

1946

Present : Howard C.J.

CHRISTINAHAMY *et al.*, Appellants, and CONDERLAG,
INSPECTOR OF POLICE, Respondent.

195-6—*M. C. Colombo South, 3,847.*

Cheating by personation—Defining section in Penal Code contemplates two types of offences—Penal Code, ss. 398, 399 and 402.

The first accused was charged, under section 402 of the Penal Code, with having cheated by personation a Magistrate by pretending to him that she was the lawful mother of a girl and thereby dishonestly induced him to deliver the girl to her.

According to the evidence, the Magistrate had, acting on the false statement of the accused that she was the mother of the girl, made an order that the accused should be given a letter of authority to remove the girl from a remand Home where she had been ordered to be kept until her parents came and took her over; the accused subsequently appeared at the remand Home with the order and removed the girl.

Held, that the accused could not be convicted under either the first part or the second part of section 398 of the Penal Code.

A PPEALS against two convictions from the Magistrate's Court of Colombo South.

H. Wanigatunge, for the 1st accused, appellant.

H. V. Perera, K. C. (with him *U. A. Jayasundere* and *H. W. Jayewardene*), for the 2nd accused, appellant.

T. S. Fernando, C.C., for the Attorney-General.

Cur. adv. vult.

July 12, 1946. HOWARD C.J.—

The first accused appeals from her conviction by the Magistrate, Colombo South, on a charge framed under section 402 of the Penal Code. The wording of this charge was as follows :—

“ That you did, within the jurisdiction of this Court at Wellawatte on September 6, 1945, you the first accused cheat by personation Mr. Ivor de Saram, Magistrate, Colombo South, by pretending to him that she was one Galkadujayasinghe Dewage Yasona of Pannala, the lawful mother of the girl named Suduhakuru Lewage Podiensina *alias* Jossie Podi Amma and thereby dishonestly induce the said Magistrate to deliver her the above said girl who is a minor aged 17 years 10 months, and thereby committed an offence punishable under section 402 of the Penal Code (Chapter 15).”

The second accused was charged with aiding and abetting the first appellant in the commission of this offence.

The facts, as put forward by the Crown, were as follows : on September 4, 1945, Inspector Conderlag produced a girl called Jossie Podi Amma before Mr. de Saram, Magistrate, Colombo South, and moved for an order that she be kept in the Jayasekera Home till her parents come and take her over. Purporting to act under section 22 of the Criminal Procedure Code Mr. de Saram remanded the girl to the Jayasekera Home, till the parents arrived and took charge of her. On September 6, 1945, the first accused, giving the name of Christinahamy, appeared before Mr. de Saram and said she was the mother of Jossie Podi Amma. Acting on this statement Mr. de Saram made an order that the first accused should be given a letter of authority to remove her daughter from the Jayasekera Home. On September 10, 1945, the first accused appeared at the Jayasekera Home with the order and removed the girl. It was subsequently discovered that the first accused was not the mother of the girl and these proceedings were instituted.

Section 402 of the Penal Code is worded as follows :—

“ Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”

Cheating by personation is defined in section 399 as follows :—

“ A person is said to ‘ cheat by personation ’ if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.”

In order to discover what is meant by “ cheating ” recourse must be had to section 398 which is worded as follows :—

“ Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person

or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, or damage or loss to the Government, is said "to cheat".

The section, therefore, contemplates two types of offence. The first an act of deceit where a person is fraudulently or dishonestly induced to deliver any property to any person or to consent that any person shall retain any property. The second type contemplates deceit where a person is intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property. The Magistrate has treated the charge against the accused as if the offence of cheating was under the second half of section 398 and in convicting the accused has held that "the very fact that the Magistrate made order handing over the girl to an utter stranger who pretended to be the mother of the girl might certainly reflect on the reputation of a Magistrate in the eyes of the public, if not of his superiors". Mr. Fernando is not prepared to support the conviction on the grounds put forward by the Magistrate. In fact it is quite impossible to support the Magistrate's reasoning.

The accused were not charged with an act of cheating under the second part of section 398. They were charged with dishonestly inducing the Magistrate "to deliver". On the assumption that the charge had been framed under this part of the section, it must be proved that it was the "act" or "omission" that caused or was likely to cause damage. The "act" which the Magistrate has performed was the giving of the order for delivery to the first accused. I am of opinion that damage to the reputation of the Magistrate is not the necessary consequence of such an act. In this connection I would refer to *Mojev v. Queen Empress*¹. If the proposition on which the Magistrate's order is based is sound, the making by a judicial officer of any wrong order on information or evidence that may not be accurate can be said to cause damage or harm to the reputation of the judicial officer concerned and form the basis of a charge under this section. It is impossible to support such a proposition.

Although Mr. Fernando is unable to subscribe to the reasons put forward by the Magistrate, he maintains that the conviction is good under the first part of section 398. In other words he contends that there was an act of deceit which induced Mr. de Saram to deliver the order for the handing over of the girl by Mrs. Jayasekera to the first accused. Unfortunately for this contention the charge against the accused was framed on the basis of the delivery not of an order but of the girl. For this reason alone I am unable to accept Mr. Fernando's contention.

For the reasons I have given the convictions of both accused are set aside.

Appeals allowed.

¹ (1889) *Indian Decisions* 17 Calcutta 606.