

1947

Present : Dias J.

TOUSSAINT (Inspector of Police), Appellant, and DHARMADASA,
Respondent.

S. C. 515—M. C. Galle, 4,580.

Abetment—Conspiracy to impersonate—Circumstantial evidence—How far sufficient—Penal Code, ss. 102, 202.

A was arrested on a criminal charge. He was liberated on executing a police bail bond which directed him to appear in the Magistrate's Court on a certain day. A signed the bail bond in a false name. On the trial date, A deliberately kept away from Court while his brother B, who resembled A, appeared before the Magistrate and pretending to be A, pleaded guilty to the charge and was convicted. Thereafter, B was charged under section 202 of the Penal Code with falsely personating A, and, under such assumed character, having pleaded guilty to the charge against A, while A was charged under section 102 of the Penal Code with abetting B in the commission of the offence under section 202.

Held (1) that A was guilty of abetting B. The evidence proved that A and B had entered into a conspiracy that B should impersonate A before the Magistrate and commit the offence under section 202. The fact that A unlawfully omitted to appear before the Magistrate on the trial date, in the absence of explanation, also indicated that he had intentionally aided B by illegally omitting to appear in Court.

(2) Where the evidence is circumstantial, the prosecution has to satisfy the Court that the evidence proving abetment is only consistent with the guilt of the alleged abettor, and is inconsistent with any reasonable hypothesis of his innocence. It would not be sufficient for the prosecution to establish merely a strong case of suspicion against the alleged abettor.

A PPEAL against an acquittal from the Magistrate's Court, Galle.

B. C. F. Jayaratne, C.C., for the complainant, appellant.

M. L. S. Jayasekere, for the accused, respondent.

August 25, 1947. DIAS J.—

The 2nd accused, whose name is Suduwage Edwin Dharmadasa, had a licence to trade in dry-fish. The 1st accused is his brother. There is evidence that the two brothers resemble each other.

On June 18, 1946, the 2nd accused was detected selling Bombay onions in excess of the controlled price. The police, therefore, arrested him for this offence, and took him to the police station where he was bailed out. The 2nd accused, however, signed the bail bond not as Suduwage Edwin Dharmadasa, but as K. H. Dharmadasa which is not his name. This fact passed undetected at the time, because the police did not know the name of the 2nd accused.

The authorities then initiated proceedings in the Magistrate's Court against the 2nd accused, naming him as K. H. Dharmadasa. The case was fixed for trial on June 25, 1946. The 2nd accused when he was enlarged on bail had been told to attend the Magistrate's Court on that day.

The Magistrate has found as a fact, and there is ample evidence to support his findings, that on June 25, 1946, the 1st accused Suduwage Peter Dharmadasa, impersonating the person charged in the case, namely, the 2nd accused, appeared and pleaded guilty and was convicted and fined.

The prosecuting police officers who detected the fraud, immediately brought this fact to the notice of Proctor Jayawickreme who was conducting the prosecution. That gentleman, however, told the police officers that nothing could be done. It apparently did not strike the proctor that he should at once have brought the matter to the notice of the Magistrate while the 1st accused was still in the Court premises.

The authorities then charged both accused in the present proceedings. The 1st accused was charged under section 202 of the Penal Code with falsely personating the 2nd accused in the profiteering case, and under such assumed character pleaded guilty to that charge. The 2nd accused was charged under section 102 of the Penal Code with abetting the 1st accused to commit the offence, which offence was committed in consequence of such abetment.

Both accused gave evidence. The 1st accused denied that he came forward and pleaded guilty to the profiteering charge. He said he had come to Court in connection with a case against his wife and that he knows nothing about this charge. The prosecution witnesses definitely identified the 1st accused as the man who came forward and pleaded guilty.

The 2nd accused denied that he had sold the Bombay onions, although he admitted that the shop is his. His story is that he has a brother-in-law named K. H. Dharmadasa, and that it was this man who was arrested by the authorities and bailed out. The 2nd accused denied that he signed any bail bond. His story is that K. H. Dharmadasa duly appeared in Court on June 25, 1946, and pleaded guilty. K. H. Dharmadasa is said to be a man of 25 with a knot of hair, whereas the 2nd accused is a man of 60. K. H. Dharmadasa did not appear to give evidence in the case. The 2nd accused did not say what has happened to his brother-in-law K. H. Dharmadasa or where he was to be found.

The Magistrate accepted the evidence given by the prosecution and disbelieved the testimony of the two accused. He convicted the 1st accused on evidence which I consider overwhelming. The 1st accused has not appealed against that conviction.

The Magistrate, however, acquitted the 2nd accused of the charge of abetment. The Attorney-General appeals against that order.

A person is said “*to abet the doing of anything*” when he :—(a) either instigates another person to do that thing ; or (b) engages in a conspiracy for the doing of that thing ; or (c) intentionally aids by any act or illegal omission the doing of that thing—section 100 of the Penal Code.

A person is said “*to abet an offence*” when he abets (a) either the commission of an offence ; or (b) the commission of an act which would be an offence if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor—Section 101 of the Penal Code.

The word “*offence*” denotes a thing punishable in Ceylon under the Penal Code, or under any law other than the Penal Code—Section 38 (2) of the Penal Code.

A conspiracy for “the doing of anything” is when two or more persons agree to do that thing, or cause or procure that thing to be done—Section 100, Explanation 2 of the Penal Code. An act or offence is said to be committed “in consequence of abetment” when it is committed in pursuance of the conspiracy which constitutes the abetment—Section 102, Explanation.

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”—Section 100, Explanation 3 of the Penal Code.

There being no direct evidence proving the alleged abetment by the 2nd accused, the evidence against him necessarily was of a circumstantial character. Therefore, the prosecution had to satisfy the Court that the evidence proving abetment was only consistent with his guilt, and was inconsistent with any reasonable hypothesis of his innocence. It would not be sufficient for the prosecution to establish merely a strong case of suspicion against the 2nd accused.

What are the circumstances ? On June 18, 1946, the 2nd accused was arrested on a charge of profiteering and taken to the police station. He then signed a bail bond giving a false name. In the absence of an explanation, the only inference to be drawn from that fact is that even at that early stage the mind of the 2nd accused was working in a certain way. The second accused was enlarged on bail and told to attend the Magistrate's Court on June 25, 1946. The two accused are brothers and they resemble each other. On June 25, 1946, the 2nd accused deliberately kept away from Court, while the 1st accused appeared

and in the name of K. H. Dharmadasa pleaded guilty to the profiteering charge. This has been found as a fact by the Magistrate. In the absence of an explanation the inference is irresistible that the two brothers had agreed together or conspired that the 2nd accused should keep away from the Court, and that the 1st accused should impersonate the 2nd accused giving the false name which the 2nd accused had already given the police, and plead guilty—thereby avoiding the indignity which would attach to the 2nd accused by having to appear as an accused in a profiteering case and plead guilty in public. In the absence of explanation, the circumstances lead to the inference that the two accused had engaged in a conspiracy to commit the offence defined by section 202 of the Penal Code. Furthermore, the 2nd accused by unlawfully omitting to attend Court, as he was bound by his bail bond to do, intentionally aided the 1st accused in committing the offence under section 202. On the facts of this case, the circumstances taken as a whole are only consistent with the guilt of the 2nd accused, and are quite inconsistent with any reasonable hypothesis of his innocence.

The findings of the Magistrate support this view. He holds as a fact the defences of both the accused are false. He finds that it was the 2nd accused who was arrested on the profiteering charge, that the 2nd accused signed the bail bond in a false name, that the 1st accused appeared in Court and pleaded guilty pretending that he was the 2nd accused. The Magistrate finds that K. H. Dharmadasa is a mythical person and that the 1st accused "is obviously a tool in the hands of the 2nd accused having allowed the latter to exploit their similarity in physical appearance to advantage".

Nevertheless, in spite of these findings of fact, the Magistrate acquitted the 2nd accused holding that "the evidence against him is circumstantial; but the circumstances which point to his guilt, *however strong*, do not take the case beyond suspicion. There is no evidence of anything which constitutes abetment that may be imputed to the 2nd accused". I disagree. The evidence when fairly considered in the light of what constitutes the offence of abetment, proves beyond all reasonable doubt that the 2nd accused engaged in a conspiracy with his brother to commit the offence under section 202, and intentionally aided the 1st accused to commit the offence by unlawfully keeping away from Court on the day in question. The offence committed by the 1st accused was committed in consequence of this abetment.

A person convicted of the offence of abetment under section 102 is liable to be awarded the punishment prescribed by law for the principal offender. I set aside the acquittal of the 2nd accused and convict him under sections 202/102 of the Penal Code. I sentence him to undergo three months' rigorous imprisonment.

Accused convicted.