[COURT OF CRIMINAL APPEAL.]

1948 *Present:* **Dias J. (President), Nagalingam and Gratiaen JJ.**

THE KING *v.* MARSHALL *et al.*

APPLICATIONS 173–176.

S. C. 28—M. C. Walasmulla, 1,269.

Court of Criminal Appeal—Alibi—*Abetment of murder—Intention to assist offender—Essentials of abetment—Non-direction—Penal Code—Sections 102, 296.*

(i) An *alibi* is not an exception to criminal liability, like a plea of private defence or grave and sudden provocation. An *alibi* is nothing more than an evidentiary fact, which, like other facts relied on by an accused, must be weighed in the scale against the case for the prosecution. If sufficient doubt is created in the minds of the jury as to whether the accused was present at the scene at the time the offence was committed, then, the prosecution has not established its case beyond reasonable doubt, and the accused is entitled to be acquitted. *Rex v. Chandrasekera (1942) 44 N. L. R. at p. 126*, and *Rex v. Fernando (1947) 48 N. L. R. at p. 251*, applied.

(ii) The jury found the second accused guilty of murder and the first, fourth and seventh accused guilty of abetment of murder. The facts were that a quarrel having arisen, the first, fourth and seventh accused were holding the deceased man and dragging him along for some purpose of their own. The second accused who was some distance behind, taking advantage of the defenceless position of the deceased, rushed up *from behind* and struck the deceased *from behind* causing a fatal injury.

Held, that in order to convict the first, fourth and seventh accused of abetment their mere presence with the intention of giving aid to the principal offender was not enough. There must also be the doing of something, or the illegal omission to do something, in order to facilitate the commission of the offence by the principal offender.

Held further, that the aid given by an alleged abettor must be "intentional" and, where the offence abetted is murder, the aid must be "*murderously* intentional aid". Furthermore, the facility or aid afforded by him to the doer of the act must be such as was essential for the commission of the crime abetted.

APPLICATIONS for leave to appeal from certain convictions in a trial before a Judge and Jury.

F. A. Hayley, K.C., with *M. H. A. Aziz* and *K. A. P. Rajakaruna*, for the first, second, fourth, and seventh accused, appellants.

H. A. Wijemanne, Crown Counsel, for the Crown.

August 27, 1948. DIAS J.—

At the close of the argument we intimated to learned counsel that we were of the opinion that the conviction of the second accused should be affirmed, while the conviction of the first, fourth, and seventh accused should be set aside. We intimated we would give our reasons later.

The indictment charged eight persons with being members of an unlawful assembly, the common object of which was to cause hurt to S. Jamis and S. Dionis—section 140 of the Penal Code; with the offence

of rioting—section 144 ; and with murdering S. Jamis—sections 296 and and 146 of the Penal Code. Count 4 of the indictment charged the second accused alone with committing the murder of S. Jamis under section 296 of the Penal Code, and count 5 charged the first, fourth, and seventh accused with abetting the first accused to commit the murder of Jamis " which said offence was committed in consequence of such abetment " under sections 296 and 102 of the Penal Code.

The Jury acquitted all the accused under the unlawful assembly counts 1 to 3. They convicted the second accused under count 4, and the first, fourth, and seventh accused of abetment under count 5.

The facts as found by the Jury indicate that on October 2, 1947, S. Deonis and his father, the deceased S. Jamis, went to the boutique of Elias Appuhamy. They had tea at the boutique and the deceased having purchased some dried fish, the two started to go towards Hakmana. Neither of them was armed. On the way a quarrel arose between the sixth accused and Deonis. The other accused who were on the road joined in. They surrounded the father and son and began to assault them. Thereupon, Don Carolis and Vidane Appu intervened and rescued Deonis and took him back to the boutique of Elias Appuhamy. They then returned to extricate the deceased. At that time, the first, fourth, and seventh accused were holding the deceased man and dragging him along. The first accused was holding the deceased by his right arm, the fourth accused by his left arm and the seventh accused was grasping the hair of the deceased. Then the second accused, who was some distance away, rushed up from behind, ran up with a katty and struck the deceased a blow which proved fatal. Thereupon the first, fourth, and seventh accused let go of the deceased and dispersed.

The motive for the original quarrel between the sixth accused and Deonis is not very clear. About ten days prior to this incident a land dispute between the deceased man and his people and a woman called Lucyhamy had been settled by the headman. The deceased and his son belong to the *goi-gama* community. Lucyhamy is the mother-in-law of the seventh accused. Deonis however says that there had been displeasure between his people and the *hunu* people over the possession of this land. There is evidence that the seventh accused had been cited by Lucyhamy as her witness in various criminal cases about this land, but he gave no evidence. There is also evidence that Lucyhamy had come armed with a katty to the garden of the deceased and had a quarrel with the deceased's daughter.

The medical evidence proves that the injury inflicted by the first accused was a penetrating cut 13 inches long from the point of the left shoulder downwards to the abdomen, cutting through seven ribs, opening into the chest cavity and slicing the heart in two. Having regard to the circumstances under which that injury was inflicted and its nature, we think there can be no doubt as to the intention with which it was inflicted.

The defence of the second accused was an *alibi*. According to him, at the time the deceased man was injured he was in the copra shed of Premasiri and he only reached the scene after the murder had been committed. He called Premasiri to support him. The Jury rejected that defence.

Various grounds have been urged on behalf of the second accused. It was submitted that the learned trial Judge has not adequately dealt with the case of the second accused, and that his defence was not fairly left to the Jury. We are of opinion that the case both for and against the second accused was left to the Jury by the learned Judge. Mr. Hayley particularly complained of the following passage in the summing-up in regard to the manner in which the learned Judge dealt with the *alibi* of the second accused :

" Well gentlemen, as regards *alibis*, I had better read to you something from that great writer whom I quoted earlier. It is much better than my expressing it in my own words :

' What had you for supper ?—But if in speaking of a supper given on an important or recent occasion, six persons, all supposed to be present, give a different bill of fare, the contrariety affords evidence pretty satisfactory, though but of the circumstantial kind, that at least some of them were not there. The most usual application of this is in detecting fabricated *alibis*. These seldom succeed if the witnesses are skilfully cross-examined out of the hearing of each, especially as Courts are aware that a false *alibi* is a favourite defence with guilty persons '

Well gentlemen, that is as regards *alibis*, but of course you will test the *alibi* set out by each person on its own merits."

An *alibi* is not an exception to criminal liability like a plea of private defence or grave and sudden provocation. An *alibi* is nothing more than an evidentiary fact, which like other facts relied on by an accused must be weighed in the scale against the case for the prosecution. In a case where an *alibi* is pleaded, if the prisoner succeeds thereby in creating a sufficient doubt in the minds of the Jury as to whether he was present at the scene at the time the offence was committed, then the prosecution has not established its case beyond all reasonable doubt, and the accused is entitled to be acquitted—*Rex v. Chandrasekera* [1] and *Rex v. Fernando* [2]. Although the learned Judge did not deal with the *alibi* in this way, a study of the evidence shows that no miscarriage of justice resulted thereby. There are contradictions between the evidence of the second accused and his witness Premasiri which may have induced the Jury to reject the *alibi*. In regard to the case against the second accused there was ample evidence before the Jury, which, if believed, justified the verdict which they returned. We therefore think the conviction of the second accused is justified and we dismiss his application.

In dealing with the question of abetment under count 5 of the indictment, the learned Judge said :

" A person abets by aiding when by any act or illegal omission—I will leave the second portion out—abets by aiding when any act is done prior to or at the time of the commission of the act he does anything to facilitate, and does in fact facilitate, the commission thereof ;

[1] *(1942) 44 N. L. R. at p. 126.* [2] *(1947) 48 N. L. R. at p. 251.*

either prior to or at the time of the commission of the act he does anything in order to facilitate the commission of that act and thereby he facilitates the commission of the act; intention should be to aid the commission of a crime. A mere giving of an aid will not make an act an abetment of an offence. If the person who gave the aid did not know that an offence was being committed or contemplated; for example, A and B get married, A's wife is living. The persons who are merely present at the celebration of the marriage and are not aware that A is already married, are not abettors. A priest who knowingly officiated at a bigamous marriage was held to have intentionally aided. Mere presence at the commission of a crime does not amount to an abetment, unless there is a presence of a party and the presence is intended to have the effect of giving aid. If a person accompanies another and is aware that the other is about to commit an offence and directly encourages him in the act, he may be said to aid or facilitate the commission of the offence.

If you have three people taking hold of a man and leading him like a sacrificial lamb to a place as counsel stated and there another man cuts him with a katty, then what is the inference you draw? Counsel says it may be, the three persons took Jamis to the mara tree to give him a slap—the three persons would be the first, fourth, and seventh accused. That is a matter for you. That is the abetment under count 5."

We are of opinion that this direction was inadequate and tended to confuse the Jury in the light of the facts of this case. The learned Judge pointed out that the mere presence of the alleged abettor at the scene of the offence at the time the principal offender committed the offence does not amount to abetment unless such presence was intended to have the effect of giving aid. In our opinion that is an inadequate direction. Explanation 3 to section 100 defines what is meant by aiding the doing of an act—" Whoever either prior to or at the time of the commission of an offence, *does anything in order to facilitate the commission of that offence, and thereby facilitates the commission thereof*"—is said "to aid the doing of that act". It will, therefore, be seen that mere presence with the intention of giving aid to the principal offender is not enough. There must also be the doing of something, or the illegal omission to do some thing "in order to facilitate the commission of the offence". In this connection we would refer to the case of *Wijeyratne v. Menon*[1] which lays down that the abetment must be complete apart from the mere presence of the abettor. It is necessary first to establish the circumstances which constitute abetment, so that if absent, he would have been liable to be punished as an abettor. Furthermore, the indictment stated that the offence of the second accused was committed "in consequence of the abetment" by the first, fourth, and fifth accused. The explanation to section 102 of the Penal Code says: "An act is said to be committed in consequence of abetment" when it is "committed with the aid which constitutes the abetment". We cannot see how on the facts of this case it can be said that the conduct of these accused in holding the deceased

[1] *(1947) 48 N. L. R. at p. 165.*

and dragging him *for some purpose of their own*, amounts to aid intentionally given to the second accused to facilitate him to murder the deceased. This aspect of the matter was not put to the Jury, and amounts to non-direction.

The aid given by an abettor must be "intentional aid". When the charge is one of abetment of murder, in order to justify a capital sentence, the intentional aid must be a murderously intentional aid. It was laid down in *Rex v. Kadirgaman* [1] that the intention of an abettor must be presumed from the nature and effect of the facility given by him to the doer of the act. Not only was the Jury not directed on these points, but we are unable to hold a presumption of a murderous intention can be drawn against the first, fourth, and seventh accused on the proven facts. The principle is that in order to make a person an abettor, the facility or aid afforded by him to the doer of the act must be such *as was essential* for the commission of the crime abetted. This is a question of fact for the Jury and must depend on the circumstances of each case—*Amarasinghe v. Silva* [2].

There are several cases in our law reports which illustrate these principles. It is only necessary to cite one of them. In *Rex v. Kadirgaman* [3] the facts established that B held C round his body while A hit C on the head with an iron rod. From the nature and facility given by B to A, his intention to aid A in the assault on C was presumed. The facts of the present case are distinguishable, because there is no evidence at all to show that the act of the first, fourth, and seventh accused in holding the deceased and dragging him along the road was intentional aid, or was an intentional facility given by them to the second accused who came up from behind unknown to them in order to murder the deceased.

We are of opinion that the direction "If you have three people taking hold of a man and leading him like a sacrificial lamb to a place as counsel stated, and there another man cuts him with a katty, then what is the inference you draw? Counsel says it may be the three took Jamis . . . . to give him a slap . . . . That is abetment under count 5" is unfortunate, inasmuch as it might create in the minds of a lay Jury the impression that where three men drag a man for some purpose of their own, and another taking advantage of that situation utilises that opportunity to inflict a fatal wound, the only permissible inference is that the three men who held the deceased did so with the object of giving intentional aid to the murderer. The facts of this case do not warrant such an inference. The learned Judge did not tell the Jury that the evidence of the alleged abetment must be consistent only with the guilt of the accused and inconsistent with any reasonable hypothesis of their innocence. He did not tell them that the prisoners should have the benefit of any reasonable doubt on this point. We think that at the close of the case for the prosecution, there was sufficient justification for the learned Judge to rule as a matter of law that, assuming all the facts of the case for the prosecution are true, there was

[1] *(1940) 41 N. L. R. at p. 535–536.* [2] *(1944) 45 N. L. R. at p. 526.*

[3] *(1940) 41 N. L. R. 534.*

insufficient evidence in regard to abetment to warrant the Judge from withdrawing the cases of the first, fourth, and seventh accused from the Jury. In these circumstances their convictions cannot stand.

In view of the decision we have reached, it is unnecessary to consider the application of the seventh accused to lead further evidence in this Court.

We set aside the conviction and sentences imposed on the first, fourth, and seventh accused. The conviction and sentence passed on the second accused are affirmed.

Convictions of first, fourth, and seventh accused set aside.

Conviction of second accused affirmed.

1949 *Present :* **Windham J.**

EBERT SILVA BUS CO., LTD., Petitioner, and HIGH LEVEL ROAD BUS CO., LTD., Respondent

S. C. 264—Application for a Writ of Certiorari *against the Motor Tribunal*

Writ of certiorari—*Omnibus Service Licensing Ordinance, No. 47 of 1942—Sections 5 (1), 13 (1), 14 (1) (b) and 14 (3)—Powers of Tribunal of Appeal—Meaning of words " route which is substantially the same "—Temporary diversion of route—Not illegal.*

In an appeal under section 13 (1) of the Omnibus Service Licensing Ordinance it is competent for the Tribunal of Appeal to require that while a road along which the prescribed route is to run is closed to traffic the route shall temporarily run along another road or roads. Such an order does not exceed the jurisdiction conferred on the Tribunal by section 14 (1) (*b*).

In determining whether one route is substantially the same as another route, slight divergencies are immaterial.

THIS was an application for a writ of *certiorari* to quash an order made by the Motor Tribunal of Appeal.

H. V. Perera, K.C., with *N. E. Weerasooria, K.C., D. D. Athulathmudali* and *W. D. Gunesekera*, for the petitioner.

C. Thiagalingam, with *Stanley de Zoysa* and *S. E. J. Fernando*, for the fifth respondent.

Cur. adv. vult.