

1944

*Present: de Kretzer J.*DE SILVA, Appellant, *and* FORT POLICE, Respondent.1,011—*M. C. Colombo, 48,949.*

Omnibus—Conviction of conductor for overloading bus—Charge against driver for aiding and abetting—What abetment of offence means—Motor Car Ordinance, No. 45 of 1938, s. 151.

Where, on the conviction of the conductor of an omnibus for overloading, the driver is charged with aiding and abetting the conductor.

Held, that mere knowledge on the part of a driver that the bus was overloaded was not sufficient to convict him of aiding and abetting as it was no part of his duty to interfere with the conductor and the offence of abetment requires more than abstention from interfering.

The abettor must actively aid with the intention of aiding the offender or illegally omit to perform a duty with such intention.

A PPEAL against a conviction by the Magistrate of Colombo.

Nihal Gunsekere for the appellant.

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

Cur. adv. vult.

November 13, 1944. DE KRETZER J.—

The appellant was the driver of an omnibus licensed to carry 27 passengers. On the day in question it carried 41. It appears an allowance is made of 5 passengers in view of prevailing conditions. The conductor of the omnibus has been duly prosecuted. Now, the driver of the omnibus is charged with aiding and abetting the conductor. He has been convicted and appeals.

Under section 111 (2) of the Motor Car Ordinance, No. 45 of 1938, the conductor is made liable in case too many passengers are carried.

Under section 151 anyone abetting any one of the many offences mentioned in the Ordinance may be charged and convicted.

No previous case has been cited to me and I was told that other cases await the decision in this appeal.

It seems to me that the Legislature being aware of the fact that every omnibus has a driver did not make the driver liable for overloading. In section 111 (1), however, it makes the driver liable in respect of a motor cab. His business is to drive the omnibus. The conductor is the person who sees to the passengers and to the goods. He is, as his name indicates, the conductor of the omnibus. Under section 120 it is he who issues tickets to passengers. The driver is made liable for improper driving and the conductor does not come in then. The duties and liabilities of the two are kept distinct. The driver's position is much the same as the driver of a train and the difference that he is close up to the passengers should not make any difference in his position. It would be intolerable if the driver had to perform the duties of a conductor as well. In the present case the Magistrate has convicted the driver, not on any special circumstances, but because the driver "must be held to be aware of the overload" and failed to get the extra passengers set down.

I do not think the conviction is justified. Considering that the omnibus was so full, there is no reason to hold that the accused had reason to believe that an already fully loaded omnibus was loaded to a particular extent and not to something less. But if he did know, that knowledge of his could not constitute abetment, both because it was no part of his duty to interfere with the conductor and also because abetment requires something more than abstention from interfering. The abettor must actively aid with the intention of aiding the offender or illegally omit to perform a duty with the intention of aiding the offender. There was no legal duty cast on him to see that the omnibus was not overloaded. The prosecution is seeking to implement the provisions of the Ordinance by bringing in a charge of abetment.

There may, of course, be special circumstances when a driver, like anyone else, may be guilty of abetment, *e.g.*, if he instigates the conductor. but no such special circumstances have been proved.

In *S. Thangiah, S.I., Police v. Batchi Appu*¹ Moseley J. dealt with a very similar situation and refused to see abetment even though in that case the driver was out of his seat and might have seen the overloading of goods.

In my opinion section 151 indicates the position of the driver in regard to offences other than those specially provided for and then makes him liable only if it is proved that the contravention was due to any act, omission, default or neglect on his part. If that is his position in the case of such offences his position cannot be worse where special provision is made making only a particular person liable for the contravention.

In my opinion the conviction is not justified. It will accordingly be set aside and the accused will be acquitted.

Set aside.