1948 *Present :* **Gratiaen J.**

TENNAKOON, Appellant, *and* DISSANAYAKA (A. S. P.), Respondent

S. C. 1,255—M. C. Colombo South, 19,010

Penal Code—Taking of illegal gratification by public servant—Ingredients of offence—Abetment—Sections 158 and 101.

A public officer who takes a bribe in connection with a matter in respect of which he has no power to act officially is not guilty of an offence under the first part of section 158 of the Penal Code.

In a prosecution for the abetment of an offence it is essential that the act abetted should be capable, if committed, of constituting an offence. A man cannot be punished for abetting an act which is not an offence even though he believes that it is an offence.

APPEAL from a judgment of the Magistrate, Colombo South.

H. V. Perera, K.C., with *A. H. C. de Silva* and *C. E. Jayewardene*, for the accused appellant.

Boyd Jayasuriya, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

December 8, 1948. GRATIAEN J.—

This case illustrates the unsatisfactory state of the law in Ceylon relating to bribery. The provisions of the Penal Code are not always wide enough to deal with the iniquity of persons attempting by improper means to influence the actions and decisions of public servants. It is not surprising that this is so. Chapter 9 of the Code was adapted in this country from the corresponding provisions of the Indian Penal Code of 1860, the final draft of which had been completed by its distinguished author in 1837. At that time the law aimed principally at the taker and not at the giver of bribes, because "the giver was so often found to be a person struggling against oppression by the taker." (*Law Quarterly Review, Volume 60, at page 46*). For this reason it was not thought necessary to introduce a substantive section directly prohibiting persons from giving or offering bribes to public officials, such conduct being caught up, if possible, by the somewhat circuitous application of the law dealing with abetment. In spite of the mischievous changes which have since taken place, the law which was conceived over a century ago still stands unamended. That is of course a matter for the consideration of the Legislature. In the meantime the plain meaning of the language of an antiquated enactment cannot be given an extended judicial interpretation so as to cope with modern methods of corruption.

The facts of the present case are set out in the learned Magistrate's very helpful judgment. An uncertified teacher named H. M. Ratnayake *alias* Mudalihamy, in whom the appellant was interested, had through past disappointment almost abandoned hope of passing by honest means the Government examination in Sinhalese for Ceylon teachers. For this examination he had again presented himself as a candidate in November, 1947. On September 6, 1948, the appellant approached Mr. Lorage, the 3rd Assistant Director of Education, and offered him a bribe of Rs. 50 to ensure that Ratnayake "obtained a pass either in Part 1 or Part 2 of the examination for 1947". As it turned out, this was an official act which it was not within Mr. Lorage's power to perform. Apart from the Government regulations which rule out the possibility of any official action by Mr. Lorage in the matter, and apart from Mr. Lorage's unwillingness to act dishonestly, the true position was that Ratnayake *had already irrevocably failed* the examination in accordance with what had become in his case a somewhat painful habit. The decision of the Examiners that he had failed had been announced in May, 1948, four months before the offer of the bribe.

The appellant has certainly been guilty of most deplorable conduct. A person enjoying the status of a School Manager cannot reasonably expect the sympathy which is reserved for the "struggling victims of oppression" whom the draftsman of the Indian Penal Code had in mind.

The prosecution have been handicapped in this case by the absence of any simple provision of law which directly makes the offer of a bribe to a public officer a punishable offence. An attempt was therefore made to lead the appellant to his punishment through the side-entrance, so to speak, of the law dealing with abetment. The substance of the charge

is that he " abetted the commission by Mr. Lorage of the offence of obtaining for himself a gratification other than legal remuneration . . . . as a motive or reward for showing favour to Ratnayake *in the exercise of his official function*". In other words, the case against the appellant is that he had abetted an act which, if it had been committed by Mr. Lorage, would have rendered Mr. Lorage liable to punishment for an offence under section 158 of the Penal Code. As Mr. Lorage had neither the intention nor the power to commit the offence which the appellant is alleged to have abetted, the strategy which the prosecution was compelled to employ might well appear to a layman to border on unreality. To the advocate the situation presents many opportunities for the exercise of skill and ingenuity, and the Judge finds it difficult at times to realise that he is not merely " supervising a game of forensic dialectics". (*Per* Lord Justice Mackinnon in *Newstead v. London Express Newspapers, Ltd.*[1]). All this could be avoided by an amendment of the law. In the meantime, persons who commit acts which certainly should be made punishable sometimes escape punishment. The question for decision is whether the appellant is such a person.

The argument for the defence in this case can be summarized as follows :—

(*a*) that it was not within the power of Mr. Lorage to do any official act in the exercise of his official functions in respect of which the bribe was offered ;

(*b*) that it was accordingly impossible for Mr. Lorage to commit an offence (punishable under section 158 of the Penal Code) which the appellant sought to abet ;

(*c*) that the appellant was therefore not guilty of abetment because the act abetted could not constitute an " offence ".

The Crown in reply to these submissions maintained that although the propositions (*a*) and (*b*) above were not seriously disputed, all that was relevant in disposing of a charge of abetment was to consider the state of mind of the abettor. It was therefore argued that as the accused clearly intended to abet the commission of an offence by Mr. Lorage, the requisite *mens rea* was established, and his conviction by the learned Magistrate was justified. I have come very regretfully to the conclusion that the contention of the defence is correct, and that the submission for the prosecution sets out what the law ought to be and not, unfortunately, what it is at present.

It is first necessary to analyse the provisions of section 158 of the Penal Code. This section is directed against public officers who take bribes, and not as I have already pointed out, against persons who offer bribes to them. The intention is to ensure that public officers should not be subjected to any sinister temptations while performing their official duties. What the section specially prohibits is (*a*) the receipt by any public officer of an illegal gratification of any description whatsoever in connection with the performance of his *official* acts or functions, and (*b*) any form of subtle influence which might be exercised upon a public servant who has official duties to perform *by another public servant* who

[1] *(1940) 1 K. B. 377.*

has been bribed for the purpose. Section 158 therefore makes it a punishable offence for any public officer or prospective public officer to receive an illegal gratification which is intended *either* to influence him in respect of any official duty which he has to perform *or* to persuade him to exercise some influence upon another public officer in respect of some official duty which the latter has to perform. It similarly prohibits the receipt of any illegal gratification for official favours of the same description which have already been granted. If the matter is considered from this point of view, it follows that the first part of the section has no reference to any bribes received or about to be received in respect of the performance of functions other than strictly official acts. A public officer who takes a bribe in connection with a matter in respect of which he has no power to act officially is not therefore guilty of an offence under the first part of section 158 of the Penal Code although his conduct may in certain cases amount to the commission of some other offence with which we are not at present concerned. Learned Crown Counsel also concedes that the second part of section 158 which prohibits the taking of a bribe "for rendering or attempting to render any service or disservice to any person with the Legislative or Executive Government or with any public servant" does not apply to this case.

In the view which I have taken, it follows that even if Mr. Lorage had accepted the bribe which he was offered and which he very properly disdained, he would not have been guilty of an offence under section 158 because it was not within his power to perform any official act or to confer any official favour in connection with the Examination which had caused Mr. Ratnayake *alias* Mudalihamy so much frustration. This conclusion is in conformity with the decision of my brother Wijeyewardene in *De Zoysa v. Suraweera*[1], where he held that a police constable who took a bribe for promising to confer a favour which he was powerless to confer was not guilty of an offence under section 158. The same view has been consistently taken by the High Courts of Madras and Calcutta (*in re Pulipati Vankiah*[2] and *Venkatarama v. Emperor*[3]). With respect, I agree with my brother Wijeyewardene that the reasons given in certain judgments of the High Court of Lahore for taking a contrary view do not appear to be sound. In fact the Federal Court of India has recently accepted as correct the decisions of the Madras Court *as far as the first part of the corresponding Indian section 161 goes* (*Afzalur Rahman v. Emperor*)[4] but rightly pointed out that in appropriate cases a public servant may be found guilty *under the second part of the section* if, though acting independently of his official functions, he obtains a reward for rendering or attempting to render any service to a person *with another public servant*. I am satisfied that the provisions of section 158 of the Code do not, in their present form, prohibit the receipt by a public officer of an illegal gratification as a motive or reward for doing an act which it is not within his official power to perform and which does not answer to the description of an "official act". This is certainly a most unsatisfactory state of affairs, and it is to be hoped that the law will soon be amended to meet the situation.

[1] *(1941) 42 N. L. R. 357.*
[2] *A. I. R. (1924) Madras 851.*
[3] *A. I. R. (1929) Madras 756.*
[4] *A. I. R. (1943) F. C. 8, at p. 23.*

The only question which remains for consideration is whether a person can be found guilty of abetment if he offers a bribe to a public officer for doing something which it is not within the power of the latter officially to achieve. Section 100 of the Penal Code defines abetment and it is clear that the appellant has "abetted" *by instigation* the commission by Mr. Lorage of what he desired Mr. Lorage to do. But section 100 only tells us when a person "abets the doing *of a thing*", and it is section 101 which declares when a person must be regarded as having *abetted an offence*. The effect of section 101 is to render a person liable to punishment for the abetment of an offence only in one or other of the following cases :—

(*a*) when he abets the commission of an offence which has actually been committed by the person abetted ;

(*b*) when the act abetted has not been committed but would, *if it had been committed by a person capable of committing an offence* (e.g., a person not protected from the consequences of his actions by reason of lunacy, minority, or other incapacity recognised by the criminal law), have constituted an "offence". It is the second of these alternatives which indicates, as shown in the statutory explanations to section 101, that a man can be regarded as guilty of the abetment of an offence even though the offence has not in fact been committed. It is in that sense also that when a person is charged with abetment the relevant state of mind is not that of the person to whom the offer is made but of the person making the offer. (*Perera v. Kannangara* [1] and *Hendrick Silva v. Imbuldeniya* [2].) In both those cases, however, the act abetted was an act which, if committed by the public officer concerned, would have possessed the requisite elements of a punishable offence. It is not the law that a man can be regarded as having "abetted *an offence*" if the act abetted, judged from a objective standard, could not possibly constitute an offence. In other words it is essential that the act abetted should be capable, if committed, of constituting an offence. A man cannot be punished for abetting an act which is not an offence even though he believes that it is an offence. In the present case the appellant offered a bribe to Mr. Lorage, in order to induce Mr. Lorage to do something which Mr. Lorage, in the discharge of his official functions, was powerless to achieve. He has therefore abetted an act in respect of which it was legally impossible for Mr. Lorage to commit an offence punishable under section 158. The judgment of the High Court of Madras in *Venkatarama v. Emperor* (*supra*) is precisely in point. His Lordship the Chief Justice of Madras, in disposing of that case said, "it is time that fresh legislation was introduced into the Penal Code to make these most dangerous offences of giving and taking bribes punishable in much wider terms than are contained in the Code at present". I venture to express the view that this

[1] (*1939*) *40 N. L. R. 465.* [2] (*1948*) *49 N. L. R. 159.*

suggestion also merits the consideration of the Legislature in this country. In the present state of the law the appellant is not guilty of the offence with which he was charged.

During the argument I suggested to learned Counsel, to whom I am greatly indebted for their assistance, that the appellant might perhaps have been found guilty under section 490 of the Penal Code of an *attempt* to abet the commission of an offence, and that the verdict of the learned Magistrate could with propriety be varied accordingly in terms of section 183A of the Criminal Procedure Code. That aspect of the matter was not however fully argued before me, and learned Crown Counsel did make any submission on the point. I do not therefore feel ju d in giving any direction other than on the basis that the appellant is not guilty of the particular offence with which he was charged. I make order acquitting the appellant.

Appeal allowed.