1944

Present: **Soertsz J.**

AMARASINGHE, Appellant, *and* SILVA (Inspector of Police), Respondent.

89—M. C., Chilaw, 22,107.

Fictitious note—Collateral transaction to disguise the amount of the note—Abetment of offence of taking a fictitious note—Money Lending Ordinance (Cap. 67), ss. 13 and 14—Penal Code, s. 102.

Where a sum of Rs. 650 was lent on the understanding that a promissory note for Rs. 2,000 would be given by the borrower and in pursuance of that agreement a promissory note for Rs. 2,000 was subsequently given.

Held, that the note was a fictitious note within the meaning of section 14 of the Money Lending Ordinance.

Where a Proctor, who arranges the loan in the circumstances and on the terms stated above, writes out the note and takes an active part in the transaction.

Held, that he was guilty of abetting the offence of taking a fictitious note.

APPEAL from a conviction by the Magistrate of Chilaw.

H. V. Perera, K.C. (with him *E. F. N. Gratiaen* and *H. W. Jayawardene*), for the accused, appellant.

H. A. Wijemanne, C.C., for the complainant, respondent.

Cur. adv. vult.

August 23, 1944. SOERTSZ J.—

This is a deplorable case, and I have examined it anxiously this way and that, to see whether the evidence has established, beyond reasonable doubt, the charge of which the appellant has been convicted, namely that he abetted one Seiyed Mohamed Issa Bhai to take a promissory note in which the amount stated to be due was, to the knowledge of the lender, the aforesaid Bhai, fictitious.

I would say, at once, that it is difficult to withhold sympathy from the appellant, a young Proctor of good reputation who has fallen into the distressing situation in which he now finds himself by responding to an urgent request made to him by a brother Proctor in a neighbouring district, and by going to the assistance of a complete stranger to him, but a kinsman of the other Proctor. The man to whose assistance he went goes by the name of Victor Ameresekere. He is described by the Magistrate as a " thoroughly dishonest and unscrupulous witness ". There can be no doubt about that. He is an accompolished perjurer, thoroughly unabashed. But, the evidence reveals him as so much worse that there is occasion to fear that he may see, in the description given by the Magistrate, a very flattering picture of himself for, not to waste too many words on him, the evidence shows that law, morality, decency mean nothing at all to him. I cannot help thinking that the Magistrate would have done well if he had promptly dealt with him under section 440 (1) of the Criminal Procedure Code.

But when all that has been said about this man, the question still remains whether the appellant has not, by yielding to a generous impulse and going to his assistance, thoughtlessly transgressed the law.

The charge of which the appellant was convicted was laid under section 13 of the Money Lending Ordinance read with section 102 of the Penal Code.

Section 13 says:—

> "Any person who shall take as security for any loan a promissory note . . . . in which the amount stated as due is, to the knowledge of the lender, fictitious . . . . shall be guilty of an offence."

And section 14 explains the meaning of the word "fictitious" in this context. It cuts down the ordinary connection of the word, and limits it to the following cases:—

> (*a*) Cases in which a promissory note given in respect of a loan does not disclose upon it any reduction made or sum paid to or about the time of the loan on account of interest, premium or advance charges;
>
> (*b*) Cases in which a promissory note is taken or other obligation incurred in respect of a loan and *at or about the time of the loan, a payment is made or a collateral transaction entered into in order to disguise the actual* amount advanced or the rate of interest payable.

Upon the evidence this case cannot be brought under (*a*) so that if this promissory note is "fictitious" it must be so under (*b*), and even there, it is clear, upon the evidence, that it is not within the first part of (*b*) for no sum was paid, no reduction made in the manner indicated. The sole quetion on this part of the case, therefore, is whether there was a disguising collateral transaction of the kind indicated. Mr. H. V. Perera argued that the admitted fact that on the document itself a larger sum was inserted than was actually lent did not amount to a collateral transaction. That he submitted was a part of the main transaction itself. I have examined that submission with all the care it undoubtedly deserved and I could give, and it seems to me that it overlooks the fact that this part of the section contemplates the actual loan, as the main transaction. Collateral transactions may be of all sorts. The giving of the promissory note, whether it precedes the actual loan or is simultaneous with it or subsequent to it, may itself well be the collateral transaction, as I think it is in this case, for the facts, really not disputed, or at any rate found by the Magistrate, are that the loan was made at Kurunegala, and the note was given some hours later at Marawila, and that at Kurunegala it was understood by all the parties concerned that the note that was going to be given was to be a note for Rs. 2,000, although the sum actually lent was Rs. 650 and such a note was actually given by the borrowers. On these facts I cannot but hold that when this note was given in pursuance of the agreement entered into at the time of the loan there was collaterally with the loan, a transaction entered into with a view to disguising the actual amount advanced and the rate of interest. The note was therefore, a fictitious note within the meaning of section 14. This was the view taken in *Sockalingam Chettiar v. Ramanayake*[1]. It follows that the Afghan who took the note rendered himself liable under section 13.

[1] *35 N. L. R. 35.*

The only other question in the case is whether the appellant is liable as an abettor. In that regard, the appellant's liability depends on whether, on the evidence accepted by the Magistrate, the appellant can be said to have " intentionally aided by an act " the taking of this promissory note by the Afghan. In other words whether he facilitated the taking of the note.

The kind of abetment taken in large involves a question of difficulty which has given rise to a wilderness of single instances, some apparently inconsistent with others. To mention a few in *Reg. v. Coney* [1] the seconds in a prize-fight which ends fatally, as well as spectators who actively encouraged the contest by their applause were held to aid and abet but not so the mere spectators, but in contrast there is *Rex v. Gray* [2]. Similarly in India in the case noticed by the Magistrate, the priest who officiates to solemnize a bigamous marriage is an abettor, but not so the persons who are present, at the marriage. Again in *Bomdila Sankara v. Singh (1884—1 Weir 47—Gour. p. 620)* a man who wrote and attested a sale deed of a child purchased by a prostitute for purposes of prostitution was not liable as an abettor for the transactions might have been completed without any writing at all. The principle appears to be that in order to make an abettor the facility afforded must be such as was essential for the commission of the crime. Whether there was assistance in an essential way is a question of fact and must depend on the findings in a particular case.

Applying this principle to the facts of this case I must hold that the appellant fills the role of an abettor. Although he cautioned Ameresekere against getting into the clutches of the Afghan—incidentally I would observe that, as subsequent facts proved, it was the Afghan who stood in need of being cautioned against Ameresekere, for it was he who eventually got into Ameresekere's clutches—the appellant ultimately arranged the loan and its terms, he took the money to the scene of the sale and got the sale stayed; he actually *wrote* the note in question; and whether he asked for it or not he was given Rs. 60 as a fee or as a *solatium*. Indeed one might say that without his part in it the play would lack the prince.

In view of the many mitigating features in favour of the appellant the Magistrate imposed a nominal fine, but after a most anxious consideration of the case in all its aspects and taking into account the fact that this is the first instance in which, so far as I am aware, such a prosecution was launched, I am of the opinion that the ends of justice will be met by an order under section 325 (1) (*a*) of the Criminal Procedure Code. The warning will serve to bring home to the appellant and others the peril attendant upon such a participation, as there was in this instance, in transactions of this kind.

I would send the case back to the Magistrate for him to take action in the manner indicated. The fine will be remitted.

Fine remitted;
Case sent back.

[1] *(1882) 8 Q. B. D. 534.*

[2] *(1917) 12 Cr. A. R. 246.*