1948 *Present :* **Howard C. J.**

HENDRICK SILVA, Appellant, *and* IMBULDENIYA (S. I. Police), Respondent.

S. C. 1,321—M. C. Matara, 65,977.

Penal Code, sections 158 and 109—Abetting acceptance of illegal gratification by public servant—Ingredients of offence—State of mind of accused—Proof that public officer was acting in lawful exercise of duties.

Where a person is charged with abetting the acceptance of an illegal gratification by a public officer the only question at issue is the state of mind of the accused. It is irrelevant whether the officer had authority to make the investigation in the course of which the gratification was offered.

Perera v. Kannangara (1939) 40 N. L. R. 465 referred to

APPEAL from a judgment of the Magistrate, Matara.

Colvin R. de Silva, with *K. C. de Silva*, for accused, appellant.

A. C. Alles, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 24, 1948. HOWARD C.J.—

The appellant appeals from his conviction of aiding and abetting a public servant, to wit, P. S. 2666 D. D. Abeywardena of the Criminal Investigation Department to accept for himself a gratification other than legal remuneration, namely, a sum of Rupees one hundred as a reward for doing an act, to wit, suppressing evidence recorded by the said public servant in his official capacity as such by destroying the paper wherein he had recorded the statement of one Lairis and obtained specimens of the handwriting of the said Lairis whilst inquiring into a case of alleged forgery of some applications for permits to purchase maternity outfits at Pathegama South, but which said act was not committed by the said P. S. Abeywardena in consequence of such abetment. The charge was laid under sections 158 and 109 of the Penal Code. The evidence of P. S. Abeywardena so far as material was as follows :—

" On October 23, 1946, I was investigating into a case of fraud. I completed investigations and came to Kapugama on October 24, 1946. I had another inquiry there in connection with the alleged forgery of some paddy permits. The accused came to the Headman's house when I was making inquiries with another man. He said that he was interested in one Lairis whose statement I had recorded and a specimen of whose signature I had taken at the earlier inquiry at Pathegama. Accused addressed the man he came with as " Dionis ". At Pathegama too while I was investigating the accused came, and wanted to know from me where I was going next and said he wanted to see me. When he told me at Kapugama that he was interested in Lairis I asked him what he wanted. He said he would give me Rs. 100 and asked me to tear up the notes of inquiry relating to Lairis. I refused. The Headman was not there then. Accused went away. When the Headman came home the accused came back again and persisted in

asking me to take the Rs. 100 and destroying the notes. He then handed me Rs. 100 in ten ten-rupee notes. I took the money and noted the numbers of the notes and I anded it over to the Headman. The man whom the accused called Dionis, the accused, the headman and I were present, when the money was handed over to me. When I started taking down the numbers of the notes the man addressed as Dionis ran away. The Headman and I took the accused with the money to the Police Station. The Headman heard the accused asking me to take the Rs. 100 and destroy the notes of inquiry."

The evidence of Sergeant Abeywardene was corroborated by the testimony of the Headman. The appellant called no evidence, but on his behalf the point was taken that, inasmuch as no evidence was produced to prove that the Sergeant was investigating the case of forgery, a non-cognizable offence, with the authority of the Court under section 129 of the Criminal Procedure Code, a prosecution would not lie. The Magistrate held that there was no substance in this point. In convicting the appellant he has cited the case of *Perera v. Kannangara* [1].

Dr. Colvin R. de Silva on behalf of the appellant has raised the same point as was taken for the defence before the Magistrate. The appellant was charged under section 158 of the Penal Code which is worded as follows:—

"Whoever, being or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person with the legislative or executive Government of Ceylon or with any public servant as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

Section 129 (1) of the Criminal Procedure Code is worded as follows:—

"Every inquirer and Police Officer shall have power upon receiving an order from a Magistrate, to investigate a non-cognizable offence and to exercise all the powers conferred upon them by this Chapter in respect of such investigation."

Dr. de Silva contends that as the offence of forgery, a non-cognizable offence, was being investigated by Sergeant Abeywardena the latter was not, in the absence of proof that he had the authority of the Magistrate to make such investigation, acting in any official capacity. In these circumstances Dr. de Silva contended that the charge must fail. In support of this proposition he cited the case of *De Zoysa v. Subaweera* [2]. In that case it was held by Wijeyewardene J. that where a Police Constable, who had no official functions to perform at a Police inquiry, dishonestly represented to a person that he would favour him at such inquiry and

[1] *(1939) 40 N. L. R. 465 ; 14 C. L. W. 106* [2] *(1941) 42 N. L. R. 357.*

obtained a gratification from him, the constable had not committed an offence under section 158. The accused was taking no part in the inquiry. There was, therefore, no proof that he accepted the gratification as a reward for showing favour in the exercise of his official functions. In the present case it was the appellant who asked for a favour. In these circumstances I do not consider that the decision in *De Zoysa v. Subaweera* has any relevance so far as the facts in the present case are concerned. Dr. de Silva also cited the case of *Mudalihamy v. Isma*[1] the headnote of which is as follows :—

" In the case of a non-cognizable offence (such as that under the Game Protection Ordinance) the person who searches for and seizes anything necessary for an investigation must act under the orders of the Police Magistrate.

When an Arachchi acting under the orders of a Ratemahataya seized (for the purposes of inquiry) a wild buffaloe captured by the accused, and the accused rescued the animal by force—*Held :* that accused could not be convicted under section 183 of the Penal Code.

' The complainant cannot be said to have been obstructed in the discharge of any public function. The public function must for this purpose be legally authorised : it is not enough that the public servant when he acts under any order believes that the order is lawful. The order must in fact be lawful.' "

I do not think that this case has any bearing on the present case. The Arachchi was admittedly exercising a function for which he had no legal authority. Moreover the offence alleged to be committed by the accused arose as the result of the action taken by the Arachchi on the orders of the Ratemahataya. In the present case it is not conceded that Sergeant Abeywardena was acting without the authority of the Magistrate. There is merely lack of formal proof. Moreover Sergeant Abeywardena was approached by the accused. There was no connection between the investigation on which he was engaged and the bribe of Rs. 100 offered by the appellant. *Mudalihamy v. Isma* was followed in *Banda v. Tikka* [2] where the same principle was formulated.

In *Perera v. Kannangara* [3] it was held by Soertsz A.C.J. that in a charge of abetting the acceptance of an illegal gratification by a public officer under sections 158 and 109 of the Penal Code (Chapter 15) the relevant state of mind is not that of the person to whom the offer is made, but of the person making the offer. In the present case the only question at issue is the state of mind of the appellant. Did the latter by the offer of a gratification instigate the Sergeant to forbear to do an official act, namely, forward the notes of the inquiry relating to Lairis? There is no doubt that he did. The bribe offered by the appellant had no connection with the inquiry on which Sergeant Abeywardena was engaged at the time it was offered. The question as to whether Sergeant Abeywardena was holding either inquiry with the authority of the Magistrate is not material.

For the reasons I have given the appeal is dismissed.

Appeal dismissed.

[1] *(1916) 19 N. L. R. 286.*
[2] *4 C. W. R. 242.*
[3] *(1939) 40 N. L. R. 465 ; 14 C. L. W. 106.*