1935 *Present :* **Maartensz J.**

THE KING *v.* SILVA.

142—D. C. (Crim.) Colombo, 10,907.

Using a forged document—False death certificate—Obtaining a loan from Co-operative Society—Deprivation of property—Fraudulent use of certificate—Penal Code, ss. 23 and 459.

The accused, who was a member of a Co-operative Society, obtained a loan from the Society by means of a forged certificate of death. The rules provided for the grant of a "death" loan as follows: "In the event of a death occurring in a family of a member, the managing committee may grant to such member a loan on low interest as they consider reasonable on production of satisfactory proof by the member . . . . ".

The accused thereafter repaid the loan to the society.

Held, that the accused had acted fraudulently within the meaning of section 23 of the Penal Code.

APPEAL from a conviction by the District Judge of Colombo.

Soertsz, K.C. (with him *Siri Perera*), for accused, appellant.

Pulle, C.C., for Crown, respondent.

Cur. adv. vult.

February 28, 1935. MAARTENSZ J.—

The accused-appellant was convicted of fraudulently using as genuine a certificate of death in respect of one P. A. de Silva purporting to have been signed by one J. L. Fernando, Registrar of Births and Deaths, knowing or having reason to believe it to be a forged document, an offence punishable under section 459 of the Penal Code.

He was sentenced to two weeks' simple imprisonment and has only a right of appeal upon a matter of law. The petition of appeal contains a statement of the matter of law to be argued but it has not been certified to by an advocate or proctor as a fit question for adjudication by this Court. I, however, heard counsel in support of and against the point of law stated in the petition of appeal with a view to satisfying myself as to the legality of the order made by the learned District Judge.

The facts are not in dispute and the question of law argued was whether these facts established that the accused had made a fraudulent use of the forged death certificate.

The facts are as follows. The accused was at the time in question, about May 24, 1933, a member of the Ceylon Government Printing Office Co-operative Society, Limited, which had a share capital of Rs. 75,000 made up of 15,000 shares of Rs. 5 each. Every member on election had to take at least one share and pay an entrance fee before he could exercise the privileges of membership. One of the privileges is the obtaining of loans from the society at a reasonable rate of interest. According to the rules a member is entitled to ordinary loans and death loans.

Rule 27 provides that "Ordinary loans may be made to the extent of 95 per cent. of the amount at the disposal of the society, 5 per cent. being reserved for emergencies. Loans in future shall be calculated on the applicant's share value, his monthly salary, plus an amount equivalent to his contributions in the Provident Fund" but rule 26 prescribes that "Ordinary loans shall be repaid in full before any further application is considered"; that is to say, a member who has obtained an ordinary loan is not entitled to a second loan although the outstanding loan does not exhaust the amount at the disposal of the society.

Death loans are provided for by rule 28 in terms of which "In the event of a death occurring in a family of a member, the managing committee may grant to such member a loan on low interest as they consider reasonable, on production of satisfactory proof by the member that the deceased was either his father, mother, brother, sister, wife, or child".

On May 23, 1933, the accused held 29 shares and was in receipt of a salary of Rs. 52.50 and the amount at the disposal of the society on May 23, 1933, was Rs. 197.50 less a sum of Rs. 105 taken as an ordinary loan and Rs. 11 by way of death loan, leaving a balance of Rs. 81.50. On that date the accused applied for a death loan of Rs. 50 to meet the funeral expenses of his eldest brother who he said had expired. A loan of Rs. 40 was sanctioned and he received Rs. 20. By a rule made in October, 1932, the applicant for a death loan received half the amount sanctioned at once and the balance on production of a certificate of death of the relative on account of whose death the loan was applied for; on May 24, 1933, the accused wrote letter P 1 of the same date enclosing the death certificate P 2 and he was paid the balance amount of the loan.

P 2 certifies that "P. A. de Silva expired on 23rd May, 1933. Brother of P. G. de Silva at Green street, Kotahena", it purports to be signed by J. L. Fernando, Registrar of Births and Deaths. It was subsequently discovered that the certificate was a forgery and that accused's brother had not died.

The facts I have set out were not disputed; but it was elicited from Mr. Richards, the President of the society, who gave evidence, that the society had suffered no loss; in re-examination he explained that the society had suffered no loss because the loan bad been paid back. It was in view of this evidence contended here and in the District Court that the use of the forged certificate was not fraudulent within the

meaning of section 23 of the Penal Code which provides that " A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise ".

It was argued on the authority of the case of *Rex. v. Peryatamby* [1] that before a person can be convicted of fraudulently using a document it must be proved that such use caused some loss to the prosecutor. The case cited certainly supports the argument. There I read the headnote " 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 "—it was held, that the letter was not a false document within the meaning of sections 452 and 453 of the Penal Code. He was indicted with and convicted of forging and fradulently and dishonestly using as genuine the letter. The jury found that the prosecutor had been paid in full for the cart by money and work done for him by the accused.

The trial Judge submitted for the opinion of a Divisional Court the question whether the accused had made a false document and used it fraudulently and dishonestly ; and it was held by Moncreiff A.C.J. and Wendt J. that the letter was not a false document within the meaning of sections 452 and 453 of the Penal Code. The *ratio decidendi* was that the word " defraud " as used in section 23 of the Penal Code implies the infliction of some kind of loss upon the person defrauded and there must be something more than mere deceit.

Their Lordships do not appear to have been asked to consider the effect of the words " dishonestly " and " fraudulently " being placed in juxtaposition to each other in determining the meaning to be given to the word fraudulently.

The use of these words in juxtaposition to each other was the main ground upon which the Court proceeded to give a more extended meaning to the word " fraudulently " in the case of *King v. Asirwatham* [2]. The case is reported as a " trial at bar " upon a case reserved for trial before a Bench of three Judges by Ennis J. I do not understand by what procedure this case was brought before a Bench of three Judges. A trial at bar can only be ordered by the Chief Justice (section 216 of the Criminal Procedure Code) and a Judge can only reserve and refer a question of law for decision by a Bench of two or more Judges after the accused has been convicted. Here Ennis J. appears to have reserved and referred the question of law before the accused was tried.

The charge against the accused, who was a vendor of opium employed under Government, was that " he 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 ".

[1] *(1902) 5 N. L. R. 338.*

[2] *(1914) 18 N. L. R. 11.*

It was the case for the prosecution that although the accused made the false entry he made good to Government the full value of the opium said to have been sold.

The question for decision was whether the accused could be said to have acted fraudulently. A number of Indian and local cases were cited in the course of the argument, but not the case of *Rex. v. Periyatamby* (*supra*). Pereira J. who delivered the judgment of the Court was of opinion that where the words "fraudulently" and "dishonestly" are used in juxtaposition to each other they cannot be regarded as having the same meaning. He then pointed out that 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" and said that "fraudulently" for that reason could not be deemed to have the same meaning and put to himself the question: what then is the meaning to be given to it? In answering the question he reviewed the Indian and local cases cited in argument. He referred particularly to the case of *Queen Empress v. Abbas Ali* [1], where a Bench 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. Ultimately he followed the decision in the case of *Mohamed Said Khan* [2], that when there was an intention to deceive, and by means of the deceit to obtain an advantage, there was fraud.

The decision in this case cannot be reconciled with the decision in the case of *Rex v. Peryatamby* (*supra*) and with due deference to the Judges who decided that case I am of opinion that the decision as to the meaning of the word "fraudulently" in the later case is correct and should be followed. The Court in the earlier case had not the assistance of the authorities cited in the later case and came to a decision mainly upon a first impression as to the meaning of the word.

The decision in the later case, having been arrived at after a full consideration of the authorities and supported as it is by cogent reasoning, must prevail, and I see no reason for reserving this case for consideration by a Full Bench.

The accused on the authority of the decision in *King v. Asirwatham* (*supra*) was guilty of fraudulently using the forged death certificate even if the money he obtained thereby by way of loan belonged to him. I am of opinion however that the money did not belong to him. It was the property of the society from whom the shares were purchased, the only interest in the money the accused had while he continued to be a member was the right to receive loans to the extent and on the terms provided for by rules 26 and 28 for which he had to pay interest at the rate fixed by the society at the general meeting (rule 18). This right was limited by rule 9 which empowers the managing committee to refuse loans at discretion.

The liability of a member to pay interest on the loans is obviously inconsistent with the idea that the borrower was the owner of the money

[1] *I. L. R. 25 Cal. 512.*

[2] *I. L. R. 21 All. 113. 115.*

loaned to him. The interest from loans represented wholly or in part the profits of the society in which the members participated according to the terms of rule 34.

A member or his nominee became entitled to the amount standing to his credit on his ceasing to be a member or on death as provided by rule 31. Till then the money to his credit remained the property of the society. The accused therefore deprived the society of property by obtaining a loan by means of a forged certificate which he would not have received but for the deception practised by him.

For the reasons given by me the appeal is dismissed.

Appeal dismissed.