

[TRIAL AT BAR.]

1914.

Present: Pereira J., Ennis J., and De Sumpayo A.J.

KING v. ASIRWATHAM.

Case No. 1 (Third Criminal Sessions, Western Circuit).

Act done with intention to deceive—"Fraudulently."

When an act is done with an intention to deceive, and by means of the deceit to obtain an advantage, is done "fraudulently."

THIS case was reserved for trial before a Bench of three Judges by Ennis J.

Accused, who was a vendor of opium employed under Government, was charged with having wilfully, and with intent to defraud, made a false entry in a book which belonged to his employer, in that he made in the book called "The Daily Statement of Authorized Vendors of Opium" an entry implying that he on November 23, 1912, sold to one Philipu Appuhamy, holder of certificate No. 2,644, 400 grains of opium, whereas in fact he made no such sale at all.

According to the case for the prosecution, although the accused made the false entry mentioned above, he made good to Government the full value of the opium said to have been sold.

After argument the Court made the following order:—

"Having heard argument on both sides, the Court is unanimous of opinion that the facts assumed for the sake of argument are sufficient, if established, to sustain the indictment, and the Court directs that the case do proceed to trial. At the same time, the Court expresses its opinion that the accused should have been prosecuted under the Opium Ordinance, in which there is express provision for dealing with authorized vendors of opium in the circumstances mentioned above. Hereupon the Solicitor-General moves to be allowed to withdraw the present charges against the accused in order to enable him to prosecute the accused under the Opium Ordinance.

"Counsel for accused have no objection to this course.

"The Solicitor-General's application is allowed, and all proceedings under the present indictment against the accused are stayed, and he is discharged of and from the same (section 217, Criminal Procedure Code).

"The reasons for the above ruling on the question of law discussed will be committed to writing and read out in open Court on Friday, October 23, 1914."

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van Langenberg, K.C., S.-G. (with him *Barber, C.C.*), for the prosecution.—The accused clearly made the entry "with intent to defraud." It is not necessary that he should have intended to cause wrongful loss to the Crown to hold that he acted "fraudulently." "Fraudulently" is not the same as "dishonestly." The two words are used together in several sections. If the accused intended to derive an advantage by his act which he would not have otherwise gained, he has acted with intent to defraud.

Counsel cited *The King v. Peiris*,¹ *Mohamed Said Khan*,² *Queen v. Adaman*.³

Hayley (with him *Sandrasegra* and *Arulanandam*), for the accused.—The accused cannot be said to have acted with intent to defraud if he did not intend to cause wrongful loss or injury to the person defrauded. *Iylish Chandra Mukurjee v. Empress*;⁴ *Gour.*, vol. II., p. 1892; 10 Cal. 584; 7 All. 459; 13 Cal. 349; 8 All. 653; 28 Mad. 90, 96.

Assuming that there was fraud, covering up the fraud which had been committed by the entry was held not to have come within section 477 of the Indian Code, and a special section was enacted in India to meet such cases.

In *The King v. Peiris*¹ there was actual misappropriation of the money, and the marks were inserted for the purpose of the misappropriation. But in the present case there is no misappropriation. The observations of Bonser C.J. in *Queen v. Adaman*³ are too wide, and would penalize many harmless acts.

van Langenberg, K.C., S.-G., in reply, cited 11 Mad. 411, 22 Cal. 313, 13 Bom. 515, 2 Bal. 93.

Reasons for the Order made (acquiesced in by the rest of the Court) were given by Pereira J. on October 23, 1914.

In this case the accused, who in the capacity of an authorized vendor of opium was admittedly a servant or officer under Government, was charged (to take only the first count of the indictment) with having wilfully, and with intent to defraud, made a false entry in a book which belonged to his employer, in that he made in the book called "The Daily Statement of Authorized Vendors of Opium" an entry implying that he on November 23, 1912, sold to one Philipu Appuhamy, holder of certificate No. 2,644, 400 grains of opium, whereas in fact he made no such sale at all. It was a part of the case for the prosecution that, although the accused made the false entry mentioned above, he accounted to Government for the full value of the opium said to have been sold. In these circumstances, the question is whether the accused can be said to

¹ (1912) 16 N. L. R. 11.

² (1898) 21 All. 113.

³ 1 Tamb. (Review) 91.

⁴ (1909) I. L. R. 36 Cal. 955.

have acted " with intent to defraud. " In other words, whether the accused can be said to have acted fraudulently, the word " fraudulently " and the expression " with intent to defraud " having, under section 23 of the Penal Code, one and the same meaning. In many sections of the Penal Code the words " dishonestly and fraudulently " are placed in juxtaposition to each other, thus showing that the intention of the Legislature was that they were not to be regarded as having the same meaning. The word " dishonestly " is defined in the Penal Code to mean " with the intention of causing wrongful gain to one person or wrongful loss to another. " " Fraudulently " cannot for that reason be deemed to have the same meaning. What then is the meaning to be given to it? The learned counsel for the defence cited certain decisions of Courts of India, but those decisions have already been disapproved by this Court. Referring to them in the case of *Queen v. Adaman*,¹ Bonser C.J. observed: " Like my brother Withers, I am unable to follow these cases, and it seems to me that there is a fallacy in the reasoning. " A later case of India cited for the defence is that of *Iylish Chandra Mukurjee v. Empress*.² That case hardly enables us to give the word " fraudulently " a meaning in connection with its use with which we are now concerned. The entry complained of in that case was an entry in a book of a sum that the accused had actually received, although the entry had before been fraudulently omitted. So that the entry in question was not calculated to mislead or deceive anybody, but to lead anybody into a knowledge of the true state of affairs, namely, that the amount referred to had been actually received by the accused; and Jenkins C.J., distinguishing the case from certain cases cited to him, observed that the entry showed that the postmaster (accused) was liable, and it was a statement of the true position of affairs, whereas in the cases cited the accounts were framed in such a way as to conceal liability and to present an untrue state of affairs. In the present case, the impeached entry is certainly intended and calculated to present an untrue state of affairs, namely, that the accused sold to Philipu Appuhamy, a licensed opium eater, 400 grains of opium on November 23, 1912. The cases cited by the learned Solicitor-General are more in point, and they afford greater facility for arriving at a satisfactory definition of the term " fraudulently. " In *Queen Empress v. Abbas Ali*,³ the Full Court composed of five Judges were unanimously of opinion that deprivation of property, actual or intended, was not an essential element in the offence of fraudulently using as genuine a document which the accused knew or had reason to believe to be false; and Maclean C.J. observed: " The word ' fraudulently ' is used in sections 471 and 464 together with the word ' dishonestly, ' and presumably in a sense not covered by the latter word. If, however, it be held that

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*King v. Asirvatham*¹ 1 *Tamb. (Review)* 91.² (1909) *I. L. R.* 36 *Cal.* 955.³ *I. L. R.* 25 *Cal.* 512.

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' fraudulently ' implies deprivation, either actual or intended, then apparently that word would perform no function which would not have been fully discharged by the word ' dishonestly, ' and its use would be mere surplusage so far as such a consideration carried any weight; it obviously inclines in favour of the view that the word ' fraudulently ' shall not be confined to transactions of which deprivation of property forms a part. "

Sir James Stephen in his *History of the Criminal Law of England* (vol. II., p. 121) observes: " I shall not attempt to construct a definition of ' fraud ' which will meet every case which might be suggested, but there is little danger in saying that whenever the words ' fraud ' or ' intent to defraud ' or ' fraudulently ' occur in the definition of a crime, two elements at least are essential to the commission of the crime, namely, first, deceit or an intention to deceive, or in some cases mere secrecy; and secondly, either actual injury or possible injury, or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy. This intent, I may add, is very seldom the only or the principal intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage. A practically conclusive test as to the fraudulent character of a deception for criminal purposes is this: ' Did the author of the deceit derive any advantage from it which he could not have had if the truth had been known ? ' If so, it is hardly possible that that advantage should not have had an equivalent in loss or risk of loss to someone else, and if so, there was fraud. " In view of these observations, it was held in the case of *Mohamed Said Khan,*' that when there was an intention to deceive, and by means of the deceit to obtain an advantage, there was fraud. We have no hesitation in following this decision.

In the present case the accused undoubtedly intended to deceive the Government into the belief that on November 23, 1912, he had sold to Philipu Appuhamy a quantity of 400 grams of opium, and he thus gained the advantage of having that quantity of opium to be disposed of, if so minded, unhampered by the provisions of the Ordinance.

For the reasons given above, we think that on the facts assumed for the purpose of the legal argument the indictment can be sustained, and we direct that the trial do proceed.