

1946

Present : Howard C.J. and Canekeratne J.THE KING *v.* PEIRIS.43—*D. C. (Crim.) Colombo, N 826.*

Using as genuine a forged document—Meaning of “fraudulently” —Penal Code, ss. 22, 23, 459.

Where the accused, when he sent his birth certificate to his employer, altered the date of birth in such a manner that, according to the terms of the employment, risk of loss was incurred by the employer in consequence of the alteration—

Held, that the accused had acted fraudulently within the meaning of section 23 of the Penal Code and was guilty of the offence of using as genuine a forged document.

APPEAL against an acquittal from the District Court of Colombo. When the accused became a permanent employee of the Colombo Municipal Council he was called upon to submit his birth certificate. In compliance with the request he sent the certificate, but before he despatched it he had altered the year of his birth from 1906 to 1912. He was thereupon indicted (1) for forgery and (2) for using as genuine a

forged document. The trial Judge acquitted him on the ground that he was not convinced that the alterations were made by the accused. Further, it was the learned Judge's view that what had to be considered was the immediate consequential fraud or consequential wrongful gain or loss; the ultimate loss to the Municipal Council by reason of the circumstances that the accused might, in consequence of the alteration of the date of birth, remain in service six years more than he would otherwise be entitled to and that he might obtain a larger pension than he would otherwise receive was, in the Judge's view, too remote.

T. K. Curtis, C.C., for the Crown, appellant.—The term “dishonestly” is used in section 453 of the Penal Code and it is defined in section 22 as the causing of wrongful gain to one person or wrongful loss to another. The accused has gained wrongfully by the alteration of the date of his birth in his birth certificate, because he would be entitled to claim a longer period of employment than he would have otherwise had, and it would have affected his pension rights too. The word “fraudulently” is also used in section 453 and “fraudulently” is wider than “dishonestly”; it is not confined to acquisition of wrongful gain in money's worth—*Fernando v. The King*¹. The forged document was with the accused since 1935. Hence a presumption arises under section 106 of the Evidence Ordinance—see illustration (a). There is sufficient evidence in this case to infer criminal intention on the part of the accused.

H. W. Jayewardene, for the accused, respondent.—This is an appeal from an acquittal, and it is submitted that a court of appeal will not upset a finding of a trial judge unless a grave miscarriage of justice has occurred. The case depends on circumstantial evidence and, therefore, needs strong corroboration. It is not the law of Ceylon that the burden is cast upon an accused person of proving that no crime has been committed—*King v. Attygalle*². The case reported in 46 N. L. R. 321 has no application to the present case as there should be actual injury or possible injury or a risk of possible injury by means of the deception—See 46 N. L. R. 321 (*supra*) at p. 323. There should be a possibility of being defrauded by the forgery, in order to infer a criminal intention: *Apariti Charan Ray v. Emperor*³.

Intent implies aim, and this connotes not a casual or merely possible result, but the one object for which the effort is made and thus has reference to what has been called the dominant motive—See Ratanlal and Thakore's *Law of Crimes, Sixteenth Edition, at p. 57*. The document must be made dishonestly or fraudulently and this requires two elements, viz.—(1) deceit or intention to deceive and (2) actual injury or possible injury: See *Sanji v. Ratanappa Ronad et al. v. Emperor*⁴. In this case it is submitted that the injury to the Municipality is far too remote to fix the accused with criminal liability.

Cur. adv. vult.

¹ (1945) 46 N. L. R. 321.

² (1936) 37 N. K. L. R. 337.

³ (1930) 31 Cr. Law Journal of India p. 1126.

⁴ (1932) 56 I. L. R. (Bombay) 488 at p. 499.

July 4, 1946. CANEKERATNE J.—

The accused was charged on two counts, the one of forgery (section 455 of the Penal Code), the other of using as genuine a forged document (section 459) ; after trial he was acquitted by the learned Judge.

According to the copy of the birth certificate (P4), the accused was born on December 24, 1906. He had obtained a copy of it (P3) about April 5, 1935, and he became a daily paid employee of the Colombo Municipality about July 5, 1937 : shortly after this, at the request of the employer he filled a form containing certain particulars (P1), wherein he stated that he was 26 years of age. He entered the permanent service of the Municipality about October 29, 1942. The Engineer's Department of the Municipality which had supervision over his work called upon him on March 23, 1944, to send a birth certificate as he was a permanent employee ; purporting to comply with the request he sent a letter (P2) on March 31, 1944, which reads thus—" Herewith forwarded certificate." The despatch clerk, Junoos, drew his attention to the absence of a certificate and on the following day the accused sent the certificate P3 (with P2) : Junoos sent these to the financial clerk who passed them on to clerk Weeresinghe on April 3 ; the latter observed that in two columns of P3 the year had been altered. As the learned Judge remarks the figures 12 in 1912 in P3 in columns 1 and 10 have been written over and it is apparent to the naked eye that before the " 1 " that now appears as the third figure in the year of birth a " 0 " had been written. An officer in the department then communicated with the Registrar-General and obtained P4.

The learned Judge held that P3 was the identical document tendered by the accused with the covering letter (P2) and that the alterations now to be seen on it appeared thereon at that time but he was not convinced that the alterations were made by the accused.

Though P3 had been issued on the application of the accused himself he offered no explanation at the trial. On the question of alteration all the facts taken by themselves could clearly afford sufficient proof had the learned Judge chosen to draw an inference adverse to the accused, but when he said that in the " circumstances of this case the prosecution has not proved that the alteration was made by the accused " I do not feel, sitting here on appeal from an acquittal, that I am entitled to say that the learned Judge ought necessarily to have drawn that inference.

There can be no question, according to the learned Judge, that P3 was a false document and that the accused used it for some purpose or other. The accused, if he did not know at the time he tendered P3 that it was a false document, had sufficient reason to believe it to be a false document for he certainly had sufficient cause for such belief. But he came to the conclusion that the accused by the alteration of the year of birth did not cause wrongful gain to himself or to anybody else or wrongful loss to another.

What had to be considered, in the learned Judge's view, was the immediate consequential fraud or consequential wrongful gain or loss ; the ultimate gain or ultimate loss to the Municipality by reason of the

circumstances that the accused may remain in service for a longer period (namely six years more) than he otherwise would be and may obtain a larger pension than he would otherwise receive were, in his view, too remote.

A person who fraudulently or dishonestly uses a forged document commits an offence (section 459). The terms "dishonestly" and "fraudulently" are used to denote two different things. The word "dishonestly" which is the narrower word is defined in section 22, and the word "fraudulently" in section 23. A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise. What is an intent to defraud is not defined in the Code: "fraud" is also not defined. The Roman Jurist, Labeo, defined fraud (*Dolus*) as every kind of craft, fraud or covin used for the purpose of circumventing or deceiving another (Dig. 4-3-1-2): a definition which has been described as one that is neither very precise nor very accurate¹. The term fraud is a concept of the utmost possible generality and comprehensiveness; it may be described in wide and unrestricted terms.

Sir James Stephen in his *History of the Criminal Law of England* suggested the following²:—

"There is little danger in saying that 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 the crime: namely, first deceit or an intention to deceive or in some cases mere secrecy; and secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy. This intent, I may add, is very seldom the only or the principal intention entertained by the fraudulent person whose principal object in nearly every case is his own advantage. The injurious deception is merely intended only as a means to an end, though this, as I have already explained, does not prevent it from being intentional. A practically conclusive test is this: did the author of the deceit derive any advantage from it which he could not have had if the truth had been known? If so, it is hardly possible that that advantage should not have had an equivalent in loss or risk of loss to some one else; and if so, there was fraud. In practice people hardly ever intentionally deceive each other in matters of business for a purpose which is not fraudulent."

The accused entered into a contract of service with the Municipality about October, 1943; the corporation had power to enter into such a contract (Cap. 193, section 58; Cap. 194, section 72). The terms of the contract would be those that are usually found in such contracts of service entered into with the Municipality. He agreed to serve the employer as an overseer, the duration of the contract would be fixed by the agreement of the parties or by usage: the evidence shows that there is a prescribed period which terminates with the attainment of a particular age by the employee. What that age is has not been specified, but this does not seem to be very material, it may be 50, 55 or 60 years. The employee had a right to be allowed to perform the service which he has agreed to render under the contract (*i.e.*, to serve as an overseer)

¹ *Dr. Hunter., Roman Law, page 596.*

² *Vol. II., page 121.*

till he arrived at the specified age, a right to receive salary at a fixed rate each month, a right to receive increments, if any, as and when they become due, perhaps a right to receive a gratuity or a pension. The Municipality agreed to employ the accused as an overseer from October 29, 1942, till he arrived at the specified age so long as there was continued good conduct by the servant. It agreed to pay him remuneration at the rate specified, to grant the increments, if any, as and when they became due and to dispense with his services on his reaching the retiring age. If a person who entered the service of the Municipality at the age of 25 was entitled to get an increase of Rs. 100 a year after five years service or if he was entitled to be employed till he reached the age of 55, it means that he had a right under the contract to get the additional sum of Rs. 100 in the sixth and following years or to be employed for a period of 30 years as the case may be. The fact that these rights may become extinguished by a supervening event as death or by a voluntary act, as by giving notice, does not negative the existence of the right.

If the accused was entitled to be employed till he reached the age of 55, he had a right to serve only till December 24, 1961, but if P3 was a genuine document his period of service would expire only on December 24, 1967. The accused acquired a valuable advantage by his act of tendering P3. If the employer wrongfully dispensed with the services of the employee before the end of the period of the contract, he would be liable to pay damages to the other for breach of the contract. If P3 is genuine the Municipality cannot lawfully prevent the accused from offering his service after December 24, 1961. It is true that there could be no actual breach of a contract so long as the time for termination (in terms of the contract read with P4) had not yet arrived. One party to a contract, however, has an inchoate right to the performance of the bargain by the other party. Its unimpaired and unimpeached efficacy is essential to the interests of the party.

Even if the view expounded by the learned Judges in *Sanjiv Ratanappa Ronad and another v. Emperor*³ (where the view of the majority comprising the Full Bench of the Court that decided *Kotamraju Venkatrayadu v. Emperor*⁴ was treated as obiter) quoted by counsel for the accused is accepted, risk of loss was incurred at least by the Municipality and that is sufficient. The other case quoted by counsel for the accused *Aparti Charan Ray v. Emperor*⁵ does not carry the case any further: there the accused, the husband of S. K. Dei who had given a general permission to him to file papers in Court on her behalf signed the plaint on her behalf to save the suit from becoming barred by limitation and filed it in Court: the conviction was set aside in appeal. "There was no fraud on the plaintiff because the plaint was filed in her interest and as she says in her evidence under her authority."

The accused is clearly guilty on the second count. I find the accused guilty under section 459 and sentence him to six months' rigorous imprisonment.

HOWARD C.J.—I agree.

Acquittal set aside.

³ (1932) I. L. B. 56 Bombay 488.

⁴ (1905) I. L. R. 28 Madras 90.

⁵ (1929) 31 Cr. L. J. 1126.