

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

**In the matter of an appeal in terms of
Article 138(1) of the Constitution of
the Democratic Socialist Republic of
Sri Lanka read with Section 11(1) of
the High Court of the Provinces
[Special Provisions] Act No. 19 or 1990**

Democratic Socialist Republic of
Sri Lanka

Complainant

CA HCC 130/24

High Court of Galle

Case No. HC 3787/2012

Vs.

1. Henagoda Withanachchi Ajith
Nishantha
2. Henagoda Withanachchi Dunith
Janaka

Accused

AND NOW BETWEEN

2. Henagoda Withanachchi Dunith
Janaka

2nd Accused-Appellant

Vs.

Democratic Socialist Republic of
Sri Lanka

Complainant- Respondent

Before: **B. Sasi Mahendran, J.**
 Amal Ranaraja, J.

Counsel: Razik Zarook, PC with Chanakya Liyanage and Wasim Akram for the Accused-Appellant.

Shanil Kularatna, A.S.G., for the Respondent.

Argued on: 07.05.2026

Judgment on: 25.05.2026

Judgment

Amal Ranaraja, J.

1. The second accused-appellant (hereinafter referred to as the appellant) has been indicted in the High Court of Galle in Case No. HC 3787/12 for abetting the first accused to commit the offence of rape.

2. The charge framed against the appellant specifically, alleges as follows;

02. In the same time, place and course of action as the above first charge, you, the 2nd accused aided and abetted the 1st accused to commit said offence in the first charge, and as a result, the 1st accused has committed said offence; thereby you have committed an offence punishable under Section 364(1) read with Section 102 of the Penal Code.

3. At the conclusion of the trial, the learned High Court Judge has convicted the appellant of the charge and sentenced him as follows;
 - i. Sentenced him to seven years rigorous imprisonment and fined him Rs.10,000.00 with a term of 3 months simple imprisonment in default of the payment of the same.
 - ii. The appellant has also been directed to pay a sum of Rs. 50,000.00 as compensation to PW01 and imposed a term of 6 months simple imprisonment in default of the payment of the same.
4. The appellant aggrieved by the conviction, disputed judgement together with the sentence has preferred the instant appeal to this Court.

Case of Prosecution

5. It is alleged that the first accused deceived PW01 and took her to a house in the *Mapalagama* area, where he has then committed the offence for which he has been charged.
6. On the way, to the house, the first accused has encountered several young men on the road. The first accused has inquired from one of these individuals about the location of the house keys. This person has replied that the keys were on the door. PW01 has later identified this specific individual, who indicated where the keys were as the appellant.

Case of Appellant

7. The appellant has maintained that on the particular day, he had gone to the road to engage in a sport with others, when he was accosted by the first accused. The first accused has inquired from the appellant,

whether anyone was at his house. When the appellant replied in the negative the first accused has then inquired where the keys were. The appellant has replied that they were on the door and continued with his sport. When the appellant returned home later, nobody has been in the house.

8. Abetment is a criminal offence as defined in the Penal Code of Sri Lanka, that involves helping, encouraging, or conspiring with another person to commit an offence. An abettor is a person who either commits the offence of abetment, or aids in the commission of an act that would be an offence. Section 100 of the Penal Code of Sri Lanka is as follows;

100. A person abets the doing of a thing who-

Firstly - Instigates any person to do that thing; or

Secondly - Engages in any conspiracy for the doing of that thing; or

Thirdly - Intentionally aids, by any act or illegal omission, the doing of that thing.

9. A person is guilty of abetment if he falls under any of the following three categories;

- i. Abetment by instigation

Abetment by instigation involves actively provoking, encouraging or urging the person to do an illegal act.

It includes wilful misrepresentation or concealment of a material fact to cause an action.

ii. Abetment by conspiracy

Abetment by conspiracy involves in engaging with others in a conspiracy (a secret, unlawful or harmful plan) to commit an offence, where at least one act takes place to fulfil the plan. For conspiracy the agreement itself is punishable, even if the final offence is not completed.

iii. Abetment by intentional aid

Abetment by intentional aid involves assisting the principal offender in committing the crime through an act or an illegal omission (failing to do something one is legally bound to do).

10. There can be no question that, in order to establish the offence of abetment of conspiracy under Section 100, an agreement is an essential prerequisite. The second explanation to Section 100 makes it clear that conspiracy for the doing of a thing, is when two or more persons agree to do that thing, or to cause or procure that thing to be done. A conviction of abetment by conspiracy, in the absence of clear evidence of agreement, would not be allowed to stand.

11. In the case of *The King v M.E.A Cooray et al. 1950 51 NLR 433*, Gratiaen J, has held,

“Even if two views were possible as to the proper interpretation of section 113A of the Code, there can be no question that, in order to establish the offence of " abetment by conspiracy " under section 100, an agreement is an essential prerequisite”

12. Many of the cases which recognise liability for abetment by intentional aid, refer to intentional aiding of the offender by the accused. In the case of *King v Marshall 1948 51 NLR 157 CCA*, Dias J., has held,

“The aid given by an abettor must be “intentional aid”... It was laid down in Rex v Kadirgaman that the intention of an abettor must be presumed from the nature and effect of the facility given by him to the doer of the act... The principle is that in order to make a person an abettor, the facility or aid afforded by him to the doer of the act must be such as was essential for the commission of the crime abetted.”

13. In the case of *Ago Singho v De Alwis (P.C. 808) (1945) 46 NLR 154*, Keuneman J., has held,

“Even so the mere knowledge on the part of the driver that the omnibus is overcrowded cannot, in my opinion, make him liable for abetting the offence, for he has in no way facilitated the commission of the offence.”

14. Further, in *De Silva v Fort Police (1944) 45 NLR 551*,

“...that knowledge of his could not constitute abetment, both because it was no part of his duty to interfere with the conductor and also because abetment requires something more than abstention from interfering. The abettor must actively aid with the intention of aiding the offender or illegally omit to perform a duty with the intention of aiding the offender.”

15. Therefore, to prove abetment, the prosecution must establish that the accused actively intended to provoke or aid the crime, not just knowledge of it, and direct, active involvement through instigation, conspiracy or aid. The act of encouragement or assistance must be communicated to the principal offender. Intentional aid, whether contemporaneous with commission of the offence or antecedent to it, falls within the purview of the third phrase of Section 100.

16. Courts in Sri Lanka have acted on the principle that an accused person cannot properly be convicted of the abetment of an offence different from the offence which he is accused of abetting.

17. In the case of *De Silva v Vaas* (1936) 38 NLR 158, Koch J, has held,

"It would therefore in my opinion be a distinct hardship to convict the present appellant now on a charge under section 158 read in conjunction with section 109, when he was not apprised of such a charge at any stage of the proceedings nor "was there even a reference to the commission of such offence in the judgment of the Police Magistrate."

18. Further, in the case of *Van Rooyen v Obeyasekera* (1938) 3 C.L.J xix, Keuneman J, has held,

"Although the offence of abetment may be committed not only by instigation but also by intentional aiding, issues pertinent to conspiracy and intentional aiding cannot legitimately form part of the prosecution's case if the accused has been given to understand that he is required to answer only the charge of instigation."

19. "Actively instigate", means to intentionally and energetically cause a process, event or a situation to begin. The person does not just witness or hope for something to happen, he takes concrete action to ensure it starts. It often involves pushing others to do something they might not have done otherwise. It frequently refers to starting negative, rebellious, or disruptive actions. It also implies a manipulative aspect, where the instigator starts trouble, but stays in the background while others carry out the disruptive behaviour.

20. "Intentional aid", refers to a deliberate, planned or conscious act of providing assistance support or resources to another person or group.

It implies that the help was not accidental or negligent, but rather premeditated to achieve a specific end, whether positive or negative. The person providing the aid is fully aware of what they are doing and intends to assist in bringing about a specific result.

21. Testimony presented at the trial indicates that the first accused has met the appellant and inquired where the keys were placed. The appellant has replied that they were on the door. The appellant has thereafter remained on the location where the first accused met him and has engaged with the others who were present. He has made no attempt to accompany the first accused to the particular house. The appellant has neither let the first accused into the house. Nor has he explained its layout or what facilities could be utilised for the purpose of the visit.
22. Furthermore, the appellant has taken no concrete action to ensure the incident between the first accused and PW01 commenced. Nor has he proceeded to render any pre-planned assistance aimed at achieving a specific object.
23. In essence, the testimony portrays the appellant as a passive observer or a reluctant informant who, after a brief exchange with the first accused has consciously distanced himself from any direct involvement in the first accused's subsequent actions, related to the house and the incident. This could be interpreted as a lack of intent to provoke or aid the offence and also lack of active involvement through instigation, conspiracy or aid.
24. In those circumstances, I am inclined to interfere with the conviction, disputed judgement and the sentence and proceed to set aside the same.
25. I acquit the appellant of the charge and make no order regarding costs.

Appeal allowed.

26. The Registrar of this Court is directed to send this Judgement to the High Court in Galle together with the original case record for compliance.

Judge of the Court of Appeal

B. Sasi Mahendran, J.

I agree

Judge of the Court of Appeal