1941 *Present :* **Howard C.J. and Soertsz J.**

THE KING *v.* ANDREE *et al.*

*54-56—D. C. (Crim.) Colombo, 128.*

*Conspiracy—Elements of offence—Agreement to commit an offence not essential—Acting together with a common purpose sufficient to establish offence—Conviction based on evidence of accomplice—Failure of judge to comment on rule of evidence—Power of Supreme Court to examine evidence in support of the rule—Penal Code, s. 113 (a).*

In a charge of conspiracy under section 113 (*a*) of the Penal Code it is not necessary to prove an agreement to commit an offence either directly or inferentially. It is sufficient to prove that the accused acted together with a common purpose for or in committing an offence.

Where a Judge in acting on the evidence of an accomplice does not actually say in his judgment that he is not unmindful of the rule with regard to corroboration of such evidence, it is open to the Supreme Court in appeal to examine the evidence to see whether there was corroboration of the evidence in material particulars and connecting each of the accused with the offence of which they have been convicted.

The fact of the existence of a relationship of master and servant between the first accused on the one part and the second and third accused on the other does not negative any inference of conspiracy.

THE three appellants were tried on two counts before the District Court of Colombo.

On the first count it was alleged that they at Colombo with others did agree to act together with a common purpose for committing an offence, viz., receiving or negotiating bets on horse races, other than taxable bets, an offence under section 10 of the Betting on Horse Racing Ordinance and thereby committed the offence of conspiracy under section 113B of the Penal Code.

In the second count the charge against them was that in pursuance of the said conspiracy they received or negotiated with a person unknown a bet, which said bet was other than a taxable bet and that thereby they committed an offence punishable under section 10 of the Betting on Horse Racing Ordinance.

The learned District Judge acquitted them of the charge on the second count and convicted them of the charge on the first count.

*H. V. Perera, K.C.* (with him *E. B. Wikremanayake*), for the accused, appellants.—In the first count of the indictment the three accused were charged with agreeing to act together with a common purpose for committing the offence of receiving illegal bets. The agreement is a definite act and was alleged to have taken place at a point of time within a certain period. Later the indictment was amended to extend the period of time. This extension of the period was improper and unfair to the accused because it enabled a whole series of offences to be vaguely strung together.

There has been a good deal of misconception in this case regarding the charge of conspiracy. Section 113 of the Penal Code has to be analysed carefully. It differs from the corresponding section 120A of the Indian Penal Code in that the latter deals with conspiracy with reference to an "illegal act". Similarly the English law speaks of conspiracy in relation to an "unlawful act". In our law, however, conspiracy must be in relation to "an offence". The offence alleged in the present case is that of receiving bets under section 10 of the Betting on Horse Racing Ordinance (Cap. 36). But not a single act of receiving a bet was proved, for

the accused have been acquitted on count 2 of the indictment. The most that can be said to have been proved in this case was the keeping, by the first accused, of premises for the purpose of receiving illegal bets. But that is not an offence under the law, and the conviction cannot stand.

Section 113 deals with various kinds of conspiracy, viz., (1) agreeing to commit an offence, (2) agreeing to abet an offence, and (3) acting together with a common purpose for committing or abetting an offence. In this case the subject-matter of the charge is that the accused did agree to act together with a common purpose for committing the offence of receiving or negotiating illegal bets. Agreement is the gist of the offence. There is no legal evidence in this case of an agreement to act together with a common purpose. The offence of conspiracy is not complete until the agreement is complete. The gist of the offence lies in the forming of the scheme or agreement between the parties. The substance of the agreement must be an undertaking by each of the co-conspirators to do something towards the commission of an offence. There must be an act promised by each of them. This is the effect of the words "did agree to act together". See *Russell on Crime (9th ed.), p. 1430.* The second and third accused are the employees of the first accused. If the former can be convicted even a sweeper engaged to keep clean the premises occupied by the first accused could have been charged as a co-conspirator. Employees acting on the mandate of their master cannot be said to be conspiring with him. The conduct of the second and third accused is not referable to an agreement to act together with the first accused in the commission of an offence. There is no evidence of joint action by the first, second, and third accused. There is no case at all against the second and third accused. If that is so, the first accused alone cannot be convicted of conspiracy.

The evidence of H. O. Fernando is clearly that of an accomplice. The District Judge has not directed himself correctly in regard to the necessity for corroboration of his evidence by independent testimony. It would appear that he accepted Fernando's evidence and based his verdict on it solely because he was much impressed with the manner in which the witness gave evidence. The leading case on the point of corroboration is *Rex. v. Baskerville* [1].

*S. J. C. Schokman, C.C.* (with him *H. W. R. Weerasuriya, C.C.*), for the Crown, was not called upon.

*Cur. adv. vult.*

July 21, 1941. HOWARD C.J.—

I agree. It is correct as pointed out by Counsel for the appellants that there is one fundamental difference in the law of conspiracy as known to the Common law in England as compared with the definition of the offence in the Ceylon Penal Code. In England the crime of conspiracy is committed when two or more persons agree to do an unlawful act, or to do a lawful act by unlawful means. Section 113A (1) of the Ceylon Penal Code, however, is worded as follows :—

> "If two or more persons agree to commit or abet or act together with a common purpose for or in committing or abetting an offence,

[1] *L. R. 1916, 2 K. B. 658.*

whether with or without any previous concert or deliberation, each of them is guilty of the offence of conspiracy to commit or abet that offence, as the case may be."

The English law is, therefore, wider in one sense inasmuch as it creates the crime of conspiracy not only when there is an agreement to commit an offence, but also any unlawful act. As long, however, as this distinction is borne in mind the law, as laid down by various English authorities with regard to the proof of conspiracy, applies in Ceylon. In *Mulchay v. R.*[1], a definition of the offence was given by Willes J., on behalf of all the Judges and accepted by the House of Lords, as follows :—

"A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum,* capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means, and so far as proof goes, conspiracy, as Grose J. said in *Rex. v. Brissac*[2], is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them.".

I have had the opportunity of reading the judgment of my brother Soertsz J., and agree with him that the evidence of the principal witness, H. O. Fernando, who was quite properly treated by the District Judge as an accomplice, establishes that each of the three appellants were accepting bets at 33, Canal road, in contravention of the provisions of section 10 of the Betting on Horse Racing Ordinance and that they thereby committed an offence. Moreover there was corroboration of the evidence of this witness. It is contended by Counsel for the appellants that, even if satisfactory proof of their acceptance of bets is forthcoming, the appellants are not guilty of conspiracy having regard to the relationship of master and servant that existed between the first accused on the one part and the second and third on the other. The fact that the second and third accused were performing certain acts on race days would not in view of this relationship lead to an inference that they were engaged in a conspiracy to commit an offence against the Ordinance. He seemed to suggest that this relationship of master and servant negatived any inference of conspiracy. In *R. v. Kohn*[3] a ship's carpenter was indicted for conspiring with the owner master and mate of a ship to cast away or destroy the vessel with intent to prejudice the underwriters. It appeared that the accused had by the captain's orders and with the connivance of the mate at Ramsgate cut a piece out of the ship's side and bored holes in her and then plugged them. Afterwards when at sea and in hailing distance of a ship in a position to rescue the crew he had taken out the plugs so as to let the water in. The prisoner was acquitted because it was not established that, although he took part in scuttling the ship, he was a party in England to a previous conspiracy to that end. The fact that he was a

[1] *L. R. 3 H. L. 306.* [2] *4 East 171.* [3] *176 E. R. 470.*

servant obeying the orders of his master was not pleaded as a bar to his being charged with taking part in a conspiracy to scuttle the vessel. I do not, therefore, consider that the fact of the services of the second and third accused being procured by the first accused on a hiring basis so as to establish a relationship of master and servant was in any way inconsistent with the three of them entering into a conspiracy to contravene the provisions of the Betting on Horse Racing Ordinance. In this connection I would also refer to the following passage from the summing-up of Coleridge J., in *R. v. Murphy* [1] :—

"You have been properly told that this being a charge of conspiracy, if you are of opinion that the acts, though done, were done without common concert and design between these two parties, the present charge cannot be supported. On the other hand, I am bound to tell you, that although the common design is the root of the charge, it is not necessary to prove that these two parties came together and actually agreed in terms to have this common design, and to pursue it by common means, and so to carry it into execution. This is not necessary because in many cases of the most clearly established conspiracies there are no means of proving any such thing, and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is, 'Had they this common design, and did they pursue it by these common means the design being unlawful ?'"

It may, of course, be that the idea of running a bucketshop emanated from the mind of the first accused alone. It is not clear at what period of time the second and third accused began to participate in the affair. As, however, the evidence establishes that at the relevant times they were participating, they are, having regard to the words "whether with or without any previous concert of deliberation" which occur in section 113A (1) of our Penal Code, guilty of conspiracy.

I am in agreement with the other conclusions reached by Soertsz J. The appeals must, in these circumstances, be dismissed.

SOERTSZ J.—The three appellants were tried on an indictment which contained two counts. In the first count, as amended on October 21, 1940, it was alleged that "on or about the months of April, May, June, July and August, 1939, at Colombo" they "with others did agree to act together with a common purpose for committing an offence, to wit: Receiving or negotiating bets on horse races, other than taxable bets, an offence under section 10 of the Betting on Horse Racing Ordinance (Cap. 36), and thereby committed the offence of conspiracy punishable under section 113B of the Penal Code". In the second count, the charge laid against them was that "in pursuance of the said conspiracy", they "received or negotiated with a person unknown a bet, to wit, six trebles

[1] *173 E. R. 508.*

on horses 7, 8, and 9 of the races run . . . . on August 3, 1939, which said bet was other than a taxable bet, and that" they "have thereby committed an offence punishable under section 10 of the Betting on Horse Racing Ordinance (Cap. 36) ".

The learned trial Judge acquitted all the appellants of the charge in the second count, and there is nothing more to be said in regard to that matter. But he convicted them on the charge in the first count, and sentenced the first appellant to a fine of Rs. 1,000, and each of the second and third appellants to a fine of Rs. 500. The appeals are against these convictions and sentences.

Conspiracy is defined in section 113A of the Penal Code as follows :—

> "If two or more persons agree to commit or abet or act together with a common purpose for or in committing or abetting an offence, whether with or without previous concert or deliberation, each of them is guilty of conspiracy to commit or abet that offence, as the case may be."

This section takes conspiracy a stage further than that in which it is left by section 100 of the Penal Code. Under section 100 those conspiring are treated as abettors, whereas section 113 makes them liable to be dealt with either as abettors or as principal offenders.

The definition of conspiracy in section 113A may, conveniently, be broken up thus :—

(*a*) If two or more persons *agree* to commit or abet an offence, each of them is guilty of the offence of conspiracy to commit or abet that offence ;

(*b*) If two or more persons act together with a common purpose for or in committing or abetting an offence, whether with or without previous concert or deliberation, each of them is guilty of the offence of conspiracy to commit or abet that offence.

The Indian Penal Code defines criminal conspiracy as follows :—

> "When two or more persons *agree* to do or cause to be done (1) an illegal act, or (2) an act which is not illegal by illegal means, such an agreement is designated as criminal conspiracy" (section 120A).

In England, there is no statutory definition of this offence. The definition generally adopted is that of Willes J. in *Mulchay v. R.*[1] :—

> "A conspiracy consists not merely in the intention of two or more, but in the *agreement* of two or more to do an unlawful act or to do a lawful act by unlawful means."

It will be observed that the Indian Penal Code adopts the definition of Willes J. except that it speaks of an "illegal act" and "illegal means" instead of "unlawful act" and "unlawful means". Section 113A of our Penal Code, however, differs in two material points. Firstly, in that it is not merely an illegal or unlawful act, but an offence that must be in contemplation. In that respect, our definition is more limited in scope. Secondly, our definition makes it criminal conspiracy for two or more persons to act together with a common purpose for or in committing or abetting an offence whether with *or without previous concert or deliberation,* and in that way, is wider than the English and Indian definitions. It

[1] *L. R. 3 H. L. 317.*

attaches criminal responsibility to person acting together in the commission or abetment of an offence without previos agreement, in the same way as is does to those acting in pursuance of an agreement.. The result, as it appears to me, is that in our law, an acting together in the manner indicated is sufficient to support a charge of conspiracy, without reference to any agreement between the parties, whereas under the English and Indian law, such an acting together will suffice only if an agreement between the parties acting together can, reasonably, be inferred from it Willes J. makes this quite clear when he goes on to say in the case, already referred to :—

"And so far as proof of conspiracy goes, as Grose J. said in *R. v. Brissac*, it is generally a matter of inference deduced from certain acts of the parties accused *done in pursuance of an apparent criminal purpose in common between them.*"

Kenny puts the matter thus in *Outlines of Criminal Law at p. 340* :—

"As to the evidence admissible, the principles are just the same as for other crimes. But, owing to two pecularities in the circumstances to which those principles are applied, it often seems as if there were an unusual laxity in the modes of giving proof of an accusation of conspiracy. For (*a*) it rarely happens that the actual fact of the conspiring can be proved by direct evidence, since such agreements are usually entered into both swiftly and secretly. Hence they can ordinarily be proved only by a mere inference from the subsequent conduct of the parties, in committing some overt acts *which tend so obviously towards the alleged unlawful result as to suggest that they must have arisen from an agreement to bring it about.* Upon each of the several isolated doings a conjectural interpretation is put ; and from the aggregate of these interpretations an inference is drawn . . . . (*b*) by the fact that each of the parties has, by entering into the agreement adopted all his confederates as agents to assist him in carrying it out."

The main contention of Counsel for the appellants was that there was no evidence in the present case of an agreement between the appellants and that, if all the evidence for the prosecution were accepted, there was nothing more than a case of master and servants, the master giving orders and the servants carrying them out.

In regard to this contention, under our law the position appears to be, as I have pointed out, that it is not necessary to prove agreement, either directly or inferentially. It is sufficient to prove that the accused acted together *with a common purpose* for or in committing an offence. But assuming that an agreement has to be established, there is abundant evidence in this case from which an agreement among the accused can be inferred. In regard to the three accused, having acted together *with a common purpose* for taking non-taxable bets, the evidence is overwhelming. The fact that they were acting one as the master and others as servants or employees can make no difference.

The next submission of the appellants' Counsel was that the learned trial Judge misdirected himself into accepting the evidence of the witness, H. O. Fernando, who, on his finding, was in accomplice with a strong

bias against the first accused. In making this submission of misdirection Counsel relied on the following passage in the judgment of the trial Judge :—

"I have, therefore, very carefully considered the evidence of H. O. Fernando with a view to forming an opinion as to whether his evidence is worthy of credit. From the manner in which he gave evidence of the various details both in examination-in-chief and cross-examination, it seems to me that he has, in the main, made a true disclosure of the various activities which were carried on by the accused and others at 33, Canal Row, Fort. I have, therefore, no hesitation in accepting and acting on his evidence for the purpose of ascertaining whether his evidence furnishes the requisite proof to establish a charge of conspiracy against the accused."

Counsel submits that the learned Judge does not appear to have appreciated the fact that it is a rule of practice which has now the force of a rule of law that juries and Judges must be told, or must bear in mind, that the evidence of accomplices is not accepted unless corroborated in the manner stated in the leading case of *Rex v. Baskerville* [1]. In this instance, Counsel contends, that the trial Judge overlooked this principle and accepted H. O. Fernando's evidence because of his demeanour in the witness box, and because he was able to give a circumstantial account of the various activities at 33, Canal Row. Counsel concedes that, if the Judge, keeping the rule as to corroboration in mind, was prepared to act on the evidence of this witness even if it was uncorroborated, there is nothing he can urge against that.

The question then is, whether the Judge had in mind the requirement in regard to corroboration. It is true that he has not said so in so many words, but from a perusal of the judgment as a whole, it seems clear that the Judge was not oblivious of the rule of corroboration. At any rate, this trial was a trial by a Judge without a jury, and with the evidence now before us, it is open to us to examine it to see whether there was corroboration of the evidence of this witness, in material particulars, and connecting each and everyone of the accused with the offence of which they have been convicted.

I propose now to examine the evidence under two heads :—

(*a*) The evidence that goes to establish that bets other than taxable bets were received or negotiated at 33, Canal Row, the premises in question ; and

(*b*) The evidence that goes to establish the complicity of the first, second, and third accused in these transactions.

In regard to (*a*) H. O. Fernando says:—

"I was employed under the accused . . . . from April, 1933, to June 8, 1939 . . . . Whenever there were races in Colombo or India, bets were accepted on races, treble, all-on, and straight bets were accepted. A large number of punters came to 33, Canal Row . . . . There were no social meetings even on race days at Canal Row . . . . There were no office-bearers of the social club. There is no social club in existence there."

[1] *L. R. 1916, 2 K. B. 658.*

This evidence is corroborated by a considerable volume of independent evidence both oral and documentary.

Inspector Mohamed says :—

"I myself passed 33, Canal Row, often on racing days from particularly April, 1939 up to the day of the raid. I passed it for the purpose of making my observations. I have seen people going in and coming out . . . . I have seen a large crowd going inside the premises and coming out of them."

Police Sergeant Kulatunga says :—

"I was instructed to count the number of persons entering the premises . . . . It was on July 8 (1939) that I went to Canal Row with P. S. Wickremaratne and counted the number of persons. . . . . From 10.55 to 12.30 I counted 609 persons . . . . When the people came and while going away as well as those entering *I noticed they had betting slips and race books in their hands.*"

He goes on :—

"I was ordered to keep watch again on July 15 with P. S. Wickremaratne. I counted the number of people who went there between 9.40 and 12.35. I counted 580 persons . . . . The people were of different nationalities and different walks of life."

P. C. Perera and P. C. Podimahataya say they went to these premises to take bets. They saw many others taking bets, but their own bets were not accepted because they were unknown to those engaged in receiving bets.

There is also the evidence of Inspector Mohamed and the other Police Inspector, Police Sergeants, and Constables who formed the raiding parties on August 3 and 5, that they found quite a number of men on the premises with betting slips and money in their pockets. These are exhibits in the case. Two of these men Wijeyesinghe and Cutten were called by the defence. They admitted that they were on the premises with slips showing accepted bets in their possession—the slips shown to them in Court. The trial Judge rejects, and in my view, rightly rejects the explanations given by the first accused and Wijeyesinghe and Cutten to account for these large numbers resorting to 33, Canal Row, and for the betting slips found on Wijeyesinghe and Cutten.

There is also a great volume of real evidence to show that these premises were used for negotiating bets. To mention a few, on the occasion of the raid on August 5, the Police Officers found exhibits P 25A-H, crumpled up betting slips on he floor. Sergeant Massilamany saw one of the men inside a locked room throw some papers on to the roof. In the gutters at the end of the roof were found P 51 and P 52, betting slips. In a cupboard was found P 47 a sheet containing treble combinations of the horses due to run on that day. The very arrangement of these premises—the look-out men, the closed doors, the push bells speak eloquently in support of the case for the prosecution. The learned Judge was of opinion that the presence of the Red Tail Troupe on the premises engaged in vocal

practice, the books on the walls, the carrom board, the game of cards were only an attempt to make believe that here was a social club. No other conclusion is possible in all the circumstances of this case.

The next question is in regard to the complicity of the several accused in these transactions. So far as the first accused is concerned, the evidence of H. O. Fernando is that—

> "the first accused runs the business. He is the proprietor of the bucket shop. He paid me a salary of Rs. 35 per month for working for him on race days at Canal Row and on other days at the Lorensz Press" . . . . .
>
> . . . . "First accused had a room on the landing and he sat there and accepted bets" . . . .
>
> "The chits (*i.e.*, the betting slips) are taken away from the premises at intervals by one of the clerks on a motor cycle. I have also removed chits and money and taken them to the first accused's bungalow, and handed them to his wife or eldest daughter."

There is singular corroboration of this evidence. The first accused is the tenant of the premises 33, Canal Row (see P 62). He is found on the premises on both days on which the raids were made.

The Police party found him—

> "on the first flight of the stairway. The door on the landing was closed . . . . The door was opened at his request by somebody from inside . . . . He tapped on the door two or three times, and when it was not opened he shouted that it was the Boss and then the door was opened from inside". (Inspector Mohamed's evidence.)

Kulatunga says :—

> "Inspector Mohamed gave me a chit with the names of four horses and asked me to place and all-on bet and gave me Re. 1 . . . . When I got up the stairs I went to the first accused's room. I saw the first accused there . . . . First accused was seated in a room which appeared to be an office room. I spoke to him. He asked me why I had come. I told him I came to lay a bet. He said 'sorry we do not accept bets . . . . . '. There was a table. On the table were race books and all-on betting slips . . . . I came out. I met a person named Jinadasa. I sent by him the bet with the rupee . . . . After about 10 or 20 minutes he came out and gave me the duplicate of the bet I had given him. It was initialled . . . . P 56 was the chit Jinadasa brought back and handed me."

P. C. Perera says that he too went to lay a bet, that the first accused spoke to him and asked him whether he had been there before. He said he had not, and the bet was refused. There is a mass of documentary and real evidence against the first accused. In his house are found a number of books which are obviously books used for taking bets, a sum of Rs. 15,000 in currency notes and a couple of thousand rupees in silver coins. In his garden there are charred remains of pieces of paper with the names of horses on them, arranged in such a way as to suggest bets taken on those horses. P 45, á betting slip, is found in the pocket in the upholstery of his car.

In regard to the second accused, again there is the evidence of H. O. Fernando :—

"I know the second and third accused. They were also working under the first accused at Lorensz Press and at Canal Row. They always worked on race days at Canal Row" . . . .

"I used to take trebles. Second accused also accepted trebles. Third accused sat there accepting trebles and all-ons."

Kulatunga testifies to seeing the second accused on August 3, on the occasion of the raid, at 33, Canal Row. Massilamany says that the second accused was one of those who faced him when he stood on a chair and looked into the locked room, and he says that the second accused and others standing, where they did, screened from his view the men who threw some papers on to the roof. P. C. Podimahataya says that when he went to lay a bet, the second accused it was who spoke to him and told him he could not accept the bet as he was not known to him. Inspector Toussaint says that when he went with the search warrant to search the first accused's house, he found the second accused and the first accused's wife in the house. There are several slips on which H. O. Fernando identifies the second accused's initials, and there is P 46c with the name "Hiram" on it. Hiram is the Christian name of the second accused. H. O. Fernando says that "Hiram" is in the second accused's handwriting.

As to the third accused, the evidence of H. O. Fernando is similar. He says he accepted trebles and all-on bets on race days. Massilamany says he stood near the second accused inside the locked room, and that it was their standing where they did that prevented him from seeing the men who threw the papers out of the room on to the roof. In his case too, there were documents found in 33, Canal Row, on which H. O. Fernando identified his handwriting. Among these documents were P 46 (*a*) and P 46 (*d*) with the name "Lionel" on them. "Lionel" is the third accused's Christian name. Neither the second nor the third accused elected to give evidence. They were content to rely on the evidence of the first accused. He said :—

"Second and third accused were working under me. I call them Hiram and Lionel respectively. In P 46 (*d*) there are the words 'Lionel—Book of Trebles. I can't explain it.'"

He went on to deny what H. O. Fernando and the other witnesses said in regard to their complicity in the receiving of these bets. The trial Judge has definitely disbelieved him.

From this examination of the evidence, it will be seen that, putting aside the evidence of H. O. Fernando there is a substantial case against the several accused on count one of the indictment. With Fernando's evidence taken into account, the case is strong in that it establishes that these accused agreed to negotiate these bets, and it is conclusive in that it establishes that they acted together with a common purpose for and in taking them.

I would, for these reasons, dismiss the appeals.

*Appeals dismissed.*