

1938

Present : Abrahams C.J.

HANIFFA v. SALIM.

711—P. C. Galle, 15,513.

Cheating—Jewellery entrusted to accused to be pawned—Redemption of jewellery by accused by false declaration—Nature of the offence—Penal Code, s. 398.

The accused was entrusted with some jewellery by H to be pawned. He pawned the jewellery and delivered the pawn ticket to H. after endorsing it. The accused thereafter represented to the pawn broker that he had lost the pawn ticket, made the requisite statutory declaration under the Pawn Brokers' Ordinance, and redeemed the jewellery.

Held, that the accused had committed the offence of cheating under section 398 of the Penal Code.

Theft is the taking dishonestly of movable property out of the possession of any person without that person's consent and the fact that that consent is obtained by means of a deception does not render it any the less a consent within the meaning of that definition.

Eliyatomby v. Kadiravel (37 N. L. R. 16) and *Silva v. Kangany* (10 C. L. R. 32) not followed.

A PPEAL from a conviction by the Police Magistrate of Galle.

L. A. Rajapakse, for accused, appellant.

Colvin R. de Silva (with him *Barr Kumarakulasinghe*), for complainant, respondent.

January 4, 1938. ABRAHAMS C.J.—

The appellant in this case was charged with committing theft of a necklace worth Rs. 450 belonging to one C. L. M. Haniffa. These were the facts of the case for the prosecution. The appellant was entrusted by one Haniffa, who is his uncle, with a gold necklace to pawn. The ticket was handed to Haniffa by the appellant who endorsed it in pencil. Subsequently Haniffa wanted to redeem the article and on going to the pawnbroker he discovered that he had been forestalled by the appellant who had made a statutory declaration to the effect that he had lost the pawn ticket, and had, on the faith of that affidavit, been permitted by the pawnbroker to redeem the article which he then repawned with the same pawnbroker and subsequently redeemed.

The defence of the appellant was immaterial, since on the facts, as found, he does not press his appeal, and the grounds of appeal as set out in his petition were entirely restricted to criticisms of the evidence and the Magistrate's inferences. He argues now, however, that his conviction for theft was wrong inasmuch as the pawnbroker voluntarily parted with the property. On the question of the exact offence which the Magistrate found the appellant had committed the exact words of his judgment may be quoted :—

“On the evidence in the case I have no doubt that the accused redeemed the article by swearing a false affidavit. Now the question to be decided is whether his act amounted to theft. It is argued for

the defence that the accused has not committed that offence inasmuch as the necklace was not taken from the complainant's possession. It is true that the necklace was not taken from the complainant's possession, but it was taken from the possession of the Chettiyar by a trick. By doing so the accused has committed what in English law would amount to larceny by a trick.

“In this case the accused could not get the necklace without the complainant's consent and without producing the pawn ticket which was with the complainant, and it would be theft if the accused dishonestly possessed himself of it with the intention of appropriating it”.

“Now the Magistrate's view of what the offence would be in English law is, I conceive, quite correct, but it is not always safe to go to English law for an interpretation of the Ceylon Penal Code. Theft under the Code is the taking dishonestly of movable property out of the possession of any person without that person's consent, and the fact that that consent is obtained by means of a deception of this nature does not render it any the less a consent within the meaning of that definition. The question, however, arises as to whether the appellant could have been properly convicted of any other offence on the facts, and it appears to me that the offence that he committed was cheating by deceiving a pawnbroker by means of this false affidavit representing that he had lost the ticket, and so dishonestly inducing him to deliver the pawned necklace to him. It was argued by Counsel for the appellant that in view of the fact that the pawnbroker was indemnified under section 19 (2) of the Pawnbrokers' Ordinance he had suffered no damage, and therefore a conviction for cheating could not be had, and he cites in support of his argument the case of *Eliyatamby v. Kathiravel*¹. I have examined that case, and the facts therein appear to be completely indistinguishable from the facts in this case. Mr. Justice Drieberg there stated that the conviction on the charge of cheating was wrong, and that under section 19 (2) of the Pawnbrokers' Ordinance the pawnbroker was indemnified when he gave the accused the article, and on the accused giving him the false declaration the pawnbroker suffered no damage or harm by acting on the false representation in the declaration and he could not therefore have been cheated. The learned Judge then went on to discuss the finding of the Police Magistrate in that particular case that the pawnbroker was injured in body, mind, and reputation, and that this comprised the necessary element of the offence, and the learned Judge disagreed with the learned Police Magistrate and set aside the conviction on the charge of cheating. With all respect to the learned Judge, I must differ from this finding which, it would appear from his judgment, in all probability was based on the fallacy that the words of the second half of section 398 of the Penal Code governed the words of the first half. Mr. Justice Akbar made, if I may say so with respect, a similar error in the case of *Silva v. Kangany et al*². An analytical examination of section 398 will disclose that the two portions of the section are not to be read together beyond the words indicating deception. Provided only that the deception is practised dishonestly, that is to say, with the intention of causing wrongful gain—that is gain by unlawful means—I do not think that it matters whether

¹ 37 N. L. R. 16.

² 10 C. L. R. 32.

the person who is deceived and so delivers the property suffers any harm or damage, in fact suffers anything beyond the technical loss of the possession of the property. Were the law otherwise, it is manifest that a good deal of crime punishable under English law would not be punishable under the Indian Penal Code on which the Ceylon Penal Code is based, which Code was intended to enmesh all offences of dishonest appropriation or acquisition of property under English law, and also other dishonest acts beyond the reach of the English law. The fact that the pawnbroker upon whom the deception was practised is not the complainant, is not, I think, to the purpose. A complaint from him is not required in order to launch proceedings. I alter the conviction to one of cheating, and dismiss the appeal.

Varied.