

## APPELLATE CRIMINAL.

Before Mr. Justice Jackson and Mr. Justice White.

1878  
Nov. 12.

THE EMPRESS v. TROYLUKHO NATH CHOWDHRY AND OTHERS.\*

*Abetment of Abetment—Property removed with criminal intent, but with consent of owner—Penal Code (Act XLV of 1860), s. 108, expls. 2, 4; s. 378 expl. 5.*

A sought the aid of B with the intention of committing a theft of the property of B's master. B, with the knowledge and consent of his master, and for the purpose of procuring A's punishment, aided A in carrying out his object. On the prosecution of A for theft, *held*, that as the property removed was so taken with the knowledge of the owner, the offence of theft had not been committed.

*Held* further, it is not necessary to an indictment for the abetment of an abetment of an offence to show that such offence was actually committed.

THE facts of the case sufficiently appear in the following reference made to the High Court by the Officiating Chief Magistrate of Calcutta:—

“Reference to the High Court under s. 240 of the Presidency Magistrates' Act.

“The above defendants were charged under s. 380 of the Indian Penal Code with stealing some iron and brass screws from the godowns of Messrs. Mackinnon, Mackenzie, and Co., at Fairlie Place. The following facts were proved in the case: Messrs. Mackinnon, Mackenzie, and Co. were in the habit of selling hardware by public auction through the agency of Messrs. Mackenzie, Lyall, and Co.; for the purpose of these sales, a sircar used to come from the Exchange to the godown, lot the goods and take away samples, upon which the auctions were held; after the sales, the same sircar came with the purchaser, and made delivery of the goods. The last sale took place on the 16th of August; on the 19th the first defendant came to deliver some

\* Criminal Reference, No. 335 of 1878, from an order made by Mr. Syud Ameer Ali, Offg. Chief Magistrate of Police, Calcutta, dated the 28th of October 1878.

goods, and then asked the godown-keeper, Mr. Cummins, to allow him to take out more goods than what were actually mentioned in the catalogue of sale, the profits to be divided among them in the proportion of 6 to 10; Cummins mentioned this to Mr. Moncriff, who represented the owners, and with his permission he assented to the first defendant's proposal; the plan was finally matured at Cummins's house on the 24th of August; on the 4th of September the first defendant came accompanied by the second and third defendants, who were purchasers, and pursuant to the agreement between the first defendant and Cummins, goods in excess of those mentioned in the catalogue were removed, but the Police who had been communicated with were on the watch, and immediately arrested the defendants. It was also proved that it was a frequent practice in the trade for the purchasers to take excess goods by giving a receipt to Mackenzie, Lyall's Babu (in this case the first defendant), who on his part gave a receipt to Mackinnon, Mackenzie, and Co., and that the purchaser had no concern whatever with the seller's firm. There being absolutely no legal evidence of guilty knowledge as against the purchaser-defendants, I have discharged them. With reference to the first defendant I have held that inasmuch as he removed the articles with the express or implied consent of the owners, his act did not amount to theft: expl. 5 to s. 378 of the Indian Penal Code, *Reg. v. Dolan* (1), *Reg. v. Hancock* (2). I have held further, that the first defendant is liable to a conviction under s. 116, as expl. 4 to s. 108 appeared to me to show that though the offence of theft might not have been committed, yet as the accused instigated Cummins to abet him in the commission of the theft, he is guilty under the section referred to. As however I entertain some doubts, I solicit the opinion of the High Court on both these points,—*viz.*, (1) whether, in view of the fact that the goods were removed with the consent of the owners, the act of the defendant amounts to theft; and (2) whether the defendant, under the circumstances, is liable to a conviction under s. 116. I have passed judgment subject to the deci-

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(1) 6 Cox's Cr. C., 449.

(2) 14 Cox's Cr. C., 119.

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sion of the Hon'ble Court, but have reserved sentence for a fortnight. I have remanded the prisoner to custody subject to any order the Hon'ble Court may be pleased to make with reference to bail."

*The Standing Counsel* (Mr. J. D. Bell) for the Crown.

The following judgments were delivered:—

JACKSON, J. — It appears to me that, under expl. 4 of the 108th section of the Indian Penal Code, the abetment of an abetment being an offence, and the prisoner having instigated Cummins to do that which, if committed, would have been an offence, he has himself thereby committed an offence, and inasmuch as by expl. 2, to constitute the offence of abetment it is not necessary that the act abetted should be committed, therefore the circumstance—that owing to the property being removed with the knowledge of the owner, the technical offence of theft had not been committed—does not save the prisoner from the consequence of the abetment which he has been guilty of, and therefore he has been properly convicted.

The prisoner will be brought up before the Magistrate for sentence.

WHITE, J.—I agree in thinking that, upon the facts found by the Magistrate, the prisoner may be properly convicted of the offence of abetting an offence.