Present: Garvin S.P.J.

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KING *v.* AMITH.

12—D. C. (Crim.) Kandy, 4,286.

Aiding and abetting offence—Charge of theft—Failure of charge against principal offender—May the abettor be convicted of retaining stolen property—Power of Court to frame charge under section 172 of the Criminal Procedure Code.

An accused person who is charged with abetting another in the commission of theft cannot be convicted, as a principal offender, of the offence of retaining stolen property.

APPEAL from an acquittal from the District Court of Kandy. The first accused was charged with theft of tea from the possession of his employer under section 370 of the Penal Code. The second and third accused were charged with having abetted the first accused in the commission of the theft. The learned District Judge acquitted all the three accused. The appeal was against the acquittal of the third accused.

The grounds of appeal were that the District Judge should have, in pursuance of section 182 of the Civil Procedure Code, convicted the third accused of retaining stolen property, or

[1] *(1914) 4 C. A. C. 67.* [2] *(1913) 1 S. C. D. (Wijewardene Reports) 48.*

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alternatively, that he should have framed a fresh charge against the accused, invoking his powers under section 172 of the Criminal Procedure Code.

E. V. R. Samarawickreme, C.C., for appellant.

April 16, 1930. GARVIN S.P.J.—

This is an appeal from an acquittal. The first accused, who was a teamaker on Kahawatta estate, was charged with theft of 267 lb. of tea, being property in the possession of his employer, an offence punishable under section 370 of the Penal Code. The second and the third accused were charged under sections 370 and 102 with having abetted the first accused in the commission of the said theft.

The District Judge acquitted all three accused. This appeal is against the acquittal of the third accused alone.

The case which the prosecution sought to establish was as follows:—

Late on the night of April 22 last the third accused hired a motor car at Matale and proceeded in it to Mandandawela to the boutique of the second accused. After a brief conversation the journey was resumed until they reached the Yatawatta junction. Near a tea factory the first accused approached the car, and at his request it went a little way and stopped close to the factory. Two coolies came up to the car and placed four bags in it. The car then drove back. On the way some Police officers whistled and signalled to the car, but it did not stop.

The third accused, who, it is suggested, felt that discovery would follow, caused the car to be stopped near a cacao garden and had the bags unloaded. He poured petrol over them and set fire to the bag which contained tea. Hawadiya, the owner of this garden, says he saw the third accused in the garden and came across a heap of tea, of which he says 2 or 3 lb. had not been burnt. He questioned the third accused, who admitted that the tea had been stolen and appealed to him not to give information. Hawadiya, however, did procure the attendance of the Arachchi, who made a brief inquiry and took the third accused to the Police Station.

There can be little doubt that if the prosecution succeeded in establishing its case, the first accused was guilty of theft and the third accused at least of aiding and abetting him.

The District Judge, however, declined to act on the testimony of those witnesses who implicated the first accused, holding that they were accomplices, and that whether they were accomplices or not he was not prepared to act on their testimony. Under these circumstances the failure of the charge of theft as against the first accused necessarily involved the failure of the charge made against the third accused of abetment of the first accused.

"I am compelled," said the District Judge, "to discharge the accused. I feel that the third accused should have been charged with having retained stolen property, or under the Estate Produce Ordinance."

The grounds upon which this appeal is taken are as follows :—

(*a*) That the District Judge should have, in pursuance of section 182 of the Criminal Procedure Code, convicted the third accused of the offence of retaining stolen property punishable under section 394.

(*b*) Alternatively, that he should have framed a further charge under section 394 against the third accused and tried him on that charge in accordance with sections 172 to 176 of the Criminal Procedure Code.

Section 182 empowers a Court to convict a person of a cognate offence only in the case mentioned in section 181, and that section contemplates a case in which "a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute." By way of illustration, it is said that a person may in such circumstance be charged with theft or receiving stolen property or criminal breach of trust or cheating or with having committed one of those offences. Section 182 in effect empowers a Court in such circumstances to convict a person, charged with one offence, of a cognate offence which he is shown by the evidence to have committed.

The third accused was charged, not as a principal but as an abettor. As far as the first accused, the principal, was concerned, there was and could not have been any uncertainty at all as to the offence constituted by the acts alleged against him by the prosecution. He was either guilty of theft or not guilty of any offence. The District Judge acquitted him because he disbelieved the evidence against him, not because of any uncertainty as to the offence constituted by the facts proved. The evidence failed to prove that he was guilty of any offence at all.

Similarly, in regard to the third accused he was manifestly guilty of abetment if the first accused, whom he is alleged to have abetted, was guilty of the principal offence. The effect of holding that the first accused was not proved to have committed the principal offence is that the allegation that the third accused abetted him also fails.

Under such circumstances as these, I am not prepared to hold that a person charged with abetting another in the commission of theft may under the provisions of section 182 be convicted as a principal offender of the offence of retaining stolen property.

In regard to the second ground of appeal, the District Judge does not expressly state whether he considered the question of

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framing an additional charge against the third accused in exercise of the power vested in him by section 172. There is certainly no indication that any application had been made to him to frame such a charge. But inasmuch as the Judge says that once the evidence given by the third accused in a previous proceeding was rejected by him there was no evidence to prove that tea had been stolen from Kahawatta estate factory, it is at least doubtful whether he would have taken the course of framing an additional charge of retaining stolen property against the third accused. This explains his uncertainty as to whether this accused should have been charged with retaining stolen property, or under the Estate Produce Ordinance.

Having already decided that the third accused cannot upon this appeal be convicted under the provisions of section 182 of the offence of retaining stolen property, I do not propose to consider whether the District Judge was right in rejecting the statement made by the third accused when he was called as a witness against the first and second accused who were charged with theft of this tea. The third accused was then charged by himself in a separate case for retaining stolen tea. The position he took up was that he obtained the tea from the first accused innocently and decided to destroy it when he realized that it was stolen property.

The prosecuting authorities decided to consolidate the two cases and ultimately indicted him with the first accused for aiding and abetting him in the commission of theft.

To direct the District Judge now to frame an additional charge against the third accused would be in effect to put this accused upon his trial upon a fresh indictment for an offence other than that on which he has already been tried and acquitted and to which he has indicated his defence in the statement made by him in the Police Court.

If the third accused is to be convicted of the offence of retaining stolen property, it must be upon the footing that the tea was stolen.

But the District Judge has held that there is no reliable evidence that the first accused committed theft, or that there was a theft of tea from Kahawatta estate. Even if the accused's statement be admitted in evidence against him, it will only show that he received the tea from the first accused, who has been acquitted of the theft.

Under all the circumstances, I do not think that this is a case in which the provisions of section 172 should be invoked to place the accused upon his trial again, this time on the charge on which he was first brought before the Police Court, when the prosecution with knowledge of all the facts and circumstances elected to indict him with the other persons accused for a different offence.

Appeal dismissed.