1941

Present : **Howard C.J.**

ZAHIR *v.* COORAY.

690—M. C. Panadure, 8,382.

Cheating—Charge as set out discloses no offence—Proof of different manner of cheating—Conviction bad—Criminal Procedure Code, ss. 171 and 172.

Where in a charge of cheating, the manner of cheating set out in the charge did not in law constitute the offence, the charge would be insufficient to sustain a conviction although a sufficient manner of cheating has been proved.

***Welakka v. Deyonis Appuhamy* (8 S. C. C. 56) followed.**

APPEAL from a conviction by the Magistrate of Panadure.

G. P. J. Kurukulasuriya, for the accused, appellant.

M. M. I. Kariapper, for the complainant, respondent.

Cur. adv. vult.

January 28, 1941. HOWARD C.J.—

In this case the appellant was convicted and sentenced to pay a fine of Rs. 200 in default three months' rigorous imprisonment for cheating in contravention of section 400 of the Penal Code. The charge was worded as follows :—

"Intentionally deceive A. A. M. Zahir, Manager, Razeena Stores, Panadure, by tendering in payment of sundry goods purchased by you during the month of April, 1940, cheque No. 0540 of the 15th May, 1940, drawn by you on the Bank of Ceylon, Colombo, for Rs. 130 and thereby induced the said A. A. M. Zahir to enter up payment of your April account in the said A. A. M. Zahir's books which cheque was dishonoured by the Bank on the 22nd May, 1940, as you had closed your account in the said Bank, and that you thereby committed an offence punishable under section 400 of Chapter 15 of Legislative Enactments."

The offence of cheating is defined in section 398 of the Penal Code. In order to establish such an offence it must be proved that the deceit induced the person deceived to do or omit to do something 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 to that person in body, mind, reputation or property. In this case it was alleged that the deceit of the appellant induced the complainant to enter up payment of the appellant's April account in his books. It was not established that such entering up of payment had caused or was likely to cause damage to the complainant.

[1] *20 N. L. R. 44.*

The Magistrate in his judgment, realizing that the charge as framed did not disclose an offence, agreed with Counsel for the appellant that it was defective. He held, however, that an offence under the section of cheating" had been established inasmuch as the complainant in his evidence had stated that as the result of receiving the appellant's cheque he was induced to give further goods on credit, a thing that he would never have done but for this dishonest inducement. The Magistrate further held that such giving of further credit had caused definite damage and harm to the complainant. He was, moreover, of opinion that the defects in the charge had been cured in terms of section 171 of the Criminal Procedure Code. In this connection he stated that he was satisfied that what had happened at the trial of this case was exactly what is contemplated in illustration (*b*) to this section. There is no doubt that the evidence did establish the commission of the offence of cheating and the only question that arises is whether the defects in the charge are curable under the provisions of section 171. It would appear that such defects were not apparent to the parties and the Magistrate until the latter had embarked on the preparation of his judgment. Otherwise it is difficult to understand why the charge was not amended under section 172. There is no doubt the words of section 171, with its illustrations, are very comprehensive and designed to ensure that technicalities shall not impede the due and efficient administration of justice. Having regard to the fact that the case was contested on the assumption that the appellant had to meet the charge as originally framed, I do not think it can be said that he has not been misled by the error in stating the particulars. I am, however, further fortified in the opinion I have formed by the decision of Burnside C.J. in *Welakka v. Deyonis Appuhamy*[1], when the point at issue in this case was decided. In the course of his judgment the learned Chief Justice stated as follows :—

> "Then, if the manner is set out, as in the present case, and discloses that no cheating took place, is such defect covered by the illustration to clause 200, which I have already quoted—'If the charge is set out incorrectly the Court may treat it as immaterial?' I think not. But I have not arrived at the conclusion without much consideration. I think the word 'incorrectly' means incorrectly as to the fact, but not as to the law, *i.e.*, that the manner of cheating set out in the charge may be different from the manner of cheating proved; not that the manner of cheating set out may not constitute the offence 'to cheat', or, in other words, a charge would be good, although the manner in which the cheating was effected, as stated in the charge, varied from the manner proved, if, nevertheless, it constituted the offence to cheat; but a charge would be bad and insufficient to sustain a conviction which stated a manner of cheating which did not in law constitute the offence 'to cheat', although a sufficient manner of cheating had been proved."

On the authority of this judgment I, therefore, hold that the charge could not be cured under the provisions of section 171. I, therefore, quash the proceedings and remit the case to be tried by a different Magistrate on a new charge of cheating.

Quashed.

[1] *8 S. C. C. 56.*