

Present : Jayewardene A.J.

1924.

SILVA v. RAHIMAN.

465—P. C. Balapitiya, 3,950.

*Appal—Order of discharge—Sanction of Attorney-General—Criminal Procedure Code, s. 191—Cheating—Penal Code, ss. 400 and 403.*

An order of discharge under section 191 of the Criminal Procedure Code does not amount to an acquittal, and an appeal lies to the Supreme Court from such an order without the sanction of the Attorney-General.

Where a person is charged with cheating and delivery of property has been the result of the deception, the offence disclosed is one under section 403 and not under section 400 of the Penal Code.

THE accused was charged with cheating under section 400 of the Penal Code by inducing the complainant to pay Rs. 100 on the promise of delivering some rubies. After the evidence of the complainant, the Acting Police Magistrate directed summons to issue on the accused. When the accused appeared on February 25, 1924, before the permanent Magistrate, he was charged from the summons and made a long statement. On March 10, the Magistrate without allowing the complainant to lead any further evidence acquitted the accused. The complainant appealed against the order.

H. V. Perera, for appellant.

August 22, 1924. JAYEWARDENE A.J.—

In this case the accused was charged with cheating, in that he had induced the complainant to pay Rs. 100 on the promise of delivering some rubies. The rubies were not delivered, and the complainant charges the accused under section 400 of the Penal Code. The complainant gave evidence before Mr. Alwis Proctor, who was acting as Police Magistrate and who directed summons to issue on the accused. When the accused appeared on February 25, 1924, he was charged from the summons and made a long statement before the permanent Magistrate. The permanent Magistrate without allowing the complainant to lead any further evidence acquitted the accused on March 10, 1924, which was the date fixed for the resumption of the trial. I need not examine the reasons given by the Magistrate, but I may say that they are not sufficiently strong to have led him to acquit the accused at the stage at which the order of acquittal was made. The complainant appeals against this order. The learned Magistrate thought this appeal was irregular because it has not been

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sanctioned by the Attorney-General under section 336 of the Criminal Procedure Code. There I think, the learned Magistrate was mistaken. Orders of discharge under section 191 have always been regarded as appealable (see the case of *Gunaratne v. Bernado*<sup>1</sup> and the case of *Suppiah v. Loku Banda*<sup>2</sup>) where it was held that an order under section 191 did not amount to an acquittal, but that it was a discharge of the accused person from which there is an appeal to the Supreme Court. In view of these judgments the view of the learned Magistrate is erroneous. The offence disclosed in the evidence of the complainant shows that he was induced to part with property as a result of the deception practised on him. If that is so, the proper section under which the accused should be charged is section 403, and a charge under section 403 is not summarily triable, but is triable, by the District Court or the Supreme Court. It has been held in certain cases (see 371—P. C. *Badulla-Haldummulla*, No. 7,419<sup>3</sup> and 204—P. C. *Puttalam*, No. 8,750,<sup>4</sup> that where delivery of property has been the result of a deception, the offence is one triable under section 403 and not under section 400. In the former case Pereira J. said: "The facts clearly disclosed an offence under section 403 of the Penal Code, that is, cheating, and thereby dishonestly inducing the person deceived to deliver any property (namely, money in this case) to any person. This is an offence beyond the summary jurisdiction of the Police Court. I quash the conviction and the summary proceedings, and remit the case to the Police Court for non-summary proceedings." I think in this case the ruling I have just referred to applies, and the Magistrate should take non-summary proceedings under chapter XXVI. of the Criminal Procedure Code. The order of discharge is accordingly set aside, and the case is remitted to be proceeded with in due course. I may also point out that the order of the Magistrate acquitting the accused at the stage at which he made the order is not warranted by the Code, and that the order should have been one of discharge only.

*Set aside and sent back.*

<sup>1</sup> (1904) 2 Bal. Rep. 32.

<sup>2</sup> (1916) 3 C. W. R. 127.

<sup>3</sup> S. C. Min. of May 19, 1915.

<sup>4</sup> S. C. Min. of March 1, 1916.