

1946

Present : Soertsz S.P.J.

VANDER POORTEN, Petitioner, and VANDER POORTEN,
Respondent.

Application in Revision, M. C. Kandy, 14,960.

Abetment—Private prosecution for abetment of forgery and of fabrication of false evidence—Sanction of Attorney-General not necessary—Order of discharge wrongly entered for want of Attorney-General's sanction—Remedy is by way of revision—Penal Code, ss. 454/109, 190/109.

Although the sanction of the Attorney-General is necessary to enable a private party to prosecute the alleged offender in a prosecution for forgery, under section 454 of the Penal Code, or for fabrication of false evidence, under section 190 of the Penal Code, the abetment of those offences is not subject to the same requirement.

The remedy of a complainant against an order wrongly entered by Court discharging the accused on the ground that sanction of the Attorney-General had not been obtained by the complainant is by way of application in revision and not by way of appeal.

THIS was an application to revise an order of discharge entered by the Magistrate of Kandy

N. Nadarajah, K.C. (with him *N. Gunasekere* and *G. T. Samarawickreme*), for the petitioner.

H. V. Perera, K.C. (with him *A. Muttusamy*), for the respondent.

Cur. adv. vult.

February 1, 1946. SOERTSZ S.P.J.—

The petitioner lodged a complaint in the Magistrate's Court at Kandy alleging that the two respondents named in his complaint had, in or about the month of December, 1934, abetted one Antoine Joseph Vander Poorten to commit the offence of forgery by instigating him to fabricate a document bearing a date in the year 1920, an offence which he alleged was punishable under section 109 of the Penal Code read with section 454 of that Code. In support of the complaint he gave evidence stating that the intention of the respondents when they instigated Antoine Joseph Vander Poorten was to use that document in certain judicial proceedings then pending between the petitioner and the first respondent. On this complaint the Magistrate issued summonses on the respondents and thereafter fixed the inquiry into the complaint on November 1, 1944. On that date the petitioner was examined-in-chief and was cross examined. Two witnesses were then examined and cross-examined and, thereafter, Counsel for the respondents took the objection that "the case cannot proceed without the sanction of the Attorney-General".

This question was fixed for argument and after Counsel on both sides were heard on it the Magistrate made order upholding the objection and directing that "the case be called on October 27, 1945, for the complainant to produce the necessary sanction of the Attorney-General". He added, "If this sanction is not forthcoming, I shall make order in due course discharging the accused." The petitioner prays that this order of the Magistrate be dealt with in the exercise of the revisionary powers of this Court. When the matter came up before me Counsel for the respondents took a preliminary objection contending that an appeal lay from the order made by the Magistrate and that, therefore, I ought not to deal with the order by way of revision. I am clearly of the opinion that this was not a final order, and that therefore, no appeal lay and that revision was the proper course.

The question then that arises for determination is whether the sanction of the Attorney-General is necessary for the prosecution of the offence or offences foreshadowed by the petitioner's case as it stood at the stage at which the Magistrate made his order. Those offences appear to be the offence charged in the petitioner's complaint of abetment of forgery and for the offence that the Magistrate thought would be the offence if the facts adumbrated were established, that is to say, the abetment of the fabrication of evidence for the purpose of being used at any stage of a judicial proceeding or in relation to a judicial proceeding. It seems to me that both these offences are disclosed and that a proper charge would be a charge framed in the manner indicated by section 180 of the Criminal Procedure Code.

Now it is quite clear that for the prosecution of the offence of forgery as described in section 452 of the Penal Code and of fabricating false evidence for the purpose of using it in or in relation to a judicial proceeding made punishable under section 190 of the Penal Code, the sanction of the Attorney-General is necessary to enable a private party to prosecute the alleged offender or offenders. Is the abetment of those offences subject to the same requirement? That is the question. It arose in Madras many years ago in the case of *Queen Empress v. Abdul Kadar Sheriff Saheb*¹ and a Bench of which the eminent Indian Judge, Justice Subramania Aiyar, was a member expressed their opinion on it thus—

“ The abetment of an offence is an offence of itself and is punishable under separate sections of its own. None of those sections is mentioned in clause (b) of section 195 of the Code of Criminal Procedure and therefore sanction need not be obtained in respect of them ”. Section 195 of the Indian Code is the same as section 147 of our Code. If I may respectfully say so I am in complete agreement with that view and I am unable to follow the learned Magistrate when he says that he is “ unable to follow that decision ”. At any rate *malo cum Scaligero errare*. When the Legislature thought fit to place the abetment of an offence on the same footing as the offence itself for the purpose of enabling cases to be compounded it took care to say so in section 290 (3) of the Criminal Procedure Code and it is a reasonable inference that the Legislature deliberately refrained from making a similar provision in section 147 of the same Code. If that inference is contrary to what the Legislature then intended or contrary to the view of the Legislature today, it is for that body to take the necessary action.

I see no justification whatever for reading section 147 as if it contained the words “ and the abetment of these offences ”. That would be to legislate not to interpret. As was pointed out in the Madras case “ abetment of an offence is an offence of itself and is punishable under separate sections of its own ”. Reference is generally made in charges of abetment or attempt to the sections rendering the principal offences punishable merely for convenience sake. In a case such as the present case it would, in my view, be a sufficient compliance in the requirements of section 167 (3) and (4) of the Criminal Procedure Code if the charges were laid thus : did abet the offence of fabricating false evidence for the purpose, &c., and did thereby commit an offence punishable under section 109 of the Penal Code inasmuch as the said offence was not committed or did abet the offence of forgery and thereby commit an offence punishable under section 109 of the Penal Code, inasmuch as that offence was not committed.

A word in regard to the submission made about the delay in prosecuting the alleged offences. There is no doubt of that. But the prosecution of these offences is not barred till twenty years have elapsed.

I set aside the order made by the Magistrate and remit the case for inquiry in due course.

Order set aside.

¹ 20 Madras 8.