

1945

Present: Soertsz A.C.J. and Keuneman S.P.J.

FERNANDO, Appellant, and THE KING, Respondent.

42—D. C. (Crim.), Colombo, 679.

Forgery—Cheating—Meaning of “dishonestly” and “fraudulently”—Penal Code, ss. 453, 459 and 403.

Where the accused, by producing a prescription bearing the forged signature of a doctor, attempted to buy a price-controlled article from a person who used to supply it only on doctors' prescriptions but who would have incurred a penalty under the Control of Prices Ordinance by refusing to sell it except on a prescription—

Held. that the accused had acted both dishonestly and fraudulently and was guilty, under sections 459/490 and 403/490 of the Penal Code, of attempting to use as genuine a forged document and of an attempt to cheat.

Soertsz, A.C.J.—“Thus, it will be observed that ‘fraudulently’ is wider than ‘dishonestly’ for it is not confined to the acquisition of wrongful gain or to the infliction of wrongful loss measurable in money's worth, but embraces injury to mind or reputation to take two instances”.

Rez v. Periyatamby (1902) 5 N. L. R. 338, distinguished.

A PPEAL from a conviction by the District Judge of Colombo.

L. A. Rajapakse, K.C. (with him *L. E. J. Fernando* and *B. S. R. Jayawickreme*), for the accused, appellant.—Sanatogen is an article the price of which is controlled—*Gazette No. 8,991 of August 21, 1942*. Where the maximum price above which an article may not be sold is laid down, it is an offence to refuse to sell a reasonable quantity of that article; and it is an offence to attach any condition to the sale of that article—*Gazette No. 9,019 of October 8, 1942*. Hence the demand of a doctor's prescription is an offence. It is an attempt to deprive us unlawfully of an article to which we were legally entitled.

[KEUNEMAN J.—How can you say you were legally entitled? This would be a fair test—if the shop refused to sell you the article and decided to risk the penal consequences, how can you assert your civil right to the article in question? Will you bring an action in tort, in contract or in quasi-contract?]

We have an action in tort. Where the Legislature penalizes the refusal to sell, by necessary implication it compels the sale to us. We are therefore entitled. The breach of a statutory duty is *prima facie* a wrong which will ground an action for damages at the suit of the person injured thereby—*Monk v. Warbey* ¹.

Fraud or dishonesty is an essential element of each of the offences with which we are charged.

There cannot be fraud where we are legally entitled—*R. v. Periyatamby* ², *Baburam Rai v. Emperor* ³.

To constitute fraud there must be deceit and an intention to deceive coupled with loss or possibility of loss to the person deceived—*King v. Asirwatham* ⁴. In this case there is no loss nor possibility of loss to

¹ (1935) 1 K. B. 84.

² (1902) 5 N. L. R. 338.

³ (1905) 32 Cal., 775.

⁴ (1914) 18 N. L. R. 11.

Cargills. We only induced them to do by a trick what they are compelled to do by law.

If there is no fraud, then *a fortiori*, there is no dishonesty.

M. F. S. Pulle, C.C., for the Crown, respondent.—

In the two cases cited, viz., 5 N. L. R. 338 and 32 Cal. 775, there were definite findings of fact that the accused were absolutely entitled to the properties which formed the subject matter of the charges. In both cases it was held that there was deceit, but not dishonesty or fraud. To be legally entitled to a thing a person must have an immediate right to its possession. A bottle of Sanatogen kept for sale at Cargills, Ltd. is the property of the firm and continues to be so until it is sold and delivered to a customer. To constitute its right to the bottle it is sufficient that it has not been sold, whatever may be the reason why it was not sold. It is immaterial that by not selling or by attaching a condition for its sale the firm has committed an offence. There is nothing in the price control order cited or in the Control of Prices Ordinance which vests an intending purchaser with the ownership of the article for which he is prepared to pay the price.

The remedy available against Cargills was to prosecute them for attaching a condition to the sale of the bottle. That remedy was exhaustive. Having regard to the purpose for which the condition was attached it is possible that upon a conviction of Cargills a court might impose only a nominal fine. In fact by an order published in the *Gazette* of September 15, 1944, p. 891, the law was amended prohibiting the sale of Sanatogen without a prescription. Where an act is a criminal offence, *prima facie*, a prosecution for the offence is the only remedy.—*Phillips v. Britannia Hygiene Laundry Co., Ltd.*¹ and *Monk v. Warbey*². Assuming Cargills could have been sued for failing to sell, the accused could at most only claim damages for breach of a statutory right and not the delivery to him of a bottle of Sanatogen.

In so far as the accused attempted to take property, his action was dishonest. It was also fraudulent in that by deceit he attempted to deprive Cargills of whatever benefit they hoped to derive by selling Sanatogen only on a prescription. Counsel further cited *R. v. Smith*³, *R. v. Bassey*⁴ and *R. v. Edward Wilson*⁵.

Cur. adv. vult.

July 18, 1945. SOERTSZ A.C.J.—

This is an appeal against convictions entered against the appellant under sections 459/490, and 403/490 of the Penal Code. The facts are these. Certain events on March 11, 1944, satisfied the staff of the Drugs Department of Messrs. Cargills, Ltd., that prescriptions bearing the forged signature of Dr. K. J. de Silva were being used in order to obtain certain articles which it was the custom of Cargills, Ltd., to supply only on doctors' prescriptions. The salesmen were, therefore, warned in regard to prescriptions purporting to bear the signature of Dr. K. J. de Silva. On March 18, 1944, the appellant presented document P2 to W. S. de Silva, a salesman of the Drugs Department. It purported

¹ (1923) 2 K. B. 832.

² (1935) 1 K. B. 75.

³ (1919) 14 Cr. A. R. 101.

⁴ (1931) 22 Cr. A. R. 160.

⁵ 2 Car. and K. 527.

to be a prescription signed by Dr. K. J. de Silva for a bottle of Sanatogen for the use of a patient named M. R. Fernando. The salesman, apprehensive with suspicions created by recent events, handed the appellant over to the Manager, and this case was launched. It has been established beyond all manner of doubt that P2 is a forged document and that it was presented by the appellant. The appellant's defence that he, in good faith, presented P2 which had been entrusted to him by one Nichol Peiris has been rejected by the trial Judge. In view of these facts, one would have thought that the convictions entered against the appellant were inevitable, but on appeal, Mr. Rajapakse contended that Sanatogen being a price-controlled article, any person who refuses to sell it expect on the condition that a medical prescription is produced in respect of it, contravenes section 5 of the Defence (Control of Prices) (Supplementary Provisions) Regulations (9019/8-10-1942) and is guilty of an offence, and that, therefore, the appellant did no more than resort to a trick or device for procuring what the seller in question here was bound to but would not sell. He contended that if the attempt had succeeded, there would have been no wrongful gain or wrongful loss to one side or the other and that, therefore, the appellant was not guilty either of an attempt to use as genuine a forged document or of an attempt to cheat and dishonestly induce a delivery of property. In short, his argument was that there was no element of dishonesty or fraud in the meaning those words bear in the Penal Code, in the acts and deeds and words of the appellant. Section 22 of the Penal Code defines "dishonestly" this: "whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly". Section 23 less helpfully defines 'fraudulently' as follows: "a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise". The view that "dishonestly" in section 22 is equivalent to "fraudulently" in section 23 is, as Gour points out, quite untenable. If they are synonymous, there was no occasion whatever to use both words in juxtaposition as they are used in section 453 for instance. To quote from Gour (Vol. I (1925 Ed) page 245). "Three essential ingredients must be present to constitute dishonesty in law; namely (a) intention, (b) employment of unlawful means, (c) acquisition of property to which one has no right, whereas according to Sir James Stephen (2 History of Criminal Law page 121) "whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime, two elements, at least, are essential to the commission of a crime, namely (a) deceit or an intention to deceive or, in some cases, mere secrecy, and (b) either actual injury or possible injury, or a risk of possible injury by means of that deceit or secrecy". Thus, it will be observed that "fraudulently" is wider than "dishonestly" for it is not confined to the acquisition of wrongful gain or to the infliction of wrongful loss measurable in money's worth, but embraces injury to mind or reputation to take two instances. The cases relied on by Mr. Rajapakse *Rex v. Periyatamby* (*supra*) and similar cases are distinguishable on the ground that, in those cases, the false documents and the false representations were used to recover the accused's own property. In this case, it cannot be pretended that the appellant

was entitled to the bottle of Sanatogen. The most that can be said in regard to it is that Cargills, Ltd. would, at the date of this case, have incurred a penalty by refusing to sell it except on a prescription. The fact that Cargills, Ltd., rendered themselves liable to a penalty did not, in any way, invest the appellant with a right to sue for the article they refuse to sell unconditionally. The Sanatogen was the property of Messrs. Cargills, Ltd., and it was open to them to deal with it in the manner they adopted as the course of business they would follow even if by following it they exposed themselves to a penalty. In my opinion, the appellant acted both dishonestly and fraudulently in doing what he did. I dismiss the appeal.

KEUNEMAN S.P.J.—I agree.

Appeal dismissed.

