Present : Bertram C.J. 1918.

THE KING *v.* SILVA.

149—D. C. (Crim.) Galle, 14,136.

Cheating—Borrowing money by uncertified insolvent without disclosing the fact of his insolvency—Penal Code, s. 398.

The accused borrowed a sum of money from a money lender without disclosing to him that he was at the time an uncertified insolvent. The certificate had not at that time been refused, but was refused subsequently to the loan.

Held, that the accused was not, in the circumstances of this case, guilty of cheating.

THE facts appear from the judgment.

Bawa, K.C., and *J. S. Jayawardene*, for accused, appellant.

Obeyesekere, C.C., for the Crown.

Cur. adv. vult.

August 29, 1918. BERTRAM C.J.—

In this case the appellant has been convicted of cheating, on the ground that he borrowed Rs. 500 from the prosecutor, a Chetty, without disclosing to him that at the time he was an uncertificated insolvent. The certificate had not at the time been refused, but was refused subsequently to the loan.

It was contended before the District Judge that the facts did not disclose the offence of cheating, on the ground that there was no legal duty upon the borrower to disclose the fact that he was an insolvent. The District Judge in his judgment said: "I agree that this cannot be the case. The Legislature has not codified such a duty, because I presume it never contemplated that it could be regarded as anything else than fraudulent. Dishonesty is wrongful gain at the expense of, or loss to, another; and this covers borrowing money without intention to repay, and concealing from the other party the impossibility of his recovery. It is not a case of a money lender taking risk. And, as prosecuting counsel has pointed out, there is no authority for the contention that concealment of facts does not amount to deception unless there is a duty to disclose. *Suppressio veri*, if misleading, is as dishonest a misrepresentation as a false statement."

What we have to consider, however, is not the moral conduct of the accused, but the question whether he has committed an offence within the meaning of section 398 of the Penal Code, under which

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any person who, " by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property" is declared to be guilty of cheating. The question arises under the explanation appended to the section, which declares that " a dishonest concealment of facts is a deception within the meaning of this section, " and illustration (*i*), which as an illustration of such a " dishonest concealment " cites the case of a man who sells or mortgages to another man an estate which he has already conveyed to a third person without disclosing the fact of such previous conveyance.

I am not prepared to assent to the proposition that any person who in the course of a transaction with another fails to disclose any circumstance which might, if known, have an effect on the conduct of the other party to the transaction is guilty of cheating. Such a rule would be putting a strained and unnatural meaning upon the word " deceives, " and cannot, in my opinion, be intended by the terms of the " explanation. " Nor do I think that the question whether such a person " deceives " the other within the meaning of section 398 necessarily depends upon the question whether he has a " legal duty " to disclose the circumstance in question. This is taken as the test of the matter in the Indian case of *The Emperor v. Bishan Das*,[1] where the Court said: " I have no hesitation in holding that the dishonest concealment of facts referred to in the explanation to section 415 is a dishonest concealment of facts which it is the duty of the person concealing them to disclose to the person with whom he is dealing. " It appears from the context that by " duty " the learned Judge there means " legal duty, " and not " moral duty. "

It is no doubt clear from the illustration (*i*) that the word " concealment " covers a mere non-disclosure, but to bring such a non-disclosure within the meaning of the section, the concealment must be a dishonest concealment, that is to say, it must be made with the intention of causing wrongful gain to one person or wrongful loss to another. There are certain transactions in which the law casts a " legal duty " to discuss any material fact upon the person to whom it is known. These are transactions in which, either because of the relationship between the parties, or because of the subject-matter of the transaction, the law insists on *uberrima fides;* and if this *uberrima fides* is not displayed, the Court will set aside the transaction. In this way the law indicates that any gain acquired by the person not making the necessary disclosure is a wrongful gain, and it may very well be that a person who induces another person by a non-disclosure of some material fact to enter into such a transaction is guilty of cheating. It is not necessary to decide the point here, because the case under consideration does not belong

[1] (*1905*) *I. L. R. 27 All 561.*

to this class of cases. The law does not require *uberrima fides* as between a person borrowing money and a person lending it.

I question very much whether this was the class of cases which the legislator had in mind, and certainly he gives no illustration drawn from this class. In my opinion the cases he primarily had in mind, when he said that a " dishonest concealment of facts is a deception within the meaning of this section, " were cases in which the concealment of facts amounted in effect to a false representation. Thus, where, as illustration (*i*), a man sells an estate to another without disclosing the fact that he has already sold it to somebody else, the offer of the estate for sale is in effect equivalent to a representation that he has it for sale. Similiarly, if a man goes into a restaurant and orders a dinner, or takes his place in a tram car or stage coach, and is given the dinner or is conveyed part of his journey, his conduct is in effect a representation that he has with him money to pay the bill or pay his fare, and if he has not money with him and knows it, he may be guilty of cheating. But it cannot be said in this case that when the borrower applied for the loan, his application was in effect a representation of anything except perhaps a representation of an intention to repay the loan in due course. There is nothing to show that the appellant did not so intend. He may well have hoped to obtain his certificate, or, even if he did not obtain his certificate, to get the amount made good by his relations.

The case is in effect covered by English authorities. In *ex parte Whittaker, in re Shackleton*,[1] the facts were that a person who had committed an act of bankruptcy, and against whom a bankruptcy petition had been presented, bought wool at an auction. He was subsequently adjudged a bankrupt, and, as the title of the trustee in bankruptcy related back to the act of bankruptcy, the wool vested in the trustee, the vendor, who was unaware of the purchaser's embarrassed circumstances, having allowed him to take away the wool without payment. The transaction was held not to be fraudulent. Lord Justice James said: " A man buying is not bound to tell all his affairs to those with whom he deals, though he must not say anything which amounts to a misrepresentation. I cannot say that Shackleton bought these goods without any intention of paying for them." Lord Justice Mellish said: " We need not go into the question whether mere silence may not in some cases amount to a misrepresentation. It would be outrageous to hold that Shackleton, when he purchased, was bound to make any statement to the vendor as to his pecuniary circumstances, so there is nothing to affect the validity of the contract. It is true, indeed, that a party must not make any misrepresentation, express or implied; and, as at present advised, I think that Shackleton when he went for the goods must be taken to have made an implied

[1] (*1875*) *10 Ch. Ap. 446.*

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representation that he intended to pay for them, and if it were clearly made out that at that time he did not intend to pay for them, I should consider that a case of fraudulent misrepresentation was shown. But I do not think this sufficiently made out. "

Two cases were cited on behalf of the Crown. One was an unreported case, in which Schneider A.J. upheld the conviction in a case in which the accused treated for the sale of property without disclosing the fact that the land was subject to an existing mortgage. The learned Judge said: " It was clearly, therefore, the duty of the accused to have disclosed the existence of this mortgage to the intending purchaser. He did not do so. Such concealment amounts to a wilful misrepresentation. " But in that case the facts show that the deed contained a statement that the land was " free from encumbrance, " and that this was read out in the presence of the accused, and that the accused did not contradict it.

In the other case, The *King v. Lavena Maricar*,[1] a person obtained money on a mortgage of property, which at the date of the mortgage was under seizure, without disclosing the fact that it was under seizure, and was held guilty of cheating. In that case, however, the accused had expressly stated that there was no encumbrance on the property, and a seizure under a writ was held to be fairly included in the term " encumbrance. "

For the reasons above explained, the appeal is allowed, and the accused acquitted and discharged.

Appeal allowed.

[1] *(1907) 10 N. L. R. 369.*