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Present: ENNIS A.C.J.

THE KING *v.* WIJESINGHE.

104—D. C. (Crim.) Kandy, 3,082.

Charges of cheating three persons on three different occasions—one indictment—One trial—Criminal Procedure Code, s. 279—Evidence to prove that accused cheated others inadmissible—Evidence Ordinance, s. 25—Admission by accused to a witness that he was in the habit of taking illegal gratifications—Inadmissible evidence—Former statements of a witness made one year after the alleged fact—Corroboration—Evidence Ordinance, s. 157.

Accused was charged on one indictment with having cheated three different milk vendors and obtained money on false pretences on three different occasions within one year. The prosecution wanted to call witnesses to prove that accused had committed other offences of the same kind.

Held,[1] that such evidence was inadmissible. Section 25 of the evidence Ordinance allows evidence of this nature where there is a question as to whether an act was accidently or intentionally

[1] *(1854) 10 Ex. Rep., p 222.*

done, or done with a particular knowledge; but it is admitted only to show the absence of accident or the presence of intention, but not to prove the original fact itself.

A witness gave evidence that the accused admitted that he had been in the habit of taking illegal gratifications from milk vendors; no particular milk vendor was mentioned.

Held, that the evidence was inadmissible; it was not a confession in respect of the offennce charged, but merely evidence of bad character.

Section 279 of the Criminal Procedure Code which provides for three offences of the same kind committed within one year being tried at one trial is only permissive.

Former statements of a witness made one year after the alleged fact took place is inadmissible for corroborating the evidence of such witness.

THE facts appear from the judgment.

Bawa, K.C. (with him *G. V. Perera*), for the appellant.

Jansz, C. C., for the Crown.

September 5, 1919. ENNIS A.C.J.—

In this case the accused was charged on one indictment with three distinct offences of the same kind alleged to have been committed in the course of one year: (1) That he cheated one Tikiri Menika on January 11, 1917, by pretending that a fee of Rs. 10 was payable for a certificate of registration of a dairy, and that he thereby deceived Tikiri Menika and induced her to pay him Rs. 10. He was secondly charged with cheating one Mudiyanse in similar circumstances in a similar sum on the same day. He was thirdly charged with cheating one De Silva on January 29, 1917. This charge was originally framed in respect of a sum of Rs.10. But it would seem that at some time during the trial—when it does not appear— the charge was amended, so that it now reads " that the accused cheated by falsely pretending to De Silva that a fee of Rs. 5 was payable for a certificate of registration of a dairy, and that he thereby deceived De Silva, and fraudulently and dishonestly induced him to pay Rs. 10. " Possibly this is a mistake, and it was intended that the figure Rs. 10 should be altered to Rs. 5 in both places. Be that so or not, the same mistake is repeated in the conviction form which the learned Judge has signed. Technically, therefore, the conviction on the last count without a proper alteration of the charge and in the conviction sheet is bad.

The evidence against the accused on the three charges, when it has been analysed to eliminate a mass of inadmissible evidence in the case, resolves itself into the word of Tikiri Menika against the word of the accused, the word of Mudiyanse against the word of the accused, and the word of De Silva against the word of the accused,

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and, therefore, the main question for consideration in each case is the question as to which of the conflicting statements can be taken as the more reliable. It was urged on appeal that the accused has been prejudiced by the trial of three offences at the same time, prejudiced in this that the fact that other charges were made against him has led to the suspicion that each of them severally must be true. Section 279 of the Criminal Procedure Code permits of three offences of the same kind being tried at one trial. But it is only permissive, and it was open to the Court, when objection was taken at the beginning of this trial, to have directed a separate trial in respect of each of the separate offences. It did not do so, but was satisfied to let the trial proceed as it stood. During the hearing of the case for the prosecution it became clear that the prosecution relied upon the evidence of other offences of the same kind in order to induce a belief that the accused was guilty, and it was actually attempted to call other witnesses to prove other offences not included within the indictment. The learned Judge very properly over-ruled this. But the conduct of the case shows that the view of the prosecution was that such evidence was admissible, and it is exactly that point which has to be considered when one weighs how far the accused may have been prejudiced by having three charges to meet at once. Section 15 of the Evidence Ordinance allows evidence of this nature where there is a question as to whether an act was accidentally or intentionally done, or done with a particular knowledge, and then it is open to the prosecution to prove a series of similar acts in each of which the person doing the act was concerned. But it is significant to notice that the illustrations show quite clearly that where such evidence is admitted, it is admitted only to show the absence of accident or the presence of intention, but not to prove the original fact itself. For instance, where an accused was charged with burning down his house in order to obtain money for which it was insured, evidence that the accused had lived in a number of houses successively which he had insured and that in each of them a fire had occurred was admissible to show that the fire in the case under trial was not accidental; but that evidence is not admissible to prove the main fact that the accused fired the house.

In the present charge of cheating there is no question of accident or intention, and there was nothing suggested in the defence to call for any evidence in rebuttal, so that the evidence of other acts of a similar kind merely became evidence of character, and to lead evidence of the bad character of the accused is inadmissible and prejudicial to the defence. The conviction, however, does not stand in the judgment on a mere belief in the evidence of Tikiri Menika, Mudiyanse, and De Silva. The Judge has dealt very largely with the evidence of one Dr. Attygalle, and has given reasons for accepting the truth of that evidence. The whole of that evidence, so far as I am able to see, was inadmissible, and served only to raise

a cloud of prejudice against the accused. Dr. Attygalle was allowed to give evidence in corroboration of Tikiri Menika, that she had made a statement to him which was consistent with the statement she had made to the Court, namely, that she had paid Rs. 10 to this accused. But it appears from Dr. Attygalle's evidence that Tikiri Menika made these statements to him nearly a year after the alleged act is said to have taken place, and, therefore, under section 157 of the Evidence Ordinance, the evidence was wholly inadmissible. Further Dr. Attygalle was allowed to give evidence of an alleged confession made by the accused. This evidence is not confined to the commission of any offence charged in the indictment. Dr. Attygalle nowhere says that the accused admitted specifically any one of these three charges. His words are: " He " (the accused) " said that he had heard I had reported him to the Chairman for taking illegal gratifications from milk vendors, and either that I was going to take steps about it, or bring a motion in Council. I told him I had done nothing of the kind, but that I was going to report him to his superior officer. He begged of me not to do anything. He admitted that he had done so, and that he followed the practice of his predecessor." Now, this admission is not an admission of any specific offence, but an admission apparently that he had been in the habit of taking illegal gratification from milk vendors. No particular milk vendor is mentioned. It, therefore, was not a confession in respect of the offence charged. It was merely evidence against the character of the accused, and as such was inadmissible. Now, the story of Dr. Attygalle was sought to be supported by Mr. Grenier, who on this point made the following statement: " He " (Dr. Attygalle) " told me that several milk vendors had complained to him that the accused had levied fees for issuing the certificates; that he had questioned the accused, and the accused admitted having taken fees; and that he had two witnesses in an adjoining room who had overheard the conversation between him and the accused." Here, again, there is no specific mention of any of the offences in the indictment, but merely a general allegation relating to several milk vendors. But when it comes to be regarded as corroboration of Dr. Attygalle's evidence, one can only remark that it is singular that it should be sought to support Dr. Attygalle's evidence by means of proof of a previous statement made by him, instead of by calling the two witnesses who were in the inner room and overheard the conversation of the accused. It is further to be observed that Dr. Attygalle in his evidence makes no mention of these two witnesses who were in the inner room. Dr. Attygalle's evidence is inadmissible, and so, in substance, is the whole of Mr. Grenier's evidence. Dr. Hay was also called. His evidence is to the effect that he was the authority who issued the certificates, that is to say, they were signed by him, and were issued through his office by the accused. Dr. Hay's evidence is simply to this effect: He swears

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that he received no complaint of any kind, and it does not appear that Dr. Hay is in any way inaccessible to milk vendors or others. The admission of the inadmissible evidence against the accused must seriously have prejudiced him, and on that ground alone it would not be safe to leave this conviction. But I would go further and examine the evidence such as it is against the accused, and, as I have mentioned, it is the evidence of the three persons, Tikiri Menika, Mudiyanse, and De Silva . . . . He (the accused) denies specifically the charges against him, and the case, therefore, stands on the oath of an official who had to do his duty against the oath of three milk vendors severally. The evidence of the accused is not lightly to be set aside, because in the event of a false case against him he is perfectly helpless. He can do no more than give his own sworn testimony, and a conviction against him standing in each case on the word of one witness only, and the reliability of that witness buttressed up a cloud of inadmissible evidence is doubtful and should not be allowed to stand. I accordingly set aside the conviction, and make no further order in the case.

Set aside.