1948 *Present :* **Nagalingam and Windham JJ.**

THE ATTORNEY-GENERAL, Appellant, *and*
ANTHONIPILLAI, Respondent

S. C. 111—D. C. (Criminal), Jaffna, 4,350

Penal Code—Using as genuine a forged permit—Document not legally valid—Forgery—Must document be capable of effecting the fraud ?—Section 459.

In order to constitute forgery it is not necessary that the false document should be such that, if it were in truth what it purported to be, it would possess some legal validity.

APPEAL from a judgment of the District Judge, Jaffna.

A. C. Alles, Crown Counsel, for the Attorney-General, appellant.

H. W. Jayewardene, for 1st accused respondent.

N. M. de Silva, for 2nd accused respondent.

Cur. adv. vult.

October 21, 1948. WINDHAM J.—

This is an appeal by the Attorney-General on points of law against the acquittal of the two accused in the District Court on the following charges. Count 1 was against both accused, under section 459 of the Penal Code read with section 113B, charging them with having, between May 8 and 12, 1946, at Jaffna, Elephant Pass and Marawila, conspired to use as genuine a forged permit to transport 80 hundredweight of red onions from Jaffna to Colombo purporting to have been issued to one S. Saravanamuttu of Puloly West, Point Pedro, knowing or having reason to believe it to be a forged document. Count 2 charged the 1st accused individually with the same offence, namely, using the permit knowing or having reason to believe it to be a forged document, contrary to section 459. Count 3 charged the 2nd accused with abetting the 1st accused in the commission of the offence under count 2. Count 4 charged the 1st accused with cheating, namely, with having, in the course of the above transaction, deceived A. Muttuthamby, " Assistant Government Agent (Emergency), Jaffna " (later amended to read " Staff Officer, Internal Purchase Scheme ") into the belief that the application for the permit referred to in count 1 was signed by one S. Saravanamuttu of Puloly West, whereas in truth and in fact he knew it was not signed by him, and thereby inducing the said A. Muttuthamby " to cause " the said permit " to be issued to the said Saravanamuttu, and that he has thereby committed an offence punishable under section 403 of the Penal Code ". Count 5 charged the 2nd accused with abetting the 1st accused in this offence of cheating under count 4.

The prosecution evidence, which was accepted by the learned District Judge, was briefly to the following effect. On May 8, the 2nd accused, a Government clerk, accompanied by the 1st accused, presented to Mr. Muttuthamby an application form for a permit to transport onions,

saying that it was the 1st accused who had brought the application, and that it was signed by S. Saravanamuttu, the wholesale dealer of Point Pedro. The application did in fact purport to be in the name of " S. Saravanamuttu of Puloly West, Point Pedro ", and it was for a permit to transport " 80 lbs. of red onions to Colombo by road for my domestic consumption ". The prosecution evidence showed, however, that the well known wholesale dealer S. Saravanamuttu, whom the 2nd accused represented to be the applicant, was not Saravanamuttu the applicant; and Mr. Muttuthamby made it clear in his evidence that he allowed the application to transport the 80 lbs. of onions, which he considered an exceptionally large quantity, because Saravanamuttu " was a good landed proprietor " ; in other words, he allowed it on the strength of the 2nd accused's misrepresentation. Throughout this interview the 1st accused was present, and said nothing. Mr. Muttuthamby accordingly allowed the application, and signed the permit P 2. When he signed it, however, the space in which the quantity permitted to be transported had to be inserted was left blank. But in the counterfoil to the permit, which had been filled in by the 2nd accused, the figure " 80 lbs " appeared, corresponding to the application. Upon noticing the omission in the permit Mr. Muttuthamby accordingly, with more trustfulness than caution, authorized the 2nd accused to fill it up. His evidence on the point was as follows :—" I noticed the omission and asked the 2nd accused to fill it up. At the time it was brought to me the counterfoil was filled up as 80 lbs. and I checked it with the application P 1. While signing I noticed the omission, and the 2nd accused undertook to fill it up ". This clearly constituted an authorization by Mr. Muttuthamby to the 2nd accused to fill in the blank space in conformity with the application and the counterfoil, in short to insert the amount " 80 lbs.", and no other or larger figure.

Both accused then departed. Two days later the 1st accused engaged a lorry at Jaffna and loaded 80 *hundredweight* of onions into it. The 2nd accused joined the 1st accused on the lorry before it had left Jaffna, and the two were seen talking together on it. At Elephant Pass the lorry was allowed to proceed southwards on its journey to Colombo, on the strength of the permit P 2, in which the blank space for the quantity had meanwhile been filled in with the figure " Eighty cwt." (hundredweight), in what was later shown to be the handwriting of the 2nd accused. At Marawila the lorry met with an accident and the 1st accused was injured and sent to the General Hospital, Colombo. The inquiry into the accident brought to light the circumstances leading to the present charges. From hospital the 1st accused handed to one G. Selvasamy the permit P 2 and an authorization in the words—" Please allow bearer G. Selvasamy to remove the load of onions ". The name " G. Selvasamy " was written immediately above the name " S. Saravanamuttu " which had been scored out.

Such was the evidence for the prosecution, which the learned District Judge accepted. He proceeded, however, to give judgment (apparently without calling upon the accused to answer the charges) acquitting both accused on all counts, mainly upon the legal grounds which are the subject of this appeal.

With regard to the charges of cheating, in counts 4 and 5, the learned District Judge acquitted the accused on the ground that the prosecution had failed to prove (as indeed they did fail) that the act which Muttuthamby was deceived by these accused into doing was likely to cause damage or harm to Muttuthamby in body, mind, reputation, or property, or damage or loss to the Government, as required by section 398 of the Penal Code, which defines cheating. Now section 398 contemplates two distinct types of inducement, constituting two distinct types of offence, as was pointed out in *Christinahamy v. Conderlag, Inspector of Police* [1]. The first is fraudulently or dishonestly to induce the person deceived to " deliver any property to any person, or to consent that any person shall retain any property ". The second is intentionally to induce the person deceived to " do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, or damage or loss to the Government ".

From this it is clear that where the person is induced to deliver property or to consent to its retention, that alone is sufficient to satisfy section 398, i.e., under the first part of it ; whereas if he is induced to do or to omit to do anything that he would not otherwise have done or omitted to do, other than delivering or consenting to the retention of property, then the second part of the section applies and the Crown is required to prove in addition that the act or omission induced is one likely to cause damage or harm to the person induced, in body, mind, reputation or property, or damage or loss to the Government. The Crown having failed to prove this, the charges under section 398 could only succeed if it could be shown first that they were framed under the first part of the section, and secondly, that the necessary elements of that part were proved, namely, that Mr. Muttuthamby was induced to deliver property or to consent to its retention. Now from a perusal of the relevant charge, count 4, it would appear at first sight that the Crown intended to charge the 1st accused under the first part of section 398, for it charges him with having " committed an offence punishable under section 403 " ; and section 403 is a section prescribing an enhanced punishment (imprisonment up to seven years) for cheating in particular circumstances, of which the only one relevant to the present case is where the offender thereby induces the person deceived to deliver any property to any person, as in the first part of section 398. Had the Crown intended to charge the accused with the offence set out in the second part of section 398, the offence would have been stated to be punishable not under section 403 but under section 400, which prescribes the general punishment for cheating.

But whatever may have been the intention of the prosecution in framing count 4, they failed to give effect to it ; for that count, in setting out the particulars of the offence, does not allege that the 1st accused by his deception induced Muttuthamby to *deliver* any *property* to anyone, as required by the first part of section 398, but that he induced him to " cause the permit to be issued to Saravanamuttu ". Thus even granting that the permit constituted " property " for the purpose of the first part of section 398, the count does not allege that Muttuthamby delivered it

[1] *(1946) 47 N.L.R. 382.*

to anybody. Nor was it proved that Muttuthamby in fact delivered the permit to Saravanamuttu. Clearly the particulars of count 4 allege that Muttuthamby was induced, not to deliver property, but to do an act which he would not have done but for the deception, namely, to cause the permit to be issued in the name of Saravanamuttu, and the evidence showed no more. In short the charge falls under the second part of section 398 and not the first part. The learned District Judge was therefore correct in holding that, in the absence of proof that the act caused or was likely to cause damage to Muttuthamby, or damage or loss to the Government, the charge of cheating against the 1st accused, under count 4, and with it the charge against the 2nd accused for abetting him therein, under count 5, must fail. The appeal, in so far as it relates to these two counts, is accordingly dismissed.

With regard to the charges under section 459, counts 1, 2 and 3, which relate to the use of the forged permit as genuine, two legal points have been argued. First, it is contended that the permit was not a forged document at all, on the ground that the alleged insertion by the 2nd accused of the words " eighty cwt." in the blank space, after its signature by Muttuthamby, did not amount to " making a false document " within the meaning of section 453. That section lays down that a person is said to make a false document who, *inter alia*, "without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or any other person . . . ." Now, what the 2nd accused did to the permit after its signature by Muttuthamby was clearly done without lawful authority, for the latter only authorized him to insert the words " 80 lbs.", in conformity with the application and counterfoil, and not to insert " 80 cwts". But it is argued that the 2nd accused did not " alter " the document, in that he did not change something in the document into something else, by erasing or scoring out what was there before, but merely added something to it, in a space which was blank. This is in my view a quite untenable restriction of the word " alters " in the section. First, the section speaks of altering " by cancellation *or otherwise* ". Secondly, the ordinary accepted meaning of the word " alter " is to make something different from what it was before, irrespectively of whether the change is effected by addition, deletion or substitution ; if I might venture a random instance, a clean shaven man may properly be said to alter his appearance by growing a beard (i.e., addition) no less than by shaving his head and wearing a wig (i.e., substitution). Thirdly, the illustrations (*c*) and (*d*) given under this section as examples of making a false document, namely, by inserting a sum in a blank cheque, without authority, are clear instances of " alteration " by material additions inserted in a blank space. This argument accordingly fails.

The next point of law raised is based on the fact that the prosecution failed to prove that Mr. Muttuthamby was a person authorized or empowered to issue permits for the transport of onions. The relevant piece of legislation, produced as exhibit P 9, is the Controlled Articles (Chillies and Onions) Order, 1943, and with the finding of the learned District Judge on its requirements, and on the evidence before him, I see no reason to disagree. He found as follows :—" It would appear

from document P 9 that it is only the Civil Defence Commissioner or a person authorised in that behalf by the Civil Defence Commissioner, who could validly issue a permit. Mr. Muttuthamby does not claim that he was Civil Defence Commissioner during the relevant period, nor has any document been produced to show that the Civil Defence Commissioner had authorized Mr. Muttuthamby to issue permits..... Mr. Muttuthamby is not an authorized person, and therefore any permit issued by him is ..... a useless piece of paper. No doubt the authority at Elephant Pass thought it valid and permitted the onions to pass his barrier, but that makes no difference. The permit P 2 is invalid ". The learned District Judge went on to point out that, although the words " Civil Defence Commissioner " in the above legislation were, at a date prior to the issue of the permit, amended to read " Director of Food Supplies ", the position remained the same, since Mr. Muttuthamby was not authorized to issue permits by the Director of Food Supplies, nor did he sign the permit for or on behalf of the latter but " for Deputy Food Controller ".

Thus far I see no cause to disagree with the findings of the learned District Judge, on the evidence before him. But he goes on to draw from them the legal conclusion that, since the permit was, for the above reasons, invalid *ab initio*, therefore the unauthorized alteration of it could not constitute a forgery for the purpose of section 452, and that it was not therefore a forged " document " such as it is required to be in order to support these charges under section 459 of the Penal Code. It was entirely on this ground as regards the 2nd accused, and partly on this ground as regards the 1st accused, that he dismissed the charges against them under counts 1, 2 and 3. The learned District Judge accepted the contention, which was advanced before us again on appeal, that in order to constitute forgery the false document must be such that, if it were in truth what it purports to be, it would possess some legal validity.

In short the test in the present case, it was argued, is whether the permit P2, had it in truth been issued by Mr. Muttuthamby for the transport of 80 hundredweight (and not merely 80 lb.) of onions, would have been a legally valid permit. And since by reason of Mr. Muttuthamby's lack of authority to issue such permits, it had no legal validity, no matter for what quantity it was issued, it is argued that it could not be the subject matter of a forgery.

This argument is quite unsupported by anything in the wording of sections 452 and 453 of the Penal Code, or in the definition of " document " in section 27. It appears, however, to be based on a passage quoted in Ratanlal and Thakore's " The Law of Crimes ", 16th edition, at page 1119, to the effect that to constitute forgery " it is essential that the false document, when made, must either appear on its face to be, or be in fact, one which if true, would possess some legal validity, or in other words *must be legally capable of effecting the fraud intended* ". Learned counsel for the respondents have stressed the words which I have italicized. This passage appears to be a quotation from an Indian case *Jawala Ram* [1], of which I have been unable to obtain a copy. But with the greatest respect I cannot agree that the passage stressed sets

[1] (*1895*) *Punjab Reports*

out correctly the law on the point. To begin with, the passage italicized is not consistent with the words appearing earlier in the same quotation namely the words " must *either* appear *on its face to be*..... one which, if true, would possess some legal validity ". For a false document may well be, as the permit P2 in the present case is, such that, if it were true, it would not be *legally* capable of effecting a fraud, and yet might at the same time *appear on its face to be* a document possessing some legal validity. The passage is thus self-contradictory and cannot be relied on.

The correct statement of the law on the point, in my view, is that laid down in another Indian case, *Ramasami Iyer v. Emperor* [1] where in interpreting section 464 of the Indian Penal Code, reproduced as section 453 of the Ceylon Penal Code, the court pointed out that " there is nothing in the section which requires that the document so altered shall be legally effective and valid in order that an alteration should, in the circumstances set out, constitute the offence of making a false document", and accordingly rejected counsel's argument that the alteration of the document in that case, by reason of the fact that the document when altered was incomplete and legally ineffective, could not amount to making a false document.

To put the matter briefly, all that was necessary to make the permit P2 a forged document was that, when the 2nd accused inserted in it the words " eighty cwt. " he should have done so dishonestly or fraudulently, as required by section 453. Gour, in his Penal Law of India, 5th edition at page 1576 puts the matter thus :—" Though section 464 defines a ' false document ' as something distinct from ' forgery ' as defined in section 463, it is clear that the simple making of a false document as defined in section 464 amounts to forgery as defined in section 463 ". Sections 463 and 464 in the Indian Penal Code correspond respectively to sections 452 and 453 in the Ceylon Penal Code. In the present case the prosecution evidence was sufficient to establish that the 2nd accused, when he inserted the words " eighty cwt." in the permit which Muttuthamby had signed, without the latter's authority, did so dishonestly or fraudulently. Clearly, on the evidence adduced, he intended the permit to be accepted by the customs officials at Elephant Pass and elsewhere as a legally effective permit for the transport of 80 cwt. of onions, as in fact they did accept it. That alone was sufficient to make the permit a forged document. It would indeed appear exceedingly unlikely that either the 2nd accused or even Muttuthamby himself knew that Muttuthamby was in fact not legally authorized to issue the permit ; but in any case that fact, for the reasons I have given, was legally irrelevant to the question whether P2 was a forged document. I accordingly hold that the learned District Judge erred in acquitting the 1st and 2nd accused on counts 1, 2 and 3 on the ground that the permit P2 was not a forged document.

One further point remains to be considered. In dealing with the charge against the 1st accused in count 2 (and his observations would seem to apply also to the charge of conspiracy in count 1) the learned District Judge, after dismissing those charges on the point of law which I have just considered, proceeded to state that the evidence against the 1st accused was insufficient to show that he used the permit P2 " knowing

[1] *A.I.R. (1918) Madras, 150*

the same to be a forged document ", since there was nothing to show that the 1st accused might not have honestly believed that, after the interview of both accused with Muttuthamby, the 2nd accused had obtained permission to transport a larger quantity of onions, namely 80 cwt., and that the figure " 80 cwt." had thus been inserted honestly. It is accordingly urged that this amounted to an acquittal of the 1st accused on the facts, which should not be reversed on appeal. This contention might have been acceded to but for the fact that the learned District Judge does not appear to have directed his attention to the wording of section 459 of the Penal Code, under which these accused were charged, and to the wording of count 2 itself, which follows that of the section. That section provides that " Whoever fraudulently or dishonestly uses as genuine any document which he knows *or has reason to believe* to be a forged document " shall be punished as if he had forged it. The learned District Judge merely finds that there was insufficient proof that the 1st accused knew the permit to be forged, without going on to consider whether the evidence was sufficient to show that he had reason to believe it to be forged, which requires a lesser degree of proof than actual knowledge. I cannot therefore hold that the learned District Judge acquitted the 1st accused, on the evidence, of the offence with which he was charged. And the circumstances disclosed by the evidence itself, in particular the silent acquiescence of the 1st accused when the 2nd accused falsely described the applicant Saravanamuttu to Muttuthamby, indicating a guilty mind at the outset on the part of the 1st accused, might well have been considered by the trial judge, if not as proof of his knowledge that the subsequent insertion of the figure " 80 cwt. " by the 2nd accused was fraudulent, at least as showing that he had " reason to believe " that it was fraudulent, which expression is defined in section 24 of the Penal Code as " having sufficient cause " to believe it.

In all the circumstances I think that justice would be better served by remitting this case for re-trial on counts 1, 2 and 3, rather than by remitting it for completion. The appeal is accordingly allowed in respect of those counts, and the case remitted for re-trial thereon before a different District Judge.

NAGALINGAM J.—I agree.

Sent for re-trial.