

1947

Present : Howard C.J.

DE ALWIS, Appellant, and SELVARATNAM, Inspector
of Police, Respondent.

454—M. C. Colombo, 48,955.

Cheating—Ingredients which should be proved—Penal Code, ss. 333, 400.

The appellant was charged under section 400 of the Penal Code with cheating a Proctor and Notary by falsely representing to him that certain premises described in the schedule to a mortgage bond attested by him were free from all encumbrances when, in fact, the said premises were subject to a mortgage.

There was no proof that damage or harm was caused to the Proctor in body, mind, reputation, or property.

Held, that to constitute the offence of cheating under section 400 of the Penal Code the damage or harm caused or likely to be caused to the person deceived must be the necessary consequence of the act done by reason of the deceit practised or must be necessarily likely to follow therefrom. The possibilities of damage or harm to mind or reputation were too remote to be in the contemplation of the enactment.

A PPEAL against a conviction from the Magistrate's Court, Colombo.

L. A. Rajapakse, K.C. (with him E. D. Cosme and E. O. F. de Silva),
for the 1st accused, appellant.

E. H. T. Gunasekara, Acting Solicitor-General (with him J. G. T.
Weeraratne, C. C.), for the Attorney-General.

Cur. adv. vult.

March 3, 1947. HOWARD C. J.—

The accused was convicted of cheating, an offence punishable under section 400 of the Penal Code, and sentenced to six months' rigorous imprisonment. The exact wording of the charge was as follows:—

"You did at Hultsdorf, Colombo, on 26th September, 1941, being the first accused, deceive one R. Muttusamy, Proctor and Notary, by falsely representing to him that the premises described in the schedule to mortgage bond No. 2123 dated 26th September, 1941, attested by him, the said R. Muttusamy, as Notary, were free from all encumbrances whatsoever, whereas in truth and in fact, the said

premises were on the 26th September, 1941, subject to a mortgage created by you in favour of one F. V. L. Driebérg of Borella, and fraudulently induce the said R. Muttusamy to attest the said deed No. 2123 in his capacity as Notary Public which the said Notary would not have done had he not been so deceived and which act was likely to cause damage or harm to the said R. Muttusamy in body, mind, reputation or property and that the said 1st accused abovenamed did commit an offence punishable under section 400 of Chapter 15 of the Penal Code.”

It has been contended on behalf of the appellant that the representation alleged to have been made by the appellant to Muttusamy did not induce the latter to attest the deed and that Muttusamy would have attested the deed if it had not been for the representation of the appellant. It is also maintained that it has not been established that the act was likely to cause damage or harm to Muttusamy in body, mind, reputation or property. In finding the appellant guilty of the offence the Magistrate states that it is idle to suggest that because Muttusamy has not in fact suffered any harm, or damage, the act of the appellant was not likely to cause damage to Muttusamy in mind, reputation or property. Counsel for the appellant contends that the possibilities contemplated by the Magistrate were too remote and the facts do not constitute an offence under the section. In this connection he has referred me to the case of *Mojey and others v. The Queen-Empress.*¹

The headnote of this case is as follows :—

“To constitute the offence of cheating under s. 415 of the Indian Penal Code the damage or harm caused or likely to be caused to the person deceived in mind, body, reputation, or property must be the necessary consequence of the act done by reason of the deceit practised, or must be necessarily likely to follow therefrom.

Where therefore certain persons were charged under s. 419 of the Indian Penal Code, one with personating another person before a Registrar, and the others with abetting such personation and causing the Registrar to register a divorce under the provisions of Bengal Act 1 of 1876 with the wife of the personated person, and where the lower Courts convicted the accused under that section, holding that as such registrations were voluntary and a source of gain to the Registrar harm was caused to the Registrar in mind and reputation by registering false divorces as well as by losing his fees in the future through persons being less likely to avail themselves of his services, and that therefore an offence under the section had been committed.

Held: that the possibilities contemplated by the lower Courts were too remote; that the facts did not constitute an offence under the section; and that the conviction must therefore be set aside.”

At page 609 it is stated in the judgment that it is clear that the petitioners deceived the Registrar and it is clear that they thereby induced him to register the fictitious deed of divorce—a thing he would not have done unless he had been so deceived. The judgment then goes on to

¹ *Indian Decisions, 17 Calcutta 606.*

state that in the opinion of the Court this act of registering the fictitious deed did not cause nor was it likely to cause damage or harm to the Registrar in body, mind, reputation or property. It is also stated in the judgment that the damage or harm must be the necessary consequence of the act done by reason of the deceit practised or must be necessarily likely to follow therefrom. The possibilities contemplated by the Magistrate, namely that the Registrar suffers not only in registration, but also by losing his fees in future through people declining to avail themselves of his offices, were too remote to be within the contemplation of the Statute. The conviction was, therefore, set aside. In my opinion it is not possible to distinguish the facts in the present case from those in *Mojey v. Queen-Empress (supra)*. Assuming that the appellant deceived Muttusamy and thereby induced him to attest the mortgage deed, a thing he would not have done unless he had been deceived, did such act cause or was it likely to cause damage or harm to Muttusamy in body, mind, reputation or property? There was no proof of damage or harm to body or property. Can it be said that there was damage or harm to mind or reputation? So far as reputation is concerned Muttusamy took every step that a careful Notary would take to protect the interests of his clients. I do not think damage or harm to reputation have been established. The possibilities of damage or harm to mind or reputation were in my opinion too remote to be in the contemplation of the Ordinance. I would also refer to my decision in the case of *Christinahamy v. Inspector of Police*¹. This was a case in which the prosecution was based on the alleged damage to the reputation of a Magistrate by an act of personation on the part of the accused.

In coming to this conclusion I have not lost sight of the decision in the case of *R. v. Bastian & others*². In this case the accused was charged with attempting to cheat a Notary by personation and it was held that the question whether the act would cause damage to the mind and reputation of the Notary was rightly left to the Jury. The case of *R. v. Bastian* was referred to in the judgment of Middleton J. in *The King v. Fernando*³ in the following passage :—

“As regards the first count on the indictment, the count was the same as in *Rex v. Bastian et al*⁴ 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, 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.”

In *Rex v. Bastian* it would appear that the Notary affected gave evidence to prove that such a personation would affect his reputation. There is no evidence by Muttusamy to the effect that the act of the accused in this case would affect his reputation. The cases of *Bastian* and

¹ (1946) 47 N. L. R. 382.

² (1902) 2 *Balasingham's Reports* 93.

³ (1912) 15 N. L. R. at p. 109.

⁴ (1902) 2 *Bal.* 93.

Fernando were considered in *The King v. Perera*¹ which was another case of personation. All these cases relate to cheating by personation and I can well understand that a Notary would suffer in mind and reputation if he had been deceived by such an act. In the present case, however, Muttusamy took every precaution and I am of opinion that the cases in question are not relevant when consideration is given to the act with which the accused is charged. I think I must follow *Mojev v. Queen-Empress*.

The conviction is therefore set aside.

Conviction set aside.
