

1939

*Present : Soertsz A.C.J.*PERERA *v.* KANNANGARA

715—M. C. Colombo, 25,081.

*Abetment of acceptance of illegal gratification—Offence not committed in consequence of abetment—Motive of abettor—Proof that gratification was not legal—Penal Code, ss. 109 and 158.*

The accused, a Police Officer, was informed by an Inspector of Police that a charge of theft against one P, who was held in custody, was false. P was thereupon released and left the station in the company of the accused.

Shortly after the accused returned and offered the Inspector a sum of money "for the trouble he had taken".

The accused was charged under sections 109 and 158 of the Penal Code with having abetted the acceptance by the Inspector for himself an illegal gratification other than a legal remuneration as a motive or reward for showing in the exercise of his public functions favour to P, which offence was not committed in consequence of the abetment.

*Held*, that the accused was guilty of the offence.

Where an abettor is charged the relevant state of mind is not that of the person to whom the offer is made but of the person making the offer.

Where the prosecution has adduced so much evidence as may reasonably be held to establish the positive elements of an offence the burden is cast upon the accused of disproving the negative element by producing affirmative counter evidence.

**A** PPEAL from a conviction by the Magistrate's Court of Colombo.

Colvin R. de Silva (with him C. S. Barr Kumarakulasingham), for the accused, appellant.

J. W. R. Ilangakoon, K.C., A.-G. (with him D. Janszé, C.C.), for the Crown, respondent.

*Cur. adv. vult.*

May 23, 1939. SOERTSZ A.C.J.—

The admitted facts in this case are that the accused-appellant who is the Police Officer of Attidiya was interested in one Peter Perera, a resident of Attidiya, against whom a charge of theft of a bicycle had been made by a man of Cotta. On that charge Peter Perera was in custody. The Inspector of Police, Cotta, made inquiries into this charge, and on his return to the Police Station where Peter Perera was being held in custody, he ordered his release, called him and the accused in this case before him, and informed them that he would report to Court

that the charge was a false one and that if the Magistrate agreed with that view, he would prosecute the man who made the charge, for giving false information. Thereupon, Peter Perera and this accused went away. About five minutes later this accused returned and offered the Inspector fifteen rupees saying "Here, Sir, for the trouble you have taken". The Inspector declined the offer.

On these facts, the accused-appellant was charged under sections 158/109 of the Penal Code with having abetted the acceptance by the Inspector for himself of an illegal gratification other than a legal remuneration as a motive or reward for showing in the exercise of his public functions favour to one K. Peter Perera, which offence, however, was not committed in consequence of the abetment.

The accused-appellant was convicted and sentenced to pay a fine of Rs. 100, in default six months' rigorous imprisonment.

On appeal, it was submitted that the offence charged was not made out because the evidence established that the Inspector had not shown any favour to Peter Perera, nor had he pretended to have done so, and that therefore the offer of the money by the appellant to the Inspector could not be related to a necessary ingredient of the offence charged, namely the acceptance of the money, if it was going to be accepted, on the footing that the Inspector had shown favour to Peter Perera or had pretended that he had done so. In this instance, on the Inspector's own evidence he had neither shown nor pretended to have shown favour and could not accept the money on that footing. I cannot entertain this submission at all. In a case like this where an abettor is charged, the relevant state of mind is not that of the person to whom the offer is made, but of the person making the offer. There can be no doubt whatever that the accused made this offer because he *thought* the Inspector had shown some favour. That is sufficient for the constitution of the offence. It was also submitted for the appellant—and this was the main contention—that the conviction was bad because the burden was on the prosecution to prove that this was a 'gratification' 'other than legal remuneration' and that the prosecution had not discharged that burden, had not led any evidence to show that this offer was not by way of legal remuneration. The Attorney-General who very kindly appeared to help the Court referred to the Full Bench ruling in the *The Mudaliyar, Pitigal korale North v. Kiri Banda*<sup>1</sup>. In that case the accused was charged under section 21 of Ordinance No. 16 of 1907, which enacts that "no person shall clear, set fire to, or break up the soil of any forest *not included in a reserved or village forest*". It was contended that the burden as on the prosecution to show that the forest in question was not included in a reserved or village forest, but the Bench held that the burden was on the accused to show that it was, because the words 'not included in a reserved or village forest' are in the nature of an exception within the meaning of section 105 of the Evidence Act.

I find the law stated thus in *The King v. Audley*<sup>2</sup> by Lord Alverstone C.J. who cites from the judgment of Lord Mansfield C.J. in *Rex v. Jarvis*<sup>3</sup>.

<sup>1</sup> 12 N. L. R. 304.

<sup>2</sup> (1907) 1 K. B. 383.

<sup>3</sup> 1 East. 643, n., at p. 646, n.

“It is a known distinction that what comes by way of proviso in a statute must be insisted on by way of defence by the party accused; but where exceptions are in the enacting part of a law, it must appear in the charge that the defendant does not fall within any of them”. But, I do not think it necessary to consider this matter further, for it seems clear that the prosecution in this instance has placed sufficient evidence before the Court to show that the money offered could not have been offered by way of legal remuneration. The Inspector says, and it is admitted, that when the accused offered the money, he said, ‘Here, Sir, for your trouble’. In Sinhalese the words are more expressive and negative the idea of legal remuneration. In cases of this kind, I believe the law to be as stated by Kenny in his *Outline of Criminal Law* that when the prosecution has adduced so much evidence as may reasonably be held to establish the positive elements of the offence, the burden is cast upon the accused of disproving the negative element by producing affirmative counter evidence. If the accused fails to produce that evidence, the failure may be construed as proving that no such affirmative evidence exists and accordingly as establishing the prosecutor’s negative allegation.

For these reasons, I think the appeal fails and I dismiss it.

*Affirmed.*

