1947 *Present :* **Canekeratne J.**

WIJEYERATNE, Appellant, *and* MENON (S. I. Police), Respondent.

1,322—M. C. Balapitiya, 55,988.

Abetment—Accused charged and convicted as principal offender—Proof, in fact, of abetment—Power of Court to alter verdict to one of abetment—Penal Code, ss. 102, 107, 400—Criminal Procedure Code, ss. 182, 347 (b) (ii.)

The appellant committed the offence of abetment of cheating but was in fact charged and convicted under section 400 read with section 107 of the Penal Code.

Held, that the Court could, by virtue of the provisions of section 182 and 347 (b) (ii) of the Criminal Procedure Code, alter the verdict by substituting for section 107 of the Penal Code section 102, if no prejudice was caused.

APPEAL against a conviction from the Magistrate's Court, Balapitiya.

Colvin R. de Silva (with him *K. C. de Silva*), for the second accused, appellant.

J. G. T. Weeraratne, C.C., for the Attorney-General.

Cur. adv. vult.

March 7, 1947. CANEKERATNE J.—

A forest range officer stopped a cart of timber passing his quarters, about 3 A.M. on March 6, 1945 ; first accused who was following the cart produced a permit P 1 and informed him that he was transporting the timber belonging to the second accused whose employee he was. Proceedings commenced with a report, under section 148 (b) of the Criminal Procedure Code, Ch. 16, sent to the Court by one calling himself a Sub-Inspector of Police, Criminal Investigation Department, who had only an imperfect acquaintance with the sections of the Penal Code ; it was

stated therein that H. Charles of Talawe at Kurundugaha Hetekma on March 6, 1945, attempted to deceive the forest range officer by tendering a permit, No. 11/0330, and thereby committed an offence punishable under sections 400 and 490 of the Ceylon Penal Code. The language used in describing what the second accused, P. A. Wijeratne, did is such as is appropriate to a charge of abetment but the report states that he thereby committed an offence punishable under sections 400 and 107 of the Ceylon Penal Code. The charge that was framed in Court followed the language used in this report. The prosecutor was well aware at the time of the sending of the report that the second accused was not present at the scene of the offence at that hour of the morning ; he appears to have travelled by an omnibus and to have come near the place sometime later.

A permit for transporting timber is executed in three parts. One of the parts of the permit issued in this case is P 1 (No. 11/0330) ; it was granted by the village headman to the witness Sirineris on September 1, 1943, for the removal of the timber felled on a land called Kudagalkande ; another of the parts is P 3 which was produced from the custody of the Government Agent of the province. A few days after September 1, 1943, the appellant informed Sirineris that he had lost the permit P 1 which he had received from the headman at the request of Sirineris. The timber that was being transported by the first accused was obtained from a land called Beralya Mookalana ; the evidence of Handy, who had been employed by the appellant to saw this timber, shows that the stamp on the timber in question was put by the appellant and himself on March 5, 1945. The view taken by the Magistrate was that P 1 remained with the appellant and that on March 5, 1945, he had handed it to the first accused and requested him to go with the cart. The date that originally appeared on P 1 had been altered and there were certain other interpolations on the document.

The Magistrate found both accused guilty ; he warned and discharged the first accused as he was, in his view, a tool in the hands of the second accused ; the second accused was sentenced to one month's rigorous imprisonment. This is an appeal by the second accused and it is contended that there was no charge against him and that his conviction is illegal.

To bring a person within section 107 of the Penal Code the abetment must be complete apart from the mere presence of the abettor. It is necessary first to make out the circumstances which constitute abetment, so that, if absent, he would have been liable to be punished as an abettor and then to show that he was present when the offence was committed (Ratanlal, 16th Edition, Law of Crimes, page 250).

One of the principal objects of the charge is to inform the accused precisely what acts punishable by law he is alleged to have committed. It is alleged in the charge that the appellant abetted the offence of attempting to cheat the forest range officer on March 6, 1945, at Kurundugaha Hetekma, and that there was actual commission of this offence. Since the allegation was that he had committed the offence of cheating (sections 400 and 107 of Ch. 15) it might be urged that the appellant was quite certain that he could not be liable as a principal as he was not present at the scene of the crime. But it was clear to him that the

prosecution must prove first that there was a prior abetment of the offence by him ; moreover the evidence adduced by the prosecution in support of the charge gave notice to the accused of the facts which constituted abetment. It would thus be difficult to contend that the appellant did not know with certainty the exact nature substantially of the charge preferred against him.

Crown Counsel contends that the curative provisions of section 425 of Ch. 16 should be applied in this case seeing that an error has crept into the charge. Particulars of the charge were before the appellant although section 107, which had no application to the facts, was referred to therein. I do not think that I ought to accede to this request. Reference was made at the argument to sections 183 (*a*) and 182 of Ch. 16.

Sections 181, 182, 183 and 183 (A) provide for conviction without a charge in certain cases ; section 183 deals with a case where the same transaction involves a major and a minor offence and it provides that where the accused was charged with the former only he may be convicted of the latter. In section 183 (A) it is provided that when a person is charged with an offence he may be convicted of an attempt to commit such offence, although he may not be separately charged. Section 181, on the other hand, deals with a case which places a doubt as to the offence that has been committed. There must not be any doubt as to the single act or series of acts which constitute that transaction ; that is to say, there must not be any doubt as to the facts. There is a doubt as to the inference which would be drawn by the Court from these facts thus making it " doubtful which of several offences the facts which can be proved will constitute ". Section 182 must be read with section 181. Thus if after evidence has been given it is found that the accused committed a different offence with which he might have been charged under section 181, then section 182 can be availed of. A man who is in possession of stolen goods soon after the theft may appear to be the thief or to have received the goods knowing them to be stolen ; he may be convicted of receiving stolen goods though charged with theft only (see illustration in section 182). A doubt as to a subsidiary circumstance determines what law is applicable. A man may be convicted of an offence although there has been no charge in respect of it if the evidence is such as to establish a charge that might have been made. The case of *Begu v. Emperor*[1] undoubtedly recognizes the wide power of a Court trying a criminal case to convict of a crime not the subject of the charge provided (*a*) that the crime which the accused is found guilty is established by the evidence and (*b*) that having regard to the information available to the prosecuting authorities it was doubtful which of one or more offences would be established by the evidence at the trial (*Thakur Singh v. Emperor*[2].)

The prosecutor assumed that on the given facts a particular offence was committed by the appellant ; he mistakenly thought that section 107 was applicable to the circumstances of this case. The circumstances alleged in the present case are (1) that the appellant had induced one Charles to take P 1 and go with the cart to Ambalangoda, to tender the permit and to get the timber transported : (2) that Charles left with a cart on the night of the March 5/6, taking the permit : (3) that he

[1] *Cal. 1925 A.I.R. Privy Council 130.* [2] *(1943) A.I.R. Privy Council 192.*

tendered P 1 as a genuine permit and attempted to deceive the forest range officer: and (4) that the appellant was not present at this time although he had told Charles that he was following in an omnibus. From the nature of these circumstances the question that might have presented itself to the complainant was this—was the appellant liable as a principal by his instigation of the offence committed by his servant, or was he liable as an abettor? I have come to the conclusion that section 182 of Ch. 16 should be applied to this case.

Sometimes it would be possible to convict an accused person of abetment when only charged with the principal offence. More often it is not possible to do so, for ordinarily the facts required to prove an abetment would not be included in the facts constituting the principal offence. In *Kashi Nath Naek v. Queen Empress*[1] a conviction for forgery of a deed, an offence under sections 467 and 114 of the Indian Penal Code, was changed to one of abetment of the offence of forgery, an offence under sections 467/109. In *King v. Baron Silva*[2] a conviction for conspiracy, sections 113 (*b*) and 373 of the Penal Code, was altered to one of abetment, of extortion under sections 373 and 102. In *P. Kumar Mazumdar v. Emperor*[3] the Court had to consider whether an accused person who was charged under section 302 and acquitted should be convicted under sections 302 and 34. The Court made the following observations:— "The charge which should have been proved against the accused as an alternative to the main charge . . . . was a charge under section 302 read with section 114 of the Penal Code". Order was made that the case should be retired on charges framed under section 302 read with section 114. In *Debeprasad Kalowar v. Emperor*[4] the conviction of an accused for abetment of theft under section 379 read with section 114 (Indian Penal Code) was held to be legal when he was charged only with the substantive offence under section 379 as no prejudice was caused. The views expressed in *Emperor v. Mahabir Prasad*[5] and *Padmanabha Panjikannaya v. Emperor*[6] seem to tend in the contrary direction. The decision in the former case recognizes that section 237 (corresponding to section 182 of Ch. 16) is sometimes made use of to find a man guilty of abetment of the offence on a charge of the offence itself. The decision in the latter case has to some extent been modified by the view advanced in *23 Madras Law Journal, page 722,* where the Judge states: "I do not think that *33 Madras 264* intended to lay down an universal rule that in no case was a conviction of abetment possible where the charge was only of the principal offence".

In the present case the same facts that were given in evidence at the trial support the charge of abetment, nor would the addition of a charge under section 102 have adduced any new fact which the accused had been given no opportunity to meet.

The appellant heard the evidence given by Handy and Sirineris; it cannot be said that he had no notice of the facts alleged against him or

[1] *(1897) I.L.R. 25 Cal. 207.*
[2] *(1926) 4 Ceylon Times Reports 3.*
[3] *(1922) I.L.R. 50 Cal. 41—see also 95 Cal. pages 1193 and 1194.*
[4] *(1932) I.L.R. 59 Cal. 1192.*
[5] *(1926) I.L.R. 49 Allahabad 120.*
[6] *(1909) I.L.R. 33 Madras 264.*

that he was misled by the form of the charge. The appellent was defended by counsel and gave his own account of the transaction but the Magistrate preferred to accept the evidence of Handy and Sirineris.

There remains the question whether it is proper to make an amendment in this case. If there is any chance of injustice being done by reason of the amendment of the charge a Court may order a new trial on the charge as amended : but it is not always necessary to do so, more particularly where it does not appear that any fresh case could be made or fresh evidence given on behalf of the person convicted (see *Thakur Singh v. Emperor (supra)*—page 195). It is difficult to see that any further evidence would assist the appellant or that without stultifying himself he can set up any further defence. In exercise of the powers under section 347 (*b*) (ii) of Ch. 16 I alter the verdict by substituting for section 107 of the Penal Code section 102 ; the conviction will be for an offence under section 400 read with section 102 ; with that modification the conviction and the sentence will be affirmed.

Conviction altered.