

## FULL BENCH (CRIMINAL).

*Before Sir Guy Rutledge, Kt., K.C., Chief Justice, Mr. Justice Heald and  
Mr. Justice Maung Ba.*

## KING-EMPEROR

*v.*

## MAUNG PU KAI AND ANOTHER.\*

1929

June 12.

*Penal Code (Act XLV of 1860), s. 114—Offender punished under s. 114 a  
- principal, not an abettor—Offence punishable with whipping—Liability  
of person punished under s. 114, for whipping—Whipping Act (IV of 1909)  
—Whipping (Burma Amendment) Act, 1927 (Burma Act VIII of 1927).*

If a person is convicted of an offence under a particular section of the Indian Penal Code read with s. 114 of that Code, and if the offence under the particular section of the Code renders the offender liable to whipping in lieu of or in addition to any other punishment either under the Whipping Act or under Burma Act VIII of 1927, the person so convicted is punishable with whipping in lieu of or in addition to any other punishment.

A person who is punishable under a particular section of the Indian Penal Code read with s. 114, is punishable not as an abettor but as a principal and is guilty of the substantive offence and not merely of abetment of that offence.

*K.E. v. Po Han, 7 L.B.R. 63—referred to.*

*Emperor v. Kashia Antoo, 10 Bom. L.R. 26—dissented from.*

*Lambert (Assistant Government Advocate) as  
Amicus Curiae.*

1929, April 11. Mr. Justice Baguley made the following order of reference :—

“ One of the accused in this case, Maung Hmon (a) Hmon Gyi, has been convicted under Indian Penal Code 325 read with section 114, Indian Penal Code and sentenced to two and a half years' rigorous imprisonment and thirty lashes. He appealed to the Sessions Judge, Yamethin, but the appeal was dismissed. The case has been sent for by this Court to consider the

\* Criminal Reference No. 39 of 1929 arising out of Criminal Revision No. 319A of 1929.

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legality of the sentence of whipping in addition to imprisonment in the case of a conviction under Indian Penal Code 326 read with 114.

“ It appears from a perusal of the judgment that the offence really was punishable under Indian Penal Code 326 read with 109. The legality of sentences of whipping in cases of abetments is not very clear and there seems to have been some divergence of opinion in this Court as to whether abetment of an offence mentioned in section 3 of the Burma Act VIII of 1927 can be punished with whipping in lieu of or in addition to any other punishment to which the offender may be liable under the Indian Penal Code. In view of this divergence of opinion and of the importance of the point (for at the present moment Magistrates are being urged on the one hand to pass sentences of whipping wherever they can be legally passed and appear suitable, and on the other hand are being severely dealt with when they pass illegal sentences of whipping), I refer the matter to a Bench or a Full Bench as may commend itself to the the Hon'ble Chief Justice.

The only recorded case that I can find on this point is a ruling of the late Chief Judge of the Chief Court of Lower Burma then Mr. Justice Twomey, recorded as *K.E. v. Po Han* (1). The headnote of this ruling is “ Persons (other than juvenile offenders) convicted of abetment of theft or of any other offence specified in section 3 of the Whipping Act, 1909) cannot be punished with whipping under the provisions of that section”. This case was apparently not argued in Court and the gist of the judgment is as follows: “ The words ‘punishment provided for the offence’ in section 109 of the Indian Penal Code mean the punishment provided for the offence either

in the Penal Code or in some special or local law (see section 40 or 41)". The judgment then goes on to point out that the Whipping Act is not a special or a local law within the meaning of section 40 or 41 and that therefore the offence of abetment of an offence mentioned in section 3 of the Whipping Act, 1909, cannot be punished with whipping. Section 109 is quite clear in its phraseology. It runs as follows: "Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence".

The addition made by Mr. Justice Twomey of the words, "either in the Penal Code or in some special or local law" do not appear in section 109 and I see no ground for supposing they were ever intended to be there. Words, when perfectly plain and clear, must be given their natural meaning and although I fully recognise that a penal law must be interpreted as far as possible in favour of the subject, I do not think that a Court is justified in adding at the end of a section a qualifying or explanatory phrase, which is not to be found in the section itself. It appears to me that one reason why this clause has been added and has found favour in the eyes of some Judges is that the Whipping Act of 1909 in certain cases mentions abetments in relation to certain offences, but does not mention the word "abetments" in relation to other offences. For instance, section 4 (a) makes whipping specially applicable to the offences of abetment, commission or attempt to commit rape; while in section 5, which relates to juvenile offenders, abetments, commission and attempts at commission of certain offences are made punishable

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by whipping. In my opinion, however, the fact that abetments are mentioned in some places and not in others is not a conclusive proof that it was the intention of the Legislature to make all other abetments not punishable with whipping. The offence of abetment is punishable in various ways according to the form in which the abetment takes place. Section 109 makes one form of abetment which has certain results punishable with the same punishment provided for the offence itself. Section 110 relates to another form of abetment with other consequences. Section 111 is the same; so are sections 112, 113, 116 and 117. When abetment of a certain offence is specially made punishable with whipping, I take it that abetment of that offence coming under any sections from 109 to 117 would be punishable with whipping, but at the moment I am only concerned with abetments punishable under sections 109 and 114. With regard to abetments punishable under section 114, it seems to me personally that there can be no possible doubt. Section 114 says that a person who is punishable under that section read with some substantive section "shall be deemed to have committed such act or offence" *i.e.*, the act or offence mentioned in the substantive section. When a man is deemed to have committed an offence, I take it that that means that in the eyes of the law he is to be treated as though he had committed the offence and is liable to all the pains and penalties which the commission of the offence may bring upon him. If the commission of an offence makes the man who commits it liable to whipping, he must also be regarded as liable to whipping if he is deemed to have committed the offence, for, in the eyes of the law he has committed the offence, and is liable to all the consequences entailed thereby.

With regard to section 109, the Code says that the man who abets an offence for which he is liable under section 109 read with some substantive section shall be punished with the punishment provided for the offence mentioned in the substantive section and it does not specify in what way the punishment may be prescribed. The reference to section 40 is in my opinion inapt. Section 40 refers to the definition of the word "offence" and it in no way refers to the punishment for the offence. The offences contemplated in this order of reference are offences under the Indian Penal Code, which are punishable either under the Code or under another Act. When the Code says that they shall be punished with the punishment provided for the offence, I see no limit in the words which would restrict the punishment to the punishment prescribed under the Indian Penal Code.

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I would therefore refer the following questions:—

1. If a person is convicted of abetment of an offence under the Indian Penal Code for which he is liable to punishment under section 114 read with the section of the Indian Penal Code applicable to the offence, and if the offence under that section renders the offender liable to whipping in lieu of or in addition to any other punishment, either under the Whipping Act or under Burma Act VIII of 1927, is the person so convicted punishable with whipping in lieu of or in addition to any other punishment?
2. If a person is convicted of abetment of an offence under the Indian Penal Code for which he is liable to punishment under section 109 read with the section of the

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Indian Penal Code applicable to the offence and if the offence under that section renders the offender liable to whipping in lieu of or in addition to any other punishment either under the Whipping Act or under Burma Act VIII of 1927, is the person so convicted punishable with whipping in lieu of or in addition to any other punishment?

The Full Bench answered the reference as follows :—

HEALD, J.—In his Criminal Regular Trial No. 83 of 1928 the Special Power Magistrate of Yamethin convicted an offender under section 326 read with section 114 of the Indian Penal Code and sentenced him to two and a half years' rigorous imprisonment and thirty stripes whipping under section 326 of the Code and section 3 of the Whipping (Burma Amendment) Act, 1927.

The learned Judge of this Court before whom the case came in revision suggested that section 109 should have been applied to the case instead of section 114, and raised the question of the legality of a sentence of whipping in a case to which either section 114 or section 109 of the Indian Penal Code applies.

He has accordingly referred the following questions :—

- (1) If a person is convicted of abetment of an offence under the Indian Penal Code for which he is liable to punishment under section 114 read with the section of the Code applicable to the offence, and if the offence under that section renders the offender liable to whipping in lieu of or in addition to any other punishment, either

under the Whipping Act or under Burma Act VIII of 1927, is the person so convicted punishable with whipping in lieu of or in addition to any other punishment?

- (2) If a person is convicted of abetment of an offence under the Indian Penal Code for which he is punishable under section 109 read with the section of the Indian Penal Code applicable to the offence, and if the offence under that section renders the offender liable to whipping in lieu of or in addition to any other punishment either under the Whipping Act or under Burma Act VIII of 1927, is the person so convicted punishable with whipping in lieu of or in addition to any other punishment?

It is clear that on the facts of the case only the former of these two questions arises.

Section 3 of the Whipping (Burma Amendment) Act, 1927, renders "any person who commits" an offence under section 326 of the Indian Penal Code punishable with whipping in lieu of or in addition to any other punishment under section 4 of the Whipping Act.

Section 4 of the Whipping Act says that whoever abets, commits or attempts to commit rape or "commits" certain other offences may be punished with whipping in lieu of or in addition to any other punishment to which he may for such offence abetment or attempt be liable under the Indian Penal Code.

Section 114 of the Indian Penal Code says that whenever any person, who if absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed he "shall

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be deemed" to have committed such act or offence ; while section 109 of the same Code says that whoever abets an offence shall, if the offence is committed in consequence and no express provision is made by this Code for the punishment of such abetment, be punished with punishment provided for the offence.

There is so far as I know no case-law bearing directly on the question whether or not a person who under section 114 of the Code is "deemed to have committed" an offence is punishable with whipping under section 3 or 4 of the Whipping Act, if the offence is one of those mentioned in those sections other than rape, the abetment of which is specifically mentioned in section 4 of the Whipping Act.

In the case of *Emperor v. Kashia Antoo* (1), which was decided by a single Judge of the High Court of Bombay, an offender was convicted of theft under section 379 read with section 114 of the Code and the question was raised whether or not the provisions of section 75 of the Code could be applied to the case, that is to say whether or not he was "guilty of" the offence of theft. The learned Judge said : "It seems to me that nothing could have been easier for the Legislature, had it intended the abetment of an offence . . . to be included under section 75 than to have said so". He went on to say that section 114 of the Code "does not say 'he shall have committed such act or offence' but 'he shall be deemed to have committed such act or offence'. In other words he is to be treated in the same way as if he had committed the offence. That is not the same thing to my mind as saying he has committed the offence . . . Mr. Justice Chandavarkar has recently put a construction upon the words 'shall be deemed' when used by the

(1) (1907) 10 Bom. Law Reporter 26.



Legislature as follows : 'When one thing is not the same as another thing, but the Legislature says that it 'shall be deemed to be' the same thing, it creates a legal fiction, and in that case 'The Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to' per James, L.J. in *Ex-parte Walton*, (1881) 17 Ch.D. 746. And fictions created by law shall never be contradicted so as to defeat the ends for which they are invented, though for every other purpose they may be contradicted [*Mostyn v. Fabrigas*, (1774) Cowp. 177—*Emperor v. Atmaram*, (1907) I.L.R. 31 Bom. 480, at p. 490].' It appears to me that this is a correct construction to be put upon those words. The effect of section 114, therefore, is that if a man is present at a commission of an offence he is to be deemed to have committed it not that he has committed it".

With all respect for the opinion of the learned Judge I suggest that the "legal fiction" in this case was created by the Legislature between the Court and the offender for the purpose of enabling the Court to punish the offender for the substantive offence, and that, as the learned Judge says, for that purpose he is to be treated in the same way as if he had committed the offence, that is to say he must be regarded by the Court as having committed the offence. In my opinion a person who is convicted of an offence under a particular section of the Indian Penal Code read with section 114 of that Code is not convicted of abetment but is convicted of the substantive offence. Section 114 deals expressly with a "person who if absent would be liable to punishment as an abettor", and provides that such person if present when the offence for which he would be punishable "in consequence of the abetment" is

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committed, he shall be deemed to have committed the offence". I cannot read that section otherwise than as meaning that such a person is more than an abettor and that he is in fact what is called in English law a principal in the second degree. It is true that that section is included in the Chapter of the Code which deals with "abetment" but that Chapter deals in sections 118, 119 and 120 with matters which it does not call "abetment" and which in particular cases might possibly not fall within the definition of abetment, and it was obviously a matter of convenience to include in the Chapter which deals with abetment a section which deals with the circumstances in which a person, who has in fact abetted an offence and who even as an abettor might be punished under section 109 of the Code with the punishment provided for the offence committed, is to be regarded as more than an abettor and is to be "deemed to have committed the offence."

For these reasons I am of opinion that the decision of the learned Judge who decided *Kashia Antoo's* case was mistaken, and I would hold that a person, who is punishable under a particular section of the Indian Penal Code read with section 114, is punishable not as an abettor but as a principal and is guilty of the substantive offence and not merely of abetment of that offence.

I entirely agree with the view, taken by a learned Judge of the Chief Court of Lower Burma in the case of *K.E. v. Po Han* (2), that the wording of the Whipping Act is inconsistent with the view that abetment of the offences which are mentioned in that Act or to which that Act is made applicable by the Whipping (Burma Amendment) Act, 1927, is punishable with whipping except in cases where

(2) (1913) 7 L.B.R. 63.

abetment is expressly made so punishable, but I regard cases in which section 114 is applied not as cases of abetment but as cases where the offender is punishable for the substantive offence as a principal.

I would accordingly answer the question which arises on the reference as follows:—

“If a person is convicted of an offence under a particular section of the Indian Penal Code read with section 114 of that Code, and if the offence under the particular section of the Code renders the offender liable to whipping in lieu of or in addition to any other punishment either under the Whipping Act or under Burma Act VIII of 1927, the person so convicted is punishable with whipping in lieu of or in addition to any other punishment.”

RUTLEDGE, C.J.—I concur.

MAUNG BA, J.—I concur.

## APPELLATE CIVIL.

*Before Mr. Justice Olfer.*

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Mar. 6.

*Bailee's liability—Contract Act (IX of 1872), ss. 151, 152—Bailee's power to limit or increase liability by special contract—Revisional powers of High Court—Court's erroneous decision, and Court's failure to consider law or important fact, distinction between.*

A bailee can by the law of India contract himself out of liability for negligence. S. 151 of the Indian Contract Act lays down the ordinary duty of a bailee to use the requisite care in all cases of bailment and s. 152 enacts that that degree of care is to be exacted from him in the absence of a special contract. By such special contract a bailee can increase as well as decrease the amount of his liability.

\* Civil Revision No. 296 of 1928 from the judgment of the District Court of Prome in Civil Appeal No. 49 of 1928.