

1969

*Present : de Kretser, J.*

W. D. A. JAYAMANNE, Appellant, and C. SIVASUBRAMANIAM  
(Officer in Charge, S.C.I.B., Colombo), Respondent.

*S. C. 21/69—J. M. C. Colombo, 37641*

*Penal Code—Section 403—Cheating—Quantum of evidence.*

Where A obtained a sum of money from B upon an undertaking that he would use that money for securing for B, by bribing a Corporation official, a job which was vacant in the Corporation, A is not liable to be punished under section 403 of the Penal Code for an offence of cheating if he failed to secure the job for B and there is no evidence to show that he made no attempt to bribe in connection with the job. The fact that the job did not materialise may only mean that A was unsuccessful in his efforts.

**A**PPEAL from a judgment of the Joint Magistrate's Court, Colombo.

*T. S. P. Senanayake, with V. E. Selvarajah and D. P. Mendis, for the accused-appellant.*

*Kosala Wijayatilake, Crown Counsel, for the Attorney-General.*

*Cur. adv. vult.*

October 5, 1969. DE KRETZER, J.—

The accused in this case faced three charges of cheating before Mr. D. S. Nethasinghe, the Magistrate presiding over the Joint Magistrates' Court of Colombo, who assumed the punitive powers of a District Judge for the purpose of trying him. The charges were : (1) That he had deceived D. H. P. Balasuriya on or about 15.1.67 into the belief that he could secure a job for his daughter as a typist in the Fisheries Corporation and had thereby dishonestly induced Balasuriya to pay him Rs. 350. (2) That between 17.10.66 and 5.2.67 he had deceived G. A. Ariyaratne into the belief that he could secure jobs for his brother and brother-in-law as typist and Supervisor respectively in the Cement Corporation and thereby dishonestly induced Ariyaratne to pay him a sum of Rs. 950. (3) That between 25.1.67 and 5.3.67 he had deceived Emily Perera of Wattala into the belief that he could secure a job for her sister at Radio Ceylon on a salary of Rs. 300 a month and thereby dishonestly induced Emily Perera to pay him Rs. 450.

The Magistrate allowed the application of the prosecuting Inspector to withdraw count 1 on the footing that the evidence of the accused in Court showed that he was going back on what he had told the Police. The Magistrate who was shown the statement was presumably satisfied as to the correctness of that submission.

The Magistrate convicted the accused on the other two counts and taking into consideration that the accused had repaid what he took and had no previous convictions sentenced him to pay a fine of Rs. 250 in default three months' R.I. in respect of each count. The Magistrate had lost sight of the fact that a jail sentence is imperative in the case of offences punishable under section 403 of the Penal Code. There is no need for me to put that right in revision for in my opinion the Magistrate should have acquitted the accused on all counts. The evidence makes it clear that in each of these cases it was the person alleged to have been deceived who had asked the accused who was well known to him to obtain employment for the relation mentioned in the charge. An accountant in the Mercantile Investments Ltd., a clerk in the Port Cargo Corporation, a retired operator of the Telephone Exchange would obviously know that it was not in the power of a typist-clerk in the

Police Office which is the post the accused held, to make appointments in the Fisheries Corporation, the Port Cargo Corporation or in Radio Ceylon. And so they clearly knew that what accused was going to do with the money he asked for was to bribe someone in these offices who could do so. Ariyaratne in fact says so, for he says "I accepted the position that the money was to be paid to someone in the Corporation . . . my sister and brother-in-law also accepted the position." Their acquiescence in taking no action when the accused kept postponing the date of the likely appointment points to the fact that they realised that time and more than one effort on the part of the accused might be needed for success, as does the fact that they made no attempt to fix a date for the recall of the money if the effort was unsuccessful. Ariyaratne says "because of the delay I naturally became anxious." They all explain that why they went to the Police was because accused was not to be found. Their money was with him and they would jump to the conclusion that it had gone with him. But when he explained that his keeping away was due to good reasons—he had even been allowed to resume his post in the Police Office—and that he would return their money as he had not succeeded in obtaining the posts they were satisfied with his bona fides and said so to the Police.

It appears to me that there was no deception practised in that each of the alleged victims knew why the money had to be provided. There is no evidence to show that the accused made no attempt to bribe in connection with the jobs mentioned, which the evidence shows were available at the time. He can hardly be expected to divulge the names of those whom he approached, and it would be the height of optimism to think that they would admit that he had done so, and his false explanation to the Police in this regard is then understandable. Bribery in regard to the obtaining of employment is so notoriously rampant that it may well be that the accused was taking advantage of the general impression that jobs in these places could be obtained by bribery to obtain money to what is popularly known as "roll" if not to eventually misappropriate, but suspicion is no substitute for proof that the accused was taking money on representation that he was going to bribe someone and obtain the job for these people, and was making in reality no effort to do so. The fact that the jobs did not materialise may only mean accused was unsuccessful in his efforts. I allow the appeal of the accused and acquit him. It appears to me that this is a case into which the Bribery Commissioner should make some investigation. I therefore direct that the Record in this case be sent to him for reference and return thereafter by him to the Magistrate.

*Appeal allowed.*