*Present :* Maartensz A.J. 1925.

REX *v.* FERNANDO.

*3—D. C. (Crim.) Colombo, 7,402.*

*Abetment—Causing a woman to miscarry—Act abetted physically impossible—Penal Code, ss. 102 and 303.*

A person may be convicted of the abetment of an offence under section 303 of the Penal Code, viz., causing a woman to miscarry, even where there is no evidence that woman was pregnant, provided that the accused believed she was in that condition.

APPEAL by the 2nd accused from a conviction by the District Judge of Colombo. The facts are fully set out in the judgment.

*Soertsz* (with him *Tisseveerasinghe* and *Weerasinghe*), for 2nd accused appellant.

*Obeyesekere, C.C.*, for Crown, respondent.

April 2, 1925. MAARTENSZ A.J.—

The two accused in this case were indicted on the following charges :—

(1) The 1st accused, Rose Millicent Fox, with voluntarily causing herself to miscarry, an offence punishable under section 303 of the Penal Code.

(2) The 2nd accused, B. H. Fernando, with aiding and abetting the commission of the aforesaid offence, which was committed in consequence of such abetment, thereby committing an offence punishable under sections 303 and 102 of the Penal Code.

(3) The 2nd accused with causing the said Rose Millicent Fox to miscarry, thereby committing an offence punishable under section 303 of the Penal Code.

The facts are as follows :—

The 1st accused is the widow of 2nd accused's wife's brother. She was living in Grandpass with her mother near the house of the 2nd accused, and the two accused appear to have been on

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terms of intimacy. First accused's mother, Mrs. Blok, objected to the 2nd accused's visits to her house, and moved with her daughter to Dehiwala.

At Dehiwala the letters C 1, C 2, C 3, and C 4 written by the 2nd accused to 1st accused and letter D written by 1st accused to 2nd accused were intercepted by Mrs. Blok. She suspected from these letters that 1st accused was or had been pregnant, and that 2nd accused had procured drugs for her to cause her to miscarry, and informed the Police.

The learned District Judge admitted the letters C 1, C 2, C 3, and C 4 in evidence against the 2nd accused, but not against the 1st accused, and acquitted the 1st accused holding that the prosecution had failed to prove either that she was pregnant or that she had taken drugs to cause herself to miscarry.

As against the 2nd accused the learned District Judge held that the letters C 1, C 2, C 3, and C 4 proved that 1st accused was pregnant, that 2nd accused was aware of her condition, and had procured drugs for her to cause her to miscarry. He also held on the authority of the case of *The Queen v. Kabul Pattur and Jhumpa*,[1] that it is sufficient to prove against the 2nd accused that he believed 1st accused to be pregnant, even if she was not in that condition.

In the case relied on by the learned District Judge the woman Jhumpa was convicted under section 312 (the corresponding section of the Indian Penal Code) of causing herself to miscarry, and the 2nd accused Kabul Pattur was convicted of aiding and abetting Jhumpa to commit the offence of causing herself to miscarry. In appeal Kemp and Glover JJ., acquitted Jhumpa holding that the offence defined by section 312 can only be committed when the woman is in fact pregnant, and that as it was admitted that Jhumpa was not pregnant she could not be convicted. The conviction and sentence of the accused, Kabul Pattur, were confirmed. It was held that " to constitute the act of abetment it is not necessary that the act abetted should be committed." The woman failed involuntarily in causing abortion, but the prisoner, Kabul Pattur, instigated her to commit the offence believing her to be pregnant.

The arguments are not reported, and counsel for Fernando, the 2nd accused, contended that the judges who decided the case had possibly not considered the case of *Rex v. James Scudder*,[2] where a bench of twelve judges held on an indictment for administering a drug to a woman to procure abortion, she not being quick with child, that if it appears that the woman was not quick

[1] *15 Weekly Rep. (Crim. Rulings) p. 4.*

[2] *3 C. & P. 605.*

with child at all, the prisoner must be acquitted, although it appears that the prisoner thought that she was quick with child, and gave her the drug with the intent to destroy such child.

This case was decided in 1871 and must have been considered by the judges who delivered the judgment in the case of *The Queen v. Kabul Pattur and Jhumpa* (*supra*). But whether the case was considered or not, I am of opinion that the provisions of the Penal Code with regard to abetment are wide enough to render the 2nd accused liable, although the woman was not pregnant.

Mayne in his commentary on section 312 writes as follows :—

> " The offence created by section 312 is actually causing a woman to miscarry. If she is pregnant, and the means used do not succeed, the accused could only be convicted under section 511 of an attempt. A more difficult question would arise if the attempt failed because the woman was never pregnant. In England a woman was indicted under section 58 of 24 & 25 Vict., c. 100, for doing certain acts with intent to procure her own miscarriage. The section only applies to a " woman being with child." It turned out that she had never been pregnant, and it was held that *she could not be convicted under the section*, but might be convicted of conspiring with those who assisted her to procure her own miscarriage. (See *Reg. v. Whitchurch.*[1]) There, however, the same section made such acts punishable in others, whether the woman was with child or not. She was, therefore, conspiring with them to do an act which in them was illegal. *This, under the Code, would be abetment of their act under section 107* " (the italics are mine). Continuing he says : " But an unsuccessful attempt to procure a miscarriage is not punishable except as an attempt. Can it be punishable under section 511 when it is an attempt to do that which is physically and legally impossible ? It was at one time held in England that a man could not be convicted of an attempt to pick an empty pocket. This decision after being much discredited has at last been over-ruled. It may fairly be argued that a man who intends to do a criminal act and tries his best to do it cannot be held not to have attempted it because a circumstance of which he was ignorant made it impossible to succeed." See Mayne's Criminal Law of India (3rd Edit.), pp. 685 *et seq.*

[1] *L. R. 24 Q. B. D. 420.*

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According to the proposition of the law thus laid down by Mayne, the 2nd accused-appellant would be clearly guilty of an attempt to procure a miscarriage, if there was no evidence against him that the 1st accused was pregnant. The learned District Judge has found on the evidence admissible against the 2nd accused that she was pregnant, and convicted the 2nd accused of the offence of abetting the 1st accused to cause herself to miscarry.

I see no reason to disagree with the inference drawn by the learned Judge from the statements contained in the letters C 1, C 2, C 3, and C 4, and his conduct in trying to procure drugs from the vedaralas. The mere fact that 1st accused was able to conceal her condition from her mother and sisters does not nullify the effect of that evidence.

The accused has been sentenced to three months' rigorous imprisonment, and I am not prepared to say that the sentence is too severe.

I accordingly affirm the conviction and sentence and dismiss the appeal.

*Appeal dismissed.*