

1946

*Present:* Howard C.J.

WICKREMESINGHE, Appellant, and PEIRIS, Respondent.

1,448—*M. C. Kandy*, 6,627.

**Mens rea**—*Employer's criminal liability for employee's offence—Purchase of poison by pharmacist—Liability for abetment of sale of poison—Poison s, Opium and Dangerous Drugs Ordinance (Cap. 172), s. 17A (1) and (2)*

The mere fact that a person is the Managing Director of a firm does not involve him in any general criminal liability for what is done by other members of the firm.

A pharmacist cannot be convicted, under section 17A (1) of the Poisons, Opium and Dangerous Drugs Ordinance, of aiding and abetting the selling of poison without the authority of a prescription given by a medical practitioner if there is no proof that he knew that the person from whom he bought the poison was not a wholesale druggist.

**A** PPEAL against a conviction from the Magistrate's Court, Kandy.

*H. V. Perera, K.C.* (with him *H. W. Jayewardene*), for the accused, appellant.

*T. K. Curtis, C.C.*, for the Attorney-General.

June 21, 1946. HOWARD C.J.—

In this case the appellant was charged, firstly, that he, being the Managing Director of the Premier Pharmacy, Kandy, aided and abetted the selling by Messrs. D'Cruz and Co., of Layards Broadway, Colombo, of 3,000 sulphapyridine M & B 693 Tablets for Rs. 975, a price in excess of the maximum controlled price in contravention of an Order made by the Deputy Controller of Prices (Miscellaneous Articles), published in *Government Gazette* No. 9,181 of October 15, 1943, and, secondly, that at the same time and place he aided and abetted Messrs. D'Cruz and Co. to sell to him 3,000 sulphapyridine M & B 693 tablets for Rs. 975, he being a person without the authority of a prescription given by a medical practitioner in breach of section 17A (1) of the Poisons, Opium and Dangerous Drugs Ordinance. I have come to the conclusion that for a variety of reasons the conviction of the appellant on these two charges cannot be supported.

It was proved in evidence that the appellant was the Managing Director of the Premier Pharmacy, Kandy, at the time when this order was given. It was also proved that the Premier Pharmacy did in fact purchase from Messrs. D'Cruz & Co. 3,000 M. & B tablets at a price in excess of the maximum controlled price. It was not, however, proved that the appellant actually gave this order for these 3,000 M. & B tablets. It was, however, proved that subsequently he gave an order to Messrs. D'Cruz & Co. for 2,000 tablets. It was also proved that he had protested against the action of the authorities in connection with the sale of drugs. That, in my opinion, however, does not prove that he gave this particular order for 3,000 tablets. It may possibly have been some other employee of the firm who gave the order. The mere fact that he was the Managing Director of the Premier Pharmacy at the time did not entitle the Magistrate to infer that he gave this particular order. Nor does the fact that he was the Managing Director involve him in any general criminal liability for what was done by other members of the firm. So for the same reasons the prosecution must fail on the second charge.

There are also other reasons why the prosecution cannot succeed. The appellant was charged with aiding and abetting an unlawful act, that is to say, the selling by Messrs. D'Cruz and Co. of 3,000 M & B tablets.

Now, section 100 of the Penal Code defines what abetment is according to our law. This section reads :—

“ A person abets the doing of a thing who—

Firstly.—Instigates any person to do that thing ; or

Secondly.—Engages in any conspiracy for the doing of that thing ;  
or

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.”

Now, with regard to the first part of this section, viz., that the appellant instigated Messrs. D’Cruz & Co. to commit this illegal act, the order of the Pharmacy for these drugs has not been produced in evidence. Therefore, there is no evidence to suggest that the appellant has instigated Messrs. D’Cruz and Co. to sell these 3,000 M & B tablets. The second part of the definition reads—“ Engages in any conspiracy for the doing of that thing ” Well, there is no evidence that the appellant engaged in any conspiracy with Messrs. D’Cruz & Co. to commit this offence. The third part of the definition reads—“ Intentionally aids, by any act or illegal omission, the doing of that thing ”. Explanation 3 illustrates what is meant by the third part of the definition. The explanation is worded as follows :—“ 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 ”. The unlawful act was completed when the 3,000 tablets were sent to the Premier Pharmacy, and therefore whatever the appellant had done was not done prior to or at the time of the commission of the act. Therefore, he cannot be found guilty under the third part of the definition. The charge of aiding and abetting in the first charge cannot be sustained.

With regard to the second charge, the appellant is charged with aiding and abetting the selling of these drugs without the authority of a prescription given by a medical practitioner in breach of section 17A (1) of the Poisons, Opium and Dangerous Drugs Ordinance. Now, this section provides first of all in sub-section 1 that no person shall sell any poison except on or in accordance with a prescription given by a medical practitioner. On the other hand, sub-section 2 provides for the sale of poisons to a pharmacist by a wholesale druggist in the ordinary course of wholesale dealing. There is no evidence to prove that the appellant knew that Messrs. D’Cruz were not wholesale druggists doing the business of wholesale dealing. It would appear that Messrs. D’Cruz & Co. had no licence from the Municipality and therefore were not wholesale druggists. There was no proof that the appellant was aware of that fact. The element of *mens rea* was therefore absent. For that reason the appellant cannot be convicted under charge 2.

For these reasons the appeal is allowed and the conviction set aside.

*Appeal allowed.*