

A**DIRECTOR OF PUBLIC PROSECUTIONS****v.****B****ETUATE CAMA**

[SUPREME COURT, 1975 (Grant C.J.), 14th March]

Appellate Jurisdiction

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Criminal law—aider and abettor—person who aids another to commit an offence of rape may be charged with actually committing that offence as a principal offender—Penal Code (Cap. 11) ss.21 (1)(b), 143—Criminal Procedure Code (Cap. 14) s.170 irrelevant.

Criminal law—rape—aider and abettor—person who aids another to commit an offence of rape may be charged with actually committing that offence as a principal offender—Penal Code (Cap. 11) ss.21 (1)(b), 143—Criminal Procedure Code (Cap. 14) s.170 irrelevant.

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The respondent was acquitted on a charge of rape by the Magistrate's Court. Although there was clear evidence before the Court that the respondent aided his co-accused in committing the offence, the Magistrate did not direct his mind to Penal Code s.21 (1)(b), and only considered Criminal Procedure Code s.170 which was irrelevant.

Appeal by the Director of Public Prosecutions against the order of acquittal in the Magistrate's Court of the respondent on a charge of rape.

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GRANT C.J. : [14th March 1975]—

On the 22nd April 1974 at Suva Magistrates' Court the respondent, with another (being the appellant in Criminal Appeal Number 78 of 1974 and hereinafter called the first accused), was charged with Rape contrary to section 143 of the Penal Code and after trial in the Magistrates Court, which had been invested with jurisdiction under section 4(2) of the Criminal Procedure Code, the respondent was acquitted.

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The Director of Public Prosecutions, under the powers conferred on him by the proviso to section 289(1) of the Criminal Procedure Code, appealed against the order of acquittal on the following grounds :

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1. That the learned trial Magistrate in his judgment accepted the evidence of the prosecution witnesses which established beyond reasonable doubt that the respondent participated in the said offence to the extent at least of aiding the first accused in the commission of the said offence.
2. That the learned trial Magistrate did not direct his mind to the provisions of section 21(1)(b) of the Penal Code which provides that every person who does an act for the purpose of enabling or aiding another to commit an offence is deemed to have taken part in committing the offence and is guilty as a principal offender.

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3. That in view of the evidence and the provisions of the Penal Code the order of acquittal in respect of the respondent should be set aside and a conviction recorded of the offence as charged.

The appeal was set down for hearing on the 27th September 1974 and the respondent was personally served with a notice to attend. He failed to attend and a warrant was issued for his arrest, the execution of which he managed to evade until March 1975. He was brought before the Court on the 10th March, acknowledged that he had been served with the original notice to attend but had been frightened to appear, and was thereupon remanded in custody until today.

The case for the prosecution was that at 7 o'clock on the night of the 20th April 1974 a fifteen year old girl was waylaid on her way to a shop by the respondent and the first accused, both of whom dragged her to a cassava patch where the first accused slapped her and ordered her to lie on the ground. She refused whereupon the respondent punched her in the stomach causing her to fall down. The first accused removed his shirt with which he covered the girl's head, a number of unidentified persons stripped her of her clothing, and held her hands and legs, and the first accused then raped her, after which she was raped again by an unidentified assailant.

There was some evidence that the second rape was in fact committed by the respondent, in that the girl in question was menstruating at the time and human blood was found on the underpants worn by the respondent at the time and on a handkerchief subsequently found in his pocket, for which he gave no explanation on his trial at which he elected to say nothing and to call no witnesses. Be that as it may, in his judgment the trial Magistrate accepted the evidence of the prosecution witnesses which established beyond reasonable doubt that the respondent with the first accused dragged the girl to the cassava patch and when she refused to comply with the first accused's demand that she lie on the ground the respondent punched her in the stomach thereby impelling her to do so, and the trial Magistrate found as a fact that the respondent was a participant in the actual forcible abduction of the girl and that she was an unwilling victim.

Unfortunately the trial Magistrate was then led astray, as after having convicted the first accused he concluded his judgment as follows:

"With regard to the second accused" (the respondent) "there is no evidence that he actually committed rape and in my view he should not be convicted under any of the sections in the Penal Code referred to in section 170 of the Criminal Procedure Code. In this case he must be acquitted."

Section 170 of the Criminal Procedure Code has reference to offences of a kindred nature to rape in respect of which a court may convict on a charge of rape although an accused was not charged with them; and on the evidence before the trial Magistrate the view he formed that the respondent should not be convicted of any of the kindred offences was a correct one. However the trial Magistrate's conclusion that the respondent must be acquitted was a clear misdirection.

It is apparent that, in concentrating on the kindred offences referred to in section 170 of the Criminal Procedure Code, the trial Magistrate failed to direct his mind to section 21(1) (b) of the Penal Code which provides, *inter alia*, that every person who does an act for the purpose of enabling or aiding another to commit a particular offence is deemed to have taken part in committing that offence and to be guilty of the offence and may be charged with actually committing it. Thus, where section 21(1) (b) of the Penal Code applies, a person is a principal offender, and the sections of the Criminal Procedure Code relating to convictions for offences other than those charged do not fall to be considered.

A The evidence adduced by the prosecution and accepted by the trial Magistrate proved conclusively that the respondent aided the first accused in committing rape and had the trial Magistrate properly directed himself the only course open to him was to convict the respondent as charged.

The order of acquittal is accordingly set aside and the matter remitted to the trial Magistrate for a conviction to be entered and sentence passed according to law.

B *Appeal allowed ; case remitted to Magistrate's Court for a conviction to be entered and sentence passed according to law.*

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