v. James Andrew Thompson* [2] in which it was argued that the indictment was bad for duplicity inasmuch as more than one offence was charged in each of two counts of the indictment. In dismissing the appeal Isaacs L.C.J. observed: "If we had thought that any embarrassment or prejudice had been caused to the appellant by the presentment of the indictment in this form, we should have felt bound to quash the conviction, whatever our views might be as to the merits of the case ". But it appeared to the Court in that case, as it does to us in the present case, that no embarrassment or prejudice was caused. In the present case the appellants had one set of acts alleged against them. If they had been able to disprove that they had committed those acts, or raised a reasonable doubt in the mind of the jury that they had committed them they would have been entitled to acquittal on each count in the indictment. Had it been necessary, therefore, we would have been prepared to apply the proviso.

There were also applications for leave to appeal on the facts. The points raised appear to us without substance.

The appeals and applications are dismissed.

HEARNE J.—

Of the five persons who were found guilty in S. C. 56, M. C. Matara, 43,107, four have appealed on questions of law. One ground is common to all the appeals—that there was misjoinder of charges.

The four appellants along with the 5th accused, who merely applied for leave to appeal on the facts, had been charged with murder by causing the death of Hinni Appu and, in the alternative. with abetment of the murder of Hinni Appu.

The prosecution purported to frame the indictment in accordance with the provisions of section 181, Criminal Procedure Code, and the question is whether it was justified in doing so. The circumstances in which it would be

[1] *VIII. Cr. A. R. 128.*

[2] *IX Cr. A. R. 252.*

justified are set out in the section. " 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 having committed one of the said offences without specifying which one ".

It is clear from an examination of the evidence what facts, prior to the framing of the indictment the prosecution, regarded as being capable of proof.

They were (1) that the 2nd and 5th accused held Hinni Appu's hands and the 4th accused dealt him a fist blow on his chest, (2) that he fell to the ground and the 2nd, 3rd, 4th and 5th accused struck him " with hands and feet ", the 3rd trampling him on his body, (3) that the 1st accused then arrived and said " assult him ", (4) that all the accused attacked him again, (5) that Hinni Appu died in consequence of the injuries he received.

The first charge implied that the acts were committed in furtherance of a murderous intention common to all the accused. This common murderous intention was no doubt regarded by the prosecution as a reasonable inference from (1) to (5) (*supra*), and the medical evidence.

But, in the argument of Crown Counsel, the jury may not have inferred a murderous intention but only knowledge that the death of Hinni Appu was likely. Section 106 of the Penal Code enacts that " When an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment causes a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect ". The alternative charge was, therefore, included in the indictment to provide for the case of any one of the accused who had no murderous intention, if the jury so found, but who knew that the acts of other which he abetted by his own act or acts were likely to cause death.

Witnesses at the trial deposed to certain acts which are undoubtedly acts of abetment. I refer to the holding of the deceased by the 2nd and 5th accused for the purpose of aiding the 4th accused in the initial assault. I also refer to the 1st accused's act of instigation when he said " assault him ".

But what the prosecution has chosen to do is to regard acts of aggression on the part of all the accused, by which I mean acts of violence committed by them on the person of the deceased, as amounting in the case of each one of them to actual participation in a deed of violence *or* merely to abetment.

I have said that the prosecution regarded acts of violence as participation *or* abetment. Crown Counsel argued the appeal on that footing. That, however, is not the way the learned trial Judge viewed the matter. He said in his Order " In regard to the offence or offences of which the accused may be said to be guilty that is unpredictable at the time the indictment is framed and indeed till the end of the trial, and will depend on the inference drawn by the jury in view of all the matters before them

as to the intention or knowledge imputable to the accused as a body or individually ". In another passage he said " In other words different verdicts are reasonably possible and that is only another way of saying that ' the acts are of such a nature that it is doubtful which of several offences the facts which can be proved will constitute ' ". With the greatest respect I do not agree with either of these passages in the sense that neither of them can be said to justify alternative charges. In every case in which an accused is charged with murder his intention or knowledge is not ascertained till the jury returns its verdict. Different verdicts are possible. They are unpredictable. He may be found guilty of murder, culpable homicide not amounting to murder, or grevious hurt. But these considerations do not justify alternative charges

With this aspect of the matter, the procedural aspect, I shall deal later. It depends upon the interpretation that is to be placed on section 181, Criminal Procedure Code. But the point I was emphasizing was that the prosecution view that acts of violence may be regarded as participation *or* abetment does not appear to have been shared by the learned trial Judge. That this is so is, I think, evident from his charge to the jury.

In dealing with the first charge he explained that it was necessary for the jury to ascertain who were the actual *assailants* of the deceased and if they found that the five accused attacked him " with hands and feet " they could be found guilty on the first charge of offences which he specified in accordance with the intention or knowledge imputed to them.

When he dealt with the 2nd charge he instanced the case of the 1st accused. He told the jury " If you are satisfied that the 1st accused *did not himself take part* in the attack with hands and feet but that all he did was to give an order ' take this man away and give him a good beating ' . . . . he would be liable for the grevious hurt caused, if you think that when he said ' Go and give this man a sound thrashing ' he knew that it might result in grievous hurt ". In another passage he said " Suppose you find that the 1st accused instigated the others to attack this man Hinni Appu, *he himself not contributing with his fists or feet, standing aloof in the sense that he takes no physical part in the attack* . . . . he would be liable as an instigator ".

It is clear that the learned Judge regarded the 1st accused's words of instigation as capable of amounting to abetment and not his deeds, and in dealing with the other accused he did not suggest that their acts of violence could be construed as acts of abetment.

Indeed it would have been most difficult, if not impossible, for the Judge to have stated any principle of differentiation in accordance with which the jury could have been invited to say that, for instance, the acts of the 4th accused who fisted the deceased and attacked him again after he had fallen and the acts of the 3rd accused who attacked him on the ground and trampled on his body were acts of participation and not abetment *or* merely abetment and not participation. It seems to me that acts of violence contributing to a certain result, viz., death, even if they encouraged or incited others to similar acts of violence, remain immutably acts of participation in the crime committed.

Whatever views may be held on the much debated provisions of section 181, Criminal Procedure Code the substantive law applicable to the facts of

this case is, I venture to think, free from doubt. Mere presence at the scene of a crime does not in itself involve complicity in the crime or in the abetment of it. Where there is abetment *immediately* before or at the time of the commission of the crime and the abettor, though present, does not participate in the crime, he is only liable as an abettor. Where there is abetment prior to the commission of the crime which is complete by itself, and the abettor is present at the commission of the crime, he is liable to be charged with participation, even though he did not actually participate (section 107 Penal Code) (*1925*) *A.I.R. Penal Code 1.* Finally where, as in the present case, what are alleged to be acts of abetment are acts of violence, are indeed part of the means, of the totality of acts, whereby the crime was committed, section 107 has no application. Participation is no longer a legal fiction. It is an actual fact. It is not dependent upon a presumption. It is dependent upon proof of the acts committed. The proper charge is a charge of participation, not a charge of participation or abetment. That, as it appears to me, is the meaning and purpose of section 32, Penal Code. The acts of all who participated are evidentiary of the existence of a common intention. If a jury finds that there was no common intention nevertheless all who participated are liable for their participation (not for abetment) in accordance with the criminal intention or knowledge imputed by the jury to each individual participator. Section 33 of the Penal Code.

But let me adopt the arguments of Crown Counsel and see where they lead us. He argued that if any of the accused by his acts of violence abetted the infliction of harm on the deceased with *knowledge* that death was likely, he would be guilty of abetment of murder. If by his acts of violence he abetted the infliction of harm on the deceased with the *intention* that death should be caused he would be equally guilty, on Crown Counsel's argument, of abetment of murder. But even if the acts of violence on the part of any one of the accused *may* be regarded as acts of abetment, not by instigation or conspiracy or aiding but by what I would call " vicious example "—his participation in the assault which resulted in death with criminal *knowledge* or *intention* would render him liable to be charged in the former case with culpable homicide not amounting to murder and in the latter case with murder. The resultant position would *not* be murder and not abetment or abetment and not murder—that is the effect of the indictment—but abetment of murder in either event *and* murder or culpable homicide. Even accepting the arguments of Crown Counsel the indictment should not and could not have been framed as it was framed.

I pass to a consideration of section 181, Criminal Procedure Code. The doubt which, it has been assumed, justifies the framing of alternative charges is doubt in regard to the *intention* of the accused, individually or collectively; and this doubt is not the kind of doubt that the section contemplates. Confusion of thought has arisen, I would respectfully suggest, from an unfortunate identification of " acts " with " facts ".

The two words are not used synonymously in the section. On the contrary they appear in sharp contrast. An act is a fact. But a fact is not necessarily an act. For instance, a state of mind, the intention of an accused, is a fact but not an act. Section 181 is not applicable when the

fact of intention, on the part of an accused, is in doubt. It is applicable only when the *acts* of an accused are of such a nature that legal difficulty arises on the question of which *one* of several offences the sum total of facts will constitute.

Quite apart from authority (*12 C. L. J. 224*) it seems to me that the prosecution must make up its mind, before an indictment is framed, in regard to " the facts which can be proved ". The intention with which an accused acted is one of such facts. It is not possible, in the view I take, to frame an indictment consisting (as in the present case) of alternative charges and to justify it on the ground that doubt is entertained as to whether a jury will accept a particular *fact* (the intention imputed) as having been proved.

To sum up. The acts of the accused are not ambiguous. It is difficult to conceive of acts less unambiguous than a joint assault by five bullies on the helpless victim of their choice; and where the acts of the accused are unambiguous, the prosecution (*a*) by regarding acts of violence as acts of violence amounting to murder *or* alternatively as acts of abetment only, (*b*) by imputing on the one hand an intention to cause death and by anticipating on the other a possible adverse verdict by the jury on the subject of intention, cannot arrive at two different results based on the *same unambiguous acts* of the accused: and then, by translating those results into two offences, charge the accused with having committed one of them without specifying which one. I am satisfied in my own mind that section 181 does not sanction that procedure. In my opinion there was misjoinder.

I would add that it is with regret that I find myself in disagreement with the views of the President, my brother Jayetileke and the trial Judge.

Appeal dismissed.