

1912.

Present : Middleton J.

THE KING v. FERNANDO.

2—D. C. (Crim.) Negombo, 2,895.

*Attempting to cheat by false personation—Fraudulent and dishonest—
Ceylon Penal Code, ss. 398, 402, and 490.*

The accused produced one Isa before a notary and falsely pretended that Isa was one Ligona, and endeavoured to get a deed of mortgage executed by the notary in favour of one Arumugam Chetty with the object of obtaining a loan from him.

Held, that the accused was guilty of attempting to cheat the Chetty.

MIDDLETON J.—As regards the first count (attempting to cheat the notary), there is no evidence given by the notary to prove that a personation would affect his reputation, although I have very little doubt that it might have done so if the personation had succeeded and had been subsequently repudiated by the accused.

THE facts are set out in the judgment of the learned District Judge (J. Scott, Esq.):—

The facts in this case are practically admitted by the defence. The accused in October last came to Negombo with a title deed of his mistress Ligona in his pocket in order to raise a sum of money on it. Ligona did not accompany him. He went to a Chetty, who agreed to lend the sum of money on a mortgage of a land described in the title deed, provided both accused and his mistress jointly and severally bound themselves by the mortgage bond. Accused said his wife could be produced at once to sign the deed, and so he and the Chetty repaired to a notary and gave him instructions as to the drawing up of the mortgage bond. The notary drew up the deed, and later in the same day accused took a girl, Isa, to the notary's office to sign the deed as his mistress Ligona. The Chetty also attended, but when the deed was

about to be signed it was discovered that the woman present was not Ligona, but was personating her, hence this prosecution of the accused for attempting to cheat by personation both the notary and the Chetty. It is quite clear to me that accused set out with the full intention of substituting some one (probably the woman Isa all along as his mistress Ligona in the signing of the mortgage bond. Neither woman can write, and accused thought it would be easy enough for one woman to make her mark instead of another, and so it would be, and so it is frequently done, I have no doubt. All would have gone well, but for the discovery of the substitution or personation. The only question to decide is whether such personation amounts to cheating by personation as defined in the Penal Code.

1912.

*The King
v. Fernando*

By section 398 cheating is defined, first, as fraudulently or dishonestly inducing a person by deception to deliver any property. In this case accused undoubtedly attempted by deception to induce the Chetty to lend him Rs. 125, but was it done with fraudulent or dishonest intention? I think not. He did not intend to defraud the Chetty. He wanted to borrow money from him on a mortgage drawn up in a regular manner; the only irregularity would have been the signing of the bond by Isa instead of by Ligona, because for some reason or other Ligona could not be present. That woman states she consented to her being represented by another; but even if she had not consented, I cannot see that the Chetty was thereby defrauded. It would be rather the woman than the Chetty who would have been defrauded. The Chetty, at any rate, would have his mortgage bond, which he could put in suit and recover on, and if Ligona impugned the bond, the Chetty would still have his legal right to recover the money lent from accused, who is a landed proprietor.

The accused is acquitted of the charge of attempting to cheat the Chetty by personation. As to the charge of attempting to cheat the notary, we must look at the alternative definition of cheating in section 398, which is intentionally inducing any person by deception to do anything which he would not do if he were not so deceived, and which act causes or is likely to cause damage or harm to that person in body, mind, reputation, or property. Here, again, the attempted intentional inducement of the notary by the accused, by means of personation or deception, to do an act which he would not have otherwise done, is clearly established.

But was that act likely to cause damage or harm to the notary as mentioned in the above definition? I think not. If such act could be said to be likely to prejudice the notary in the eyes of his clients, or cause him to be looked askance at as a conniver at false deeds, or lose him his accustomed patronage and fees (and I think this is not at all likely), even then such prospect is too remote to have been intended to have been contemplated by the Legislature in its definition of cheating. The accused is acquitted of the charge of attempting to cheat the notary by personation.

The Attorney-General appealed.

Walter Pereira, K.C., S.-G., for the Attorney-General.—If the deed was executed the notary would have suffered in reputation. In the case of the Chetty, it is quite clear that he would have

1912.
The King
v. Fernando

suffered loss had the false personation succeeded. The accused would have acted fraudulently if he derived any advantage from his conduct, which could not have been had if the truth had been known. See *Queen Empress v. Muhammad Saeed Khan*.¹ It is clear from the evidence that the Chetty would not have consented to accept the bond had he known that Isa was not Ligona.

Jayatileke, for the accused, respondent.—The notary does not say that the act of the accused would have caused harm in mind or reputation to him.

It was held in *Rex v. Bastian et al.*,² under similar circumstances, that the question whether the act of the accused was likely to cause harm to the notary is a question that has to be decided on the evidence by the jury. There is no evidence on the point in this case.

There is no cheating in this case, as the accused did not act "fraudulently or dishonestly" within the meaning of those words in the Penal Code. Counsel cited *Queen Empress v. Baburam Rai*;³ *Queen Empress v. Majey*;⁴ *Meera Saibu v. Paulu Silva*; ⁵ *2 Gour's Indian Penal Code 1093*; *L. R. 8 Q. B. 305, 307*; *L. R. 2 Q. B. D. 206*; *11 T. W. R. 24*.

Walter Pereira, in reply.

Cur. adv. vult.

January 29, 1912. MIDDLETON J.—

In this case the accused was tried on two counts, in one indictment charging him with attempting to cheat one H. E. de Silva, a notary public, by personation by falsely producing one Isa before him as one Ligona and endeavouring to get a deed of mortgage executed by the said notary in favour of Arumugam Chetty, thereby committing an offence punishable under section 402 and 490 of the Penal Code; (2) with attempting to cheat the said Arumugam Chetty by personation, by falsely producing the said Isa as the said Ligona and endeavouring to get a deed of mortgage executed by the said H. E. de Silva, notary public, in favour of the said Arumugam Chetty, an offence punishable under sections 402 and 490 of the Penal Code.

The District Judge held (1) that although the attempted intentional inducement of the notary by the accused by means of personation or deception to do an act which he would not have otherwise done is clearly established, that act was not likely to cause damage or harm to the notary as mentioned in the definition of cheating in section 39 of the Ceylon Penal Code; (2) that although

¹ 21 All. 114.

³ (1905) 32 Cal. 775.

² (1902) 2 Bal. 93.

⁴ (1890) 17 Cal. 606.

⁵ (1899) 4 N. L. R. 229.

the accused undoubtedly attempted by deception to induce the Chetty to lend him Rs. 125, he did not do so with fraudulent or dishonest intention.

1912.

MIDDLETON
J.*The King*
v. Fernando

The facts were practically admitted by the defence, and the District Judge found that the accused intentionally substituted Isa for Ligona, and attempted by this deception to induce the Chetty to lend him Rs. 125, although he did not intend to defraud the Chetty; while the woman stated she consented to being personated, and the Chetty averred that he refused to lend the money without the signature of the accused's wife Ligona.

The question on both counts under section 398 are whether the acts of personation were fraudulent or dishonest deceit which would cause or be likely to cause damage or harm to the notary or the Chetty in body, mind, reputation, or property.

The first question is, Was the deceit fraudulent, putting aside the element of dishonesty as defined in the Code? In *Queen Empress v. Muhammad Saeed Khan*,¹ relied on by the Solicitor-General, Banerji J. quotes from Sir James Fitz James Stephen's *History of the Criminal Law of England*, vol. II., p. 121, where it says that "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 could not have been had if the truth had been known? If so, it is hardly possible that the advantages should not have had an equivalent in loss or risk of loss to some one else, and if so, there was fraud.

The cases reported in 28 *Madras* 90; 4 *N. L. R.* 229; *L. R.* 8 *Q. B.* 305, 307; *L. R.* 2 *Q. B. D.* 206; 11 *T. W. R.* 24; 32 *Calcutta* 775; 2 *Gour's Indian Penal Code* 1093; 2 *Balasingham* 100; and 17 *Calcutta* 606 were relied upon in the interests of the accused.

It seems to me, however, as the Solicitor-General argued, that most of these cases are hardly in point. In the case relied on in 32 *Calcutta* 775, the collector who handed over the money there was not harmed in body, mind, or reputation, and the person who received it was authorized to do so.

Again (11 *T. W. R.* 24), it was held there was nothing to show an intention to defraud or injure any one by obtaining the registration of a deed in the right name by the personation of the vendor by another woman.

In 17 *Calcutta* 606 the loss or damage likely to be caused to the Registrar of Muhammadan Divorces by the personation of one person by another to him was held to be too remote to constitute a case of cheating according to the criminal law.

As regards the first count on the indictment, the count was the same as in *Rex v. Bastian et al.*,² and I there held it was a question for the jury whether it was likely or possible that the notary would be injured in mind or reputation. There is no evidence, however,

¹ 21 *All.* 114.² (1902) 2 *Bal.* 93.

1912.

MIDDLETON
J.

*The King
v. Fernando*

given by the notary here to prove that such a personation would affect his reputation, although I have very little doubt that it might have done so with the Registrar-General, if not with the respectable public, if the personation had succeeded and had been subsequently repudiated by the accused. I hesitate to interfere, therefore, with the finding of the District Judge on that count.

On the second count, as regards the Chetty, I think the case is different to that reported in *11 T. W. R. 24*. In that case the intention was manifest, that the real vendor was on her way to carry out the sale when she was taken ill.

In the present case, although Ligona now says she ratifies the act of her personator, it is clear to me that the Chetty would not have advanced the money to the accused had he known that Isa was to sign for Ligona; and that if Isa had signed, he would have advanced money to the accused on a deed which it is quite likely might have been repudiated by Ligona and so have caused him damage.

The accused falsely pretended to the Chetty that Isa was Ligona with the object of obtaining a loan from him, an act fraudulent within the meaning of Sir James FitzJames Stephen's dictum, and certainly likely, at the least, to have caused injury to the Chetty. I think, therefore, that the verdict on the second count should be reversed and a verdict of " guilty " entered in its place, but that the verdict on the first count must stand.

I send the case back to the District Judge to impose such a sentence as he may be advised to inflict.

Acquittal on second count set aside.
