1945 *Present:* **Keuneman, Wijeyewardene and Rose JJ.**

AGO SINGHE, Appellant *and* DE ALWIS (P. C. 808), Respondent.

1290—M. C. Ratnapura, 41,604.

Omnibus—Conviction of conductor for overloading omnibus—Charge against driver for aiding and abetting—Ingredients necessary for conviction—Motor Car Ordinance, No. 45 of 1938, ss. 111 (2) and 151.

Where, after the conductor of an omnibus had been charged and dealt with for overloading, the driver was charged with aiding and abetting the conductor in the commission of that offence.

Held, that the driver, by his act of driving the omnibus, could not be said to have facilitated the commission of the offence and was, therefore, not guilty of abetment, in the absence of evidence of instigation or conspiracy.

Mere knowledge on the part of the driver that the omnibus was overcrowded would not be sufficient to make him liable for abetting the offence.

CASE referred by Howard C.J. to a Bench of three Judges, under section 48 of the Courts Ordinance.

H. V. Perera, K.C. (with him *G. P. J. Kurukulasuriya* and *Ananda Pereira*), for the accused, appellant.—The accused has been charged and convicted under sections 111 (2) and 151 of the Motor Car Ordinance

No. 45 of 1938. Section 111 (2) speaks of a state of things over which the conductor has full control and for which he alone is liable. The conductor's position in sub-section (2) of section 111 may be compared with the driver's position in sub-section (1) of that section. In view, however, of the decision in *Gough v. Rees* [1] it is conceded that under certain circumstances the driver may be convicted for abetting the conductor in the commission of the offence of overloading.

The accused, in the present case, cannot be said to have done anything in the nature of abetment, within the meaning of that term in section 100 of the Penal Code. His mere presence or failure to interfere when the offence was being committed by the conductor does not amount to abetment. The decisions in *Attorney-General v. James Singho* [2] and *Thangiah v. Batchi Appu* [3] are not inconsistent with the ruling in *De Silva v. Fort Police* [4]. The conductor's offence of overloading was already complete prior to the driver's act of driving.

T. S. Fernando, C.C., for the Crown.—That the offence described in section 111 (2) of the Motor Car Ordinance can be abetted is beyond dispute—*Attorney-General v. James Singho (supra)*; *De Silva v. Fort Police (supra)*; *Gough v. Rees (supra)*.

What section 111 (2) penalises is not the existence of a state of things, but the act of carrying passengers in excess of the maximum number specified under section 61. In view of the definition of "passenger" in the interpretation section 176, the offence is committed by the conductor when the number of persons found carried in the bus is in excess of such maximum number. But the driver is the person whose act makes it possible for the persons to be carried in the bus.

Under section 112 it is not only the conductor who is empowered to prevent persons entering the bus when it is full; the driver has been given a similar power. A duty not to drive when there is an excess of persons should be implied in view of this power considered in conjunction with section 42 which makes it an offence for any person to use a motor car in contravention of any of the conditions in the licence.

[WIJEYEWARDENE J.—Can the driver be said to be using the bus by merely driving it?] Yes, in view of the decision in *Gifford v. Whittaker* [5].

[KEUNEMAN J.—The charge in this case makes no reference to section 42 at all. Is it open to us to convict the accused for a contravention of section 42?]

Section 42 justifies the argument that there is a duty on the driver not to drive in contravention of the conditions of the licence.

The form of the licence is provided by sections 31 and 34. Form 18 in the Second Schedule is the appropriate licence form. It is contended that it is a condition of this bus licence that no more than the maximum number of passengers shall be carried.

The driver intentionally facilitates the commission of the offence when he drives the bus knowing it to be overcrowded.

[1] *(1929) 142 L. T. 424.*
[2] *(1940) 41 41 N. L. R. 199.*
[3] *(1940) 5 C. L. J. R. 214.*
[4] *(1944) 45 N. L. R. 551.*
[5] *(1942) 1 A. E. R. 604.*

Abstention from action when action is called for may constitute an abetment—*Provincial Motor Cab Co. v. Dunning* [1]; *Cook v. Stockwell* [2]; *Du Gros v. Lambourne* [3]; *Rubie v. Faulkner* [4].

Under section 150 (2) the driver would be guilty of the offence described in section 111 (2) if the contravention was due to any act, omission, default or neglect on his part. The offence of carrying persons in excess could not be completed without the act of the driver.

It is submitted that *De Silva v. Fort Police* (*supra*) was wrongly decided and should be reviewed.

Cur. adv. vult.

March 20, 1945. KEUNEMAN J.—

This case was referred to a Bench of three Judges under Section 48 of the Courts Ordinance.

The accused was charged in that, being the driver of omnibus No. Z 3717, he did aid and abet the conductor of the omnibus in the commission of the offence of " bus over-loading " punishable under section 111 (2) of the Motor Car Ordinance, No. 45 of 1938, in breach of section 151 of the said Ordinance, and thereby committed an offence punishable under section 158 thereof.

The evidence of Assistant Superintendent of Police Dep was that he halted the omnibus in question at Lellupitiya. It was carrying 42 passengers when it was licensed to carry 22. The accused was the driver. The omnibus was overcrowded, and some passengers were hanging on the sides. The conductor was charged and dealt with.

The Magistrate held that the omnibus carried an excess of passengers, and that the driver was fully aware of the fact that the omnibus was overloaded. He further held that the driver had aided and abetted the conductor in the offence of " overloading " and found the driver guilty. The appeal is from that conviction.

The first point argued was that the offence set out in section 111 (2) could not be abetted. This was not pressed in view of the decisions in *Gough v. Rees* [5] and *Attorney-General v. James Singho* [6]. We agree that the driver of an omnibus can be charged with abetting an offence by the conductor under section 121 (2) of the Motor Car Ordinance.

It was further argued that the offence of abetment was not made out in this case. Under section 151 of the Motor Car Ordinance " Any person who attempts to commit, or abets the commission of, an offence shall be guilty of that offence ". Under the Interpretation Ordinance, section 2, the word " abet " has the same meaning as in the Penal Code section 100. In this case there is no evidence of instigation or conspiracy, and the only part of section 100 which applies relates to international aid, by an act or unlawful omission. Explanation 3 has a bearing: " Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof is said to aid the doing of that act ".

[1] *101 L. T. 231.*
[2] *113 L. T. 426.*
[3] *L. R. (1907) 1 K. B. 40.*
[4] *(1940) 1 A. E. R. 285.*
[5] *142 L. T. 424.*
[6] *41 N. L. R. 199.*

Crown Counsel's argument was as follows:—

Section 111 (2) runs thus "Where the number of passengers found at any time in an omnibus on a highway exceeds the maximum number specified in the licence for that omnibus, or where goods other than the personal luggage of a passenger are found in an omnibus on a highway, the conductor of the omnibus shall be guilty of an offence".

Crown Counsel emphasized the definition of the word "passenger" contained in section 176 as "a person carried in a hiring car". I may add that the term "hiring car" includes an omnibus. Crown Counsel argued that the word "carried" meant moved or transported, and that in section 111 (2) one essential of the offence was that the excess of passengers must be found in an omnibus in motion, and that persons who mount into a standing omnibus or who are seated in an omnibus which is halted are not to be regarded as passengers. He therefore argued that the driver, by driving the omnibus which had an excess of passengers to his knowledge. was facilitating the commission of the offence under section 111 (2).

It is true that the word "carried" may mean "transported", but I do not think it is the only or the necessary meaning for the purposes of the Motor Car Ordinance. The Ordinance uses the word "passengers" as applicable to persons who are not necessarily being transported. For example, "plying for hire" means standing or waiting to be hired by passengers. But more to the point is the word "stopping place" which means a place set apart as a place at which omnibuses may be halted for the purpose of taking up or setting down passengers. In my opinion the word "carried" may include the meaning "taken up", and I think that a person is a passenger from the time he is taken up into the halted omnibus, throughout the journey including all stops, and until he is set down from the omnibus. Any other meaning would be artificial and unreal.

In this view movement to transportation is not a necessary ingredient of the offence set out in section 111 (2), adn the driver of an omnibus is not by his act of driving the omnibus completing that offence, and so the driver cannot be said to facilitate the commission of the offence by his act of driving the omnibus.

At the same time it must, I think, be conceded that in its essence the offence under section 111 (2) is a continuing offence, and if an excess of "passengers" is found at any point in the journey the conductor is guilty of an offence under that section. Even so the mere knowledge on the part of the driver that the omnibus is overcrowded cannot, in my opinion, make him liable for abetting the offence, for he has in no way facilitated the commission of the offence.

Crown Counsel also referred to section 112 which grants both to the driver and to the conductor of a hiring car (including therein an omnibus) the power to request any person not to enter, when the hiring car is already carrying the full number of passengers. No person shall enter the hiring car in disobedience of the request, and if anyone does enter he is guilty of an offence under section 150 (1). Crown Counsel argued that the failure to exercise that power may be regarded as an abetment.

The first difficulty in this case is to find the evidence that the driver failed to exercise the power, but even if it is established that he did not exercise the power it has to be remembered that while the power is given to the driver no duty is imposed upon him to exercise that power, and in many cases it would be unreasonable to impose such a duty upon the driver. Further no power is given to either the driver or the conductor to request persons, who have entered either in disobedience of the request not to enter or when the full complement of passengers has already been taken in, to leave the omnibus, nor is any duty imposed on them to that effect. I do not agree with the argument of Crown Counsel.

As distinct from abetment, it has been suggested that section 150 (2) (*b*) and proviso (i) may be resorted to. But in this case it cannot be said that it has been proved that " the contravention was due to any act, omission, default or neglect " on the part of the driver. It was necessary for the prosecution to show a causal connection between the act, omission, default or neglect and the contravention, and this has not been established in the present case.

At one stage Crown Counsel argued that the driver was guilty of an offence under section 42 in that he used the omnibus in contravention of the conditions contained in the licence. I do not think it is open to us to consider that section in connection with the present case. Here the driver was charged with an offence in which his responsibility for an offence committed by the conductor was in question. The offence under section 42 is an independent offence which has no connection with the offence of the conductor, and it may raise many defences which have not been considered in the present case.

We have been referred to the cases of *Thangaiah v. Batchi Appu*[1] and *De Silva v. Fort Police*[2] where views similar to those I have adopted were expressed.

The appeal is allowed; the conviction is set aside and the accused is acquitted.

WIJEYEWARDENE J.—I agree.

ROSE J.—I agree.

Appeal allowed.