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REX *v.* PERIYATAMBY.

Forgery—Sale of cart by complainant to accused—Payment of price by accused—Non-delivery of cart to accused—Removal of cart by accused by forgery of authority to deliver it to him—Penal Code, ss. 452, 453—False document.

Where the accused bought a cart of the complainant and had paid its price, but did not obtain delivery of it because it was left by the complainant in the custody of a third party, and when the accused forged the signature of the complainant to a letter purporting to be an authority to deliver the cart to the accused,—

Held, that the letter was not a false document within the meaning of sections 452 and 453 of the Penal Code.

MIDDLETON, J., who presided at the Batticaloa sessions of the Supreme Court in April, 1902, submitted a question of law for the consideration of two or more Judges of the Honourable the Supreme Court, under the terms of section 355 of the Criminal Procedure Code.

The case stated by His Lordship was as follows:—

"1. The accused was tried before me and an English-speaking jury on an indictment charging (1) that on or about the 12th August, 1901, at Vetaltuchenai in Mandoor in the division of Kalmunai, Batticaloa District, he did forge a certain document, to wit, a letter purporting to be an authority to deliver movable property —to wit, a cart—to him, purporting to be signed by one Chittiyar Kandappen, thereby committing an offence punishable under section 456 of the Criminal Procedure Code; and (2) that at the time and place aforesaid he did fraudulently and dishonestly use as genuine the aforesaid forged document, well knowing or having reason to believe at the time he so used it that the said document was forged, thereby committing an offence punishable under sections 456 and 459 of the Criminal Procedure Code.

"2. The facts were that the accused bought a bullock cart from the prosecutor for Rs. 25, and, according to the latter's account, only paid Rs. 16.25.

"3. The prosecutor, not being paid in full, took the cart away from the accused and handed it over to a man named Kadramerpodi Ithanataiyapodi, who is a witness.

"4. The same day accused came to this man's wife and produced a paper, purporting to be signed by the prosecutor, ordering the delivery of the cart to him (the accused).

"5. The woman delivered the cart and afterwards informed the prosecutor, who deposed that the signature to the paper was not his.

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" 6. Two other witnesses identified the paper as that used by the accused, and he himself admitted writing it in his statement to the Magistrate, which was put in evidence.

" 7. The accused gave evidence, and, as also in his statement, alleged that he had paid for the bullock cart entirely, partly in cash and goods, as admitted, and partly in work for the prosecutor.

" 8. I drew the attention of the Crown Counsel to the question whether, assuming that the cart had been entirely paid for, the offence of forgery had been committed under section 452; he submitted that the wording was wide enough to cover the case in question.

" 9. I directed the jury that even if they thought that the prosecutor had been paid in full when he deprived the accused of the cart, yet that the accused had made a false document with an intent covered by section 452, which would constitute forgery, and so bring him within the terms of the charges laid in the indictment.

" 10. The jury found the prisoner guilty on both counts unanimously, but the foreman, on behalf of the jury, recommended him for a lenient sentence, on the ground that the majority of six to one were of opinion that the prosecutor had been paid in full for the cart by money and work done by the accused for him.

" 11. Personally, I did not think that this was proved to be so.

" 12. I sentenced the man to three years' rigorous imprisonment on each count concurrently, informing him that I should reserve, for the opinion of the Supreme Court, the question whether I was right in directing the jury that the offence of forgery must be deemed to have been committed if the accused made a false document with a view to obtain his own cart from the person entrusted with it by the vendor resuming possession on a claim of non-payment of the entire price.

" 13. I now submit for the opinion of two or more Judges of this Honourable Court the question whether I was right in directing the jury as in paragraphs 9 and 12 hereof.

" 14. I enclose a copy (1) of my notes of evidence, (2) of the warrant of commitment, (3) the original record in the Magisterial Court.

" 15. The accused was undefended."

The case came on for argument before Moncreiff, A.C.J., and Wendt, J., on the 28th August, 1902.

Vanderwall, for the accused.—The charge was one of forgery under sections 456 and 459. The document in question was not a false document within the meaning of the Code. It must be dishonestly or fraudulently false. He is said to have imposed upon the custodian of the cart, but it caused him no wrongful loss

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(*I. L. R. 10, Calcutta 584*). The terms of section 456 clearly show that the intention must be proved to have been to injure. In getting back his own property, the accused injured no one. *Maine, section 582, p. 754* (edition of 1896), says on "Fraudulent Intent": "Of course there can be no intention to defraud where "no wrongful result was intended or could have arisen from the "act....." It has been held, too, that it is not forgery to erase the wrong number in a deed and insert the right one, because no injury is done to anybody by so tampering with the deed. It has also been held that it is not forgery to fabricate receipts for rent, and even to put the landlord's signature to them, in order to replace genuine receipts lost. The principle is clearly that there is no dishonesty or fraud where there is no wrongful loss or wrongful gain or any injury done or intended.

Loos, C.C., for the Crown—A man may forge in respect of his own property just as much as he may commit theft in respect of his own property. Suppose the complainant had pawned this cart with the custodian, and suppose the accused had stolen it; that would have been theft. If the accused had a right to the cart he would have gone to law; instead, he has tricked the keeper out of the cart both fraudulently and dishonestly. So far as the caretaker was aware, the cart was the property of the complainant, and he was defrauded into handing it to accused on the pretence that the accused was acting for the complainant. [WENDT, J.—You use "defraud" as a synonym for "deceive." Does it not imply more?] There is wrongful loss here. For aught we know, the caretaker may have to pay the complainant. The right to the cart is a matter for the complainant and the accused to settle between themselves. Its removal is a wrongful loss, which is defined as loss by unlawful means of property to which the person is legally entitled. The caretaker, was legally entitled to the custody of the cart, and he has been deprived of that custody. Had the complainant and the accused both claimed the cart, the caretaker would have been bound to interplead. It has been held that it is not absolutely necessary that anybody should be defrauded (*Ameer Ali and Woodroffe on Evidence, p. 103*). If fraud be proved, it is immaterial what the intention is. Here there was fraud,—false representation that he was agent of complainant, and that the letter was written by complainant.

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The accused bought a cart from the complainant. He says he paid the full price in cash and labour. The complainant says that he did not pay the balance of the price, and so he (the

complainant) took the cart back from him in the presence of the accused and some arbitrators. He says also that he gave the cart to a certain man and left it with him for safe keeping. Thereupon the accused wrote a delivery order, purporting to come from the complainant, for the delivery of the cart to bearer. In that way the accused became once more possessed of the cart. He was charged under sections 456 and 459 of the Penal Code with forging the delivery order and fraudulently and dishonestly using it as genuine. The Judge, in summing up the matter to the jury, directed them that even if they thought that the complainant had been paid in full, the accused, when he took back the cart, had made a false document within the meaning of section 452 of the Penal Code. In terms of that direction the jury returned a verdict of guilty on both counts by a majority of six to one, and gave it as their opinion that the prosecutor had been paid in full by cash or work done for him by the accused. Now, was this direction right?

The first question is, whether the accused forged this document. He did so, if he made, in terms of section 452 of the Penal Code, a false document to cause some person to part with property. Section 453 provides that a false document is made by one who dishonestly or fraudulently makes it. And therefore we are to discover what the meaning of falsely or dishonestly is. The Code has provided what seems to me a very clear and unmistakable interpretation of these words. From section 23, it appears than a man does a thing fraudulently when he does it with intent to defraud, and not otherwise. Now, the word " defraud " is a word as to the meaning of which I have a very clear opinion. It implies the infliction of some kind of loss upon the person defrauded. It is not mere deceit. And if I am asked whether the accused in this case intended to inflict some loss upon either the prosecutor or the custodian of the cart, I must say that I do not think that he did.

Then there remains the question whether the act was done dishonestly, and that by section 22 means whether he did the act with the intention of causing wrongful gain to himself or wrongful loss to some other person. Here, again, we have to come back to section 21 for the definitions of " wrongful gain " and " wrongful loss." Wrongful gain would have been aimed at in this case if the accused, by unlawful means, had attempted to gain property to which he was not legally entitled; and wrongful loss he would have inflicted if, by unlawful means, he had deprived some person of property to which the accused was not legally entitled.

Now, the passage in the Judge's direction assumes that the property in this case was the property of the accused. There is

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no doubt that the accused practised a deceit, but could it be said that the cart which he recovered was property to which he was not legally entitled? The Judge assumes that he is legally entitled to it, that he has paid for it; and the jury found that in their opinion he had paid for it. In my opinion the evidence does not show that the accused did this act intending to cause wrongful gain or wrongful loss.

For these reasons I think that the direction was wrong, and that the conviction should be set aside and a verdict of acquittal entered and the prisoner discharged.

WENDT, J.—

I am of the same opinion. It was suggested during the argument, on behalf of the Crown, that there possibly were relations between the complainant and the custodian of the cart, which gave the latter an interest in the custody of the property, and that the deprivation of that interest might amount to "wrongful loss" within the definition under section 22 of the Code. But there was no evidence of any such special relation, nor of the prisoner having a knowledge of it at the time he made this document. So that relation could not have entered into the question of his intent in doing the act charged. If the prisoner, having paid the full price, had become entitled, as against the complainant, to the possession of the cart, he could not be said to have caused wrongful loss by taking possession of it. I have felt more difficulty in connection with the word "fraudulently," which occurs in section 453 as an alternative to "dishonestly." But I agree with my Lord the Chief Justice that something more is implied in defrauding a person than merely deceiving; that there must be a contemplation of actual loss. Applying that test to the facts in this case, it cannot be said that the prisoner by getting possession of what he believed to be, and what really was, his property, defrauded the person who had sold it to him or the person who was keeping the cart for the complainant. I agree in the order that has been proposed by the Chief Justice.