Present : **Koch J.**

DE SILVA *v.* VAAS.

36—P. C. Gampaha, 37,222.

Offering a gratification to screen an offender—Essentials of charge—Accused charged with offence—Conviction for abetment of different offence—Penal Code, s. 211.

Where an accused is charged under section 211 of the Penal Code with offering a gratification to a person for screening another from legal punishment, it must be proved that an offence has been committed by the person to screen whom the gratification was offered.

An acused person cannot be convicted of the abetment of an offence different from the offence with which he is charged with abetting.

Notley v. Antonis (*22 N. L. R. 335*) followed ; *King v. Amith* (*31 N. L. R. 457*) *referred to.*

APPEAL from a conviction by the Police Magistrate of Gampaha.

H. E. Garvin, for accused, appellant.

Jayawickrama, C.C., for Crown.

March 18, 1936. Koch J.—

The appellant in this case has been charged under section 211 of the Ceylon Penal Code with giving or offering a gratification to Dr. M. W. M. de Silva. Medical Officer of Gampaha, in consideration of Dr. Silva's not proceeding against the proprietor of Wijeygiri Hotel for the purpose of bringing him to legal punishment. The charge which was to that effect was read from the Police report under section 148 (*b*) of the Criminal Procedure Code.

To begin with, it will be noticed that the charge referred to above does not set out what the alleged offence is that was committed by the hotel proprietor, and it has been contended on appellant's behalf that by reason of this omission he has been prejudiced in his defence, for he was entitled

[1] (*1917*) *20 N. L. R. 60.*

[2] (*1918*) *21 N. L. R. 205.*

to know precisely what the charge against him was. There is reason in this argument because, before a person can be convicted under this section, it must be shown that an offence has been committed by the person to screen whom the accused did offer the gratification. (See *Queen v. Ramalingam* [1], *Suppiah v. Kadrigamar* [2], and *Notley v. Antonis* [3].)

It is common ground that the hotel proprietor was later charged with concealing a case of chickenpox and acquitted as there was no case of chickenpox in the hotel. This essential was entirely lost sight of by the learned Police Magistrate who convicted the accused under section 211, and fined him Rs. 75 in default six weeks' rigorous imprisonment in spite of the offence of concealing a case of chickenpox by the hotel proprietor not having been proved.

Learned Crown Counsel who appeared for the respondent began his argument by conceding that the conviction of the accused could not be sustained under that section, but contended that on the facts established by the prosecution in the evidence that had been led, a different offence has been proved to have been committed by the accused, viz., an abetment of the offence set out in section 158. This section makes it an offence for a public servant to accept or agree to accept or to obtain from any person any gratification other than legal remuneration as a motive or reward for showing favour to any person. It will be seen that under this section the party charged with the offence provided for by that section must necessarily be a public servant, and it has been argued that the accused's conduct shows that he had attempted to bribe the public servant concerned in this section, viz., Dr. de Silva, in order to persuade him thereby not to prosecute the hotel proprietor for concealing a case of chickenpox in that locality.

I immediately pointed out to Crown Counsel the difficulty I felt in being unable to subscribe to that contention that a person can be convicted of the abetment of an offence different from that with which he had been charged. However, the submission merely was that if I considered that the facts established an abetment of a different offence the accused could rightly be convicted of abetment under section 347 of the Criminal Procedure Code unless it was felt that he was prejudiced in his defence. He further cites the case of *Badulla Police v. Chelliah* [4]. This decision is of very little assistance.

In view of the difficulties that I felt, I have been at pains to investigate what precisely is the law on the subject. Our Criminal Procedure Code is silent on the point but under section 182 which must be read in conjunction with section 181, it would appear that where a person is charged with an offence he might be convicted of a different offence if the facts established prove that he committed that other offence (section 182; also that when a person is charged with an offence consisting of several particulars, if some of these particulars are proved and such particulars constitute a complete minor offence though he was not charged with it, he can be convicted of such minor offence (section 183 (2)); and lastly that when a person is charged with an offence and facts are proved which

[1] *2 N. L. R. 48.*
[2] *8 N. L. R. 114.*
[3] *22 N. L. R. 335.*
[4] *3 L. T. R. 4.*

reduce it to a minor offence, he may be convicted of such minor offence though he was not separately charged with it (section 183 (3)). Be this as it may, our Code hardly helps one to rightly conclude from the above or any other section in the Code, that an accused can be convicted of the abetment of an offence when he has only been charged with the commission of an offence, much less of an abetment of an offence when he has been charged with the commission of a different principal offence.

Like our Code, the Indian Criminal Procedure Code of 1898 is also silent on the point, but West J. in *11 Bombay High Court Reports 240* held that it is not open to a Court to find a man guilty of the abetment of an offence on a charge of that offence iself. This judgment was so much in point that the Solicitor-General for the Crown in 1903, in the case of *King v. Hendrick Singho*[1], contended that an accused could not be found guilty of abetment of murder on an indictment for murder. The argument took place before Mr. Commissioner Sampayo. The learned Commissioner was, however unwilling to follow that decision in view of the law expressed in *Queen Empress v. Appasubbhana Mendre*[2], and was of opinion that an accused could be convicted in those circumstances of abetment. He also relied on the facts of that case which he said were the same as would be put forward if the accused was charged with abetment, but he drew the distinction that if the facts showed that the accused was "present" the principal offence would be committed, but if "absent" mere abetment would be committed. It is this distinction that makes me feel that the holding of Mr. Commissioner Sampayo cannot apply to every case. For example, if an accused is indicted with having committed murder at Colombo, and the facts show that he abetted the murder at Jaffna, it is possible that his defence may be an *alibi* that on the day stated he was not in Colombo, but the evidence he relies on may not prove that he was not in Jaffna ; so that, no inflexible rule can be laid down. It will depend on the circumstances of each case.

Although the decision of West J. has been adopted in a later case in *33 M. 264*, this latter decision has been discussed and differentiated from by Sundara Iyer J. in a case reported in *13 Cr. L. J. 453*, where he states as follows :—"I do not think that *33 M. 264* intended to lay down an universal rule that in no case can a conviction for abetment be possible where the charge was only of the principal offence. The question is what the facts charged were." See also *A. I. R. 1929 Cal. 207*. There is also the Full Bench decision in *16 Cr. L. J. 676* (*Burma*), where it was stated that it would not in all cases be illegal to convict of abetment a person charged with the principal offence itself.

It would appear therefore that the correct legal view is that in certain circumstances an accused can be convicted of the abetment of an offence with which he has been charged. But none of these cases help one in deciding the further question whether an accused can be convicted of abetment of an offence *different from the offence with which he has been charged*. It would seem that the accumulative effect of the decisions I have referred to is rather in favour of the illegality of a conviction of an abetment of a different offence.

[1] *7 N. L. R. 97.*

[2] *I. L. R. 8 Bombay 200.*

A good deal of light is thrown by a judgment of Garvin J. in the case of *King v. Amith*[1]. This is a converse case. The first accused was charged with theft of tea. The third accused was charged with having abetted the first accused in the commission of that theft. The District Judge disbelieved the evidence that the first accused committed theft and acquitted him. Garvin J. was of opinion that this acquittal necessarily involves the failure of the charge against the third accused. The District Judge however was of opinion that the evidence led in the case established that the third accused had retained stolen property but nevertheless discharged the third accused remarking that he was not charged with that offence. Garvin J. explains that as there could not have been any uncertainty as to what precisely was the offence the first accused has committed with a knowledge of which the third accused had been charged with abetment, and as the first accused was not proved to have committed the first offence, and as the allegation that the third accused abetted him also necessarily failed, he was not prepared to hold that a person charged with abetting another in the commission of theft can be rightly convicted in that case as the principal offender of the offence of retaining stolen property.

In the present case before me the prosecution was well aware of the facts and with a full appreciation of what they were the appellant was charged with having committed the offence already refered to, viz., that under section 211. To use the words of Garvin J. there was no uncertainty that he committed, according to the case for the prosecution, the offence of abetting the offence described in section 158, but yet he was not charged under that section. What would have been a complete defence under section 211 is no defence under section 158. What I mean is that under section 211 under which the present appellant is charged, it would be a complete defence to show that the prosecution had not proved that the offence of concealing a case of chickenpox had not been proved or that the prosecution for that offence had failed. It would therefore in my opinion be a distinct hardship to convict the present appellant now on a charge under section 158 read in conjunction with section 109, when he was not apprised of such a charge at any stage of the proceedings nor was there even a reference to the commission of such offence in the judgment of the Police Magistrate.

Garvin J. in circumstances such as these expressly refused to direct that the third accused in that case should be re-tried upon a charge of retaining stolen property, and this in spite of the District Judge being of opinion that the offence had been committed. I do not see any reason why I should not follow Garvin J.'s procedure and in the circumstances of this case order this appellant not to be re-tried on a new charge when I am aware that the prosecution with knowledge of all the facts elected to charge him for a different offence. My disinclination to do this is heightened by the further circumstance that in my opinion it has not been definitely proved on the proceedings already held that the accused has committed the offence of abetment of this new offence. The doctor's evidence is that the accused came into his office, remained there for a little time and informed the doctor that there was no truth in the petition

[1] *31 N. L. R. 457.*

that had been sent against the proprietor of Wijeygiri Hotel "about chickenpox" to use his own words. The accused also told him that he came to ask for a favour. The doctor then told him that he was then busy and asked him to go away. The accused then waited a minute and left a currency note on the table which he immediately thereafter transferred to his pocket when the doctor took up the telephone receiver. The doctor further said that the accused made no request of him, did not mention the name of any particular person and did not ask him not to prosecute any person. Further, in cross-examination he said that these facts made him conclude that he was offering an illegal gratification. I do admit that the inference the doctor drew was a very probable one but it is possible that the accused came there to ask him a different favour, some favour that he as a Medical man might have shown the accused without compromising himself.

It is well within the power of a tribunal to draw an inference of guilt from circumstances, that is to say, to act on circumstantial evidence and convict an accused but it must always be remembered that such an inference of guilt cannot lightly be drawn. The rule of evidence requires that in order to justify such an inference the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

Set aside.