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Present : Jayawardene J.

THE KING *v.* SILVA *et al.*

22—D. C. Kurunegala, 5,295

Attempt to cheat—Attempt—Preparation—Conspiracy—Abetment—Penal Code, ss. 109, 403, and 409.

The first accused, with the object of playing a confidence trick on H, told him that the second accused was a very wealthy Chetty and that he was fond of gambling, and that a lot of money could be made by playing a game of cards with him. He demonstrated to H that by a certain manipulation of the cards as they were put back in the pack, after they had been dealt out, on the tenth deal and subsequent deals the dealer would get all the picture cards. H was asked to take Rs. 20,000. H learnt subsequently that by extracting one card from the pack, all the picture cards would have gone to the other player. The second accused was not a rich man. H informed the police, and went to the place indicated by the first accused. Before the play commenced, the police arrived and arrested the first and second accused. The bags brought by the second accused did not contain money, but only pieces of paper. The two accused were convicted with attempting to cheat H.

Held, that the acts done by the first accused amounted only to a preparation to commit the offence of cheating, and did not amount to an attempt to commit that offence.

The Supreme Court held that first accused had conspired with the second accused to cheat, and was guilty of abetment of cheating under sections 109 and 403 of the Penal Code.

"The offence of cheating not having been committed, it seems to be impossible to deal with second accused under any section of the Penal Code."

"It is most difficult, if not impossible, to form any satisfactory and exhaustive definition which would lay down for all cases when preparation to commit an offence ends, and when an attempt to commit that offence begins. In short, the question whether any given act or series of acts amounts merely to preparation, or to an attempt which is punishable under section 490, appears to be one of fact in each case."

THE facts are set out in the judgment.

H. J. C. Pereira, K.C. (with him *R. L. Pereira*), for accused, appellants.

Akbar, S.-G. (with him *Dias, C.C.*, and *Vythialingam, C.C.*), for Crown, respondent.

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June 8, 1923. Jayawardene J.—

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This case raises a point of some nicety and difficulty. The two appellants have been convicted of attempting to cheat one Mr. Hermon, an offence punishable under sections 403 and 490 of the Penal Code. Their appeal is based on points of law, and the main point argued on their behalf is that the acts of the accused were only acts of preparation, and that they had done no acts towards the commission of the offence of cheating within the meaning of section 490 of the Penal Code. The main facts are not in dispute, for in the District Court counsel for the accused accepted Mr. Hermon's evidence in its entirety. The first accused is a Sinhalese, and the second is a Natukottu Chetty. The first accused appears to be a resident of Alauwa in the Kurunegala District. Mr. Hermon is a planter in the Kegalla District. The first accused approached Mr. Hermon about the purchase of a coconut estate, which he said a Chetty, who wanted to leave the Island, wished to dispose of, and which could be bought cheap, as the Chetty was in a hurry to go away. The Chetty, he said, was worth lakhs of rupees, and was fond of gambling. In the course of his conversation, the first accused told Mr. Hermon that he could make a lot of money by playing a game of cards with the Chetty. Mr. Hermon asked him how it could be done, and the first accused demonstrated it with a pack of cards Mr. Hermon obtained for him. I need not describe the card trick at length. The betting was to be on the picture cards of an entire pack of 52 cards. By a certain manipulation of the cards as they are put back in the pack, after they had been dealt out, on the tenth deal and subsequent deals the dealer gets all the picture cards. Mr. Hermon was advised to deal, and not to bet till the tenth deal came on. Mr. Hermon pointed out to the first accused that the whole thing would be a fraud on the other party, and amounted to cheating. The first accused contended it was not so. Mr. Hermon says that with the object of entrapping the first accused, he consented to have a game with the wealthy Chetty. Mr. Hermon was asked to bring about Rs. 20,000. On the day fixed for the game, Mr. Hermon went to the appointed spot, a land called Nangalla. He was accompanied by two of his assistants, who halted in the neighbourhood, and his kanakapulle Suppiah, to whom he gave a letter to be communicated to the Chetty, stating that the latter was going to be cheated out of a large sum of money, and asking him to see Mr. Herman on the estate, where Mr. Hermon says he intended to hand over the money he expended to win to the Chetty. Mr. Hermon was taken to a building on the land by the first accused, and there found a chetty lying on a bed with a bag by his side. The Chetty, who was afterwards found to be one Casie Chetty, a kanakapulle of a firm trading at Veyangoda, and Mr. Hermon started the game, and the Chetty began betting beginning with a bet of Rs. 5,000.

and raising his bids to Rs. 15,000 when the turn for the tenth deal arrived. Then the Chetty produced his bag which appeared to contain bundles of notes, and asked Mr. Hermon to bet Rs. 20,000 which he did. The Chetty asked Mr. Hermon where his money was, and the latter said he had not brought any cash, but would pay by cheque. The Chetty then said he would not play, except for ready money, and the party broke up. The first accused then took up the cards, and pointed out to Mr. Hermon that the next card that would have been dealt to him was a picture card, and that he would have won his bet. Casie Chetty subsequently saw Mr. Hermon, as requested in the letter, and told him that the person who was going to be cheated was not himself, but Mr. Hermon, that he was acting as instructed by the first accused, and that his bag contained not money but paper. Mr. Hermon, also, subsequently learnt that by extracting one card from the pack and making the number of cards in it 51 instead of 52, all the picture cards would have gone to the other player and not to the dealer. This appears to be the trick adopted to entrap unwary and confiding players. All this happened in July last year. No charge is brought against the first accused for his acts on that occasion. In August, 1922, the first accused wanted Mr. Hermon to gamble again, and sent him several telegrams making appointments. At last, an arrangement was made to gamble on an estate called " Mount Mary " at Narammala on September 6. This time Mr. Hermon arranged with the police at Kurunegala to surprise the party at their game. Mr. Hermon went to Narammala resthouse and sent for the first accused, and told him he would not gamble except at the resthouse, and refused to go to the bangalow on " Mount Mary." The first accused then hurried up to the estate and returned with two Chetties, one of whom is the second accused, in a travelling cart. In the carts were two bags said to contain two lakhs of rupees. The second accused got down from the cart leaving the bags of money with the other Chetty who remained in the cart. The second accused represented himself, and was represented by the first accused as a very wealthy Chetty, a brother of Casie Chetty, who took part in the first gamble, and the other Chetty, whose name was Mutu Raman Chetty, was said to be his kanakapulle. The latter remained in the cart in charge of the bags of money. The second accused refused to gamble in the resthouse, and said that he was in a hurry to get away by an early motor bus, as he had a large amount of money in his possession. He could not be persuaded to gamble at the resthouse, where the party were to be surprised by the police, and Mr. Hermon consented to go to the bungalow on " Mount Mary." The accused went ahead in the cart, and Mr. Hermon was to follow. The police, Mr. Aitken, Assistant Superintendent of Police, and two constables, arrived in the meantime, and Mr. Hermon informed them that the gambling

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was to take place at "Mount Mary," where it was arranged the accused should be arrested. Mr. Hermon went ahead, and he came to the bungalow on "Mount Mary," but before any play could begin, the police arrived, and the first accused, the second accused, and Mutu Raman were arrested. The Chetties were found hiding in the kitchen. The bags were found, but they contained no money. Only pieces of paper were discovered by the police. It is in respect of the incidents of September 6 that the accused are charged with attempting to cheat Mr. Hermon. All these acts on the part of the accused, it is contended, prove only preparation to commit the offence of cheating, and not an attempt to commit that offence, for nothing was done which could be construed as an act done towards the commission of the offence of cheating, that is, in an attempt to cheat. There can be no doubt that the accused intended to practise some sort of confidence trick on Mr. Hermon. It was not an attempt to cheat the Chetty. The fact that the bags contained no money is conclusive of that. The Crown, however, contends that the accused had passed the stages of preparation, and had done acts towards the commission of the offence of cheating, and in the indictment two acts are specified as showing that the accused had done so. They are: First that they falsely represented to Mr. Hermon that the second accused, Sevugan Chetty, was a very wealthy man, and that Mutu Raman Chetty was his kanakapulle; and, secondly, that Mr. Hermon could win a large sum of money at a game of cards from the second accused. The question I have to decide is whether the contention for the Crown is correct, that the acts attributed to the accused, and admittedly done by them, were acts done towards the commission of the offence under section 490, and not merely preparatory acts as contended for by the accused.

Several English, Indian, and local cases were cited at the argument. The English cases are not very helpful, as the English law relating to attempts to commit offences, which is not based on any statutory enactment, appears to differ from the law enacted in the Indian and local Penal Codes. The Indian decisions, if they lay down any guiding principles, would be useful, as section 490 of our Code is identical with section 511 of the Indian Penal Code. No principle can, however, be gathered from the Indian and local decisions. On the other hand, it has been stated by eminent Judges that it is most difficult, if not impossible, to form any satisfactory and exhaustive definition which would lay down for all cases when preparation to commit an offence ends, and where an attempt to commit that offence begins. In short, the question whether any given act or series of acts amounts merely to preparation, or to an attempt which is punishable under section 490, appears to be one of fact in each case.

So, it is necessary to decide whether, on the facts of this case, considering the nature of the cheating which the accused intended

to practise on Mr. Hermon, the acts attributed to the accused and proved to have been committed by them, are acts done towards the commission of the cheating contemplated by them. The cheating was to take place in the course of a game of cards. Now cheating as defined in the Penal Code consists of two elements: (1) a deception practised on a person and (2) the inducement to deliver property or to do certain other acts. If, therefore, an attempt is made to deceive the person intended to be cheated, it would be sufficient to constitute the doing of an act towards the commission of the offence. In the present case the " essence " of the deception was to make Mr. Hermon believe that he was playing with a pack of 52 cards. If a single card was extracted from the pack, and the number of cards reduced to 51, or if a pack containing only 51 cards was used in the game, a deception would have been practised on him. This is the deception, which, according to the evidence in the case, is practised on persons induced to play this game. I am, however, not quite satisfied that we are in possession of all the particulars of the trick which was to be practised on Mr. Hermon. Whatever that may be, the above, however, is what the evidence for the prosecution has established. Now, according to the indictment, the accused have done two acts towards the commission of the offence: First, they falsely represented that the second accused was a very wealthy Chetty with a kanakapulle called Mutu Raman under him; and second, that Mr. Hermon could win a large sum of money at a game of cards from the second accused. Considering the nature of the deception that was to be practised on Mr. Hermon, can it be said that these acts, or either of them amount to an act done towards the commission of the deception; I am inclined to the opinion that they do not amount to such an act. If we take a more simple example, the position might be better illustrated. Suppose A and B wish to induce C to break into D's house, their real intention being to break into C's house in his absence. For the purpose of inducing C to commit the housebreaking, they falsely represent to him that D is a very rich man, and that in his house there is a large quantity of valuables which C could steal. C, becoming aware of the intention of A and B to have his house broken into, before going to break into D's house, places guards near his house. When A and B, armed with housebreaking implements, approach C's house, they are seized by the guards. Can it be said that A and B are guilty of an attempt to commit housebreaking ? If A and B had attempted to open a door or window, or to bore a hole in a wall, they would have done an act towards the commission of the offence of housebreaking. Until then, can it be said that they had passed the stage of preparation ? So here, too, if the deception to be practised on Mr. Hermon is as stated by the prosecution, can it be said that until a card was abstracted from the full pack of 52 cards, or a pack containing 51

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cards had been handed to Mr. Hermon, or even before the game had commenced, an act had been done towards the commission of the offence of deceiving him and inducing him to deliver property? If the offence attempted to be committed had been to induce Mr. Hermon to lend money to the second accused, or to enter into any contract of a similar nature, the false representation that the second accused was a wealthy man—while he was in fact a pauper—would have had a direct tendency to deceive him, or would have amounted to the deception itself. As to the statement that Mr. Hermon could win a large sum of money from the second accused at a game of cards, I fail to see how this could be regarded as an act done in the attempt to deceive or cheat, although it was urged as an inducement to him to join in the game of cards. The act need not be the penultimate act, but I incline to the opinion that the act must be done in the attempt to commit an offence. As pointed out in the commentaries on the Penal Code, it is not always easy to say whether an act amounts to an attempt or is merely preparation, but I doubt very much whether the acts referred to in the indictment are acts done towards the commission of the offence of cheating in the very peculiar circumstances of this case. They appear to me to be acts done in planning and arranging for a deception or cheating, but not acts done towards the commission of the offence in the attempt to commit it.

The learned Solicitor-General relied strongly on the case of *In the Matter of the Petition of MacCrea.*[1] That was also a case in which the accused was charged with attempting to cheat under section 511 of the Indian Penal Code which corresponds to section 490 of the Ceylon Code. There the accused attempted to obtain delivery of a Government promissory note as the property of one Asad Ali Khan, deceased. The deception the accused had to practise was to convince the person holding the note that the note was the property of Asad Ali Khan. The note was in fact not the property of Asad Ali Khan, but of one Muhamid Asad Ali Khan. With this object the accused did certain acts, and the acts done, as Blair J. said, "were acts bearing and intended to bear upon the mind of another person. These acts having been done, that mind was left to operate. If, therefore, that which was done amounted to the commission of an act towards deceiving in a case where such deception would operate as an inducement to the person deceived to deliver any chattel or to do or omit to do any of the things mentioned in section 415 (396), then I think within the meaning of section 511 read together with illustration (*a*) an attempt to deceive, and thereby induce within the meaning of that section, has been proved in this case." There the deception was to bring about a certain conviction by operating on the mind of the person sought to be deceived, and the acts done by the accused were held to have

[1] *(1893) 15 All. 173.*

been done with that intention. But here the deception was not to produce a certain impression on the mind and thus induce the delivery of property, but to practise a deception in the course of a game of cards. No doubt, for the purpose of inducing the person to join in the game of cards, certain false statements had to be made, but these statements formed no part of the deception itself, and did not tend directly towards the deception.

If, as I have said above, the object of the accused had been to induce Mr. Hermon to lend money to the second accused, then the false representation that the second accused was a wealthy Chetty would have been intended to operate on the mind of Mr. Hermon so as to lead him to do an act which he would not have done if the false representation had not been made, and there would have been an attempt to deceive him, and the false representation would have tended directly to induce the deception, and would thus amount to an act done towards the commission of the offence. But where the acts were done with a view to inducing Mr. Hermon to join in a game of cards, at which the deception was to be practised, I fail to see that the acts can be said to be done in the attempt to practise the deception. The deception sought to be practised in MacCrea's case is certainly different from the deception contemplated here, and the reasoning there can have no application to the present case.

In the local case of *The King v. Jeeris Appu*,[1] which is also a case of attempting to cheat, the facts are not given fully in the report, but according to the judgment the first accused proposed to the complainant, the shroff of the Kandy Kachcheri, that he should circulate counterfeit notes which he said the second accused could make. The complainant informed the police, and the accused were led on. The first accused brought the second accused to the complainant, and an exhibition of what was said to be the method was given. Finally, the accused proposed that the complainant should obtain 600 ten-rupee notes from the Kachcheri and bring them to the accused. The complainant agreed. The next morning the first accused again saw the shroff, and inquired whether the notes would be ready. Later the same day both accused went to the shroff, and a day was fixed, but before it arrived, the police arrested the accused. Ennis J. held that there were several acts of preparation, but the request for 600 notes passed from preparation to attempt. After that the offence would have been completed by delivery of the property. The learned Judge, in the course of his judgment, observed: " To prove the offence punishable under section 490 of the Penal Code, it is sufficient to show that an act has been done towards the commission of the offence in the attempt to commit it. In order to distinguish between an act of preparation before the attempt and an act towards the commission of the

[1] *(1918) 5 C. W. R. 271.*

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offence in an attempt to commit it, the definition must be looked at. Some offences consist of a single act (criminally intended), others of a series of such acts. The offence of cheating come under the latter category. Section 398 defines it . . . . The offence begins with inducement by deception. The act of deceitful inducement forms part of the series of acts which would constitute the offence, and an inducing by deceit to the end that the offence of cheating may be committed is an attempt to cheat." There, too, it will be seen that the deception consisted in bringing certain facts to bear on the mind of the person sought to be deceived—nothing else had to be done. The operation of these facts on the mind was to result in his being induced to part with his property, and so the request for the 600 notes was held to be an act in the attempt to cheat. The shroff pretended to the accused that their statements and exhibition had operated on his mind, and that he was convinced that the accused were able to perform what they had suggested, that is that he had been deceived. The request for the money was an attempt to obtain delivery of the property. It is to be noted that the learned Judge did not hold that the statements of the accused, that they could counterfeit notes, or that the exhibition they gave, were acts done towards the commission of the offence. He was inclined to regard them as merely preparatory acts. Perhaps, it was not necessary to consider whether these acts amounted to acts done towards the commission of the offence, as the accused had gone a step further and actually asked for the delivery of the property, that is, the money. I need not refer to the other cases. But, as I find that the accused intended to cheat Mr. Hermon, the question remains whether the first accused did not conspire with the second to cheat Mr. Hermon. In many cases when more than one person join in a conspiracy to commit an offence, and acts are done in pursuance of such conspiracy, such acts although mere acts of preparation which have not reached the stage of an attempt, the conspirators have been found guilty of abetment. (See *The King-Emperor v. Padala Vandikatuswami* [1] and *The King-Emperor v. Ragunath.*[2] Now, under the Penal Code, section 100, a person is said to abet the doing on a thing who, " secondly, engages in any conspiracy for the doing of that thing," and explanation 2 to the section says: " A conspiracy for the doing of a thing is when two or more persons agree to do that thing or cause to procure that thing to be done."

From the facts which I have set out above there is proof, both ample and clear, of a conspiracy between the two accused to cheat Mr. Hermon. The corresponding section of the Indian Penal Code, section 107, is different from our section, and requires that an act or legal omission should take place in pursuance of the conspiracy and in order to the doing of the thing. If such an act is required

[1] *(1881) 3 Mad. 4.* [2] *(1889) Unreported Criminal Cases, Bom. 470.*

under our law, too, there is proof of several acts done in pursuance of the conspiracy and in order to carry out the object of the conspiracy. On the evidence in the case, therefore, I find that the first accused conspired with the second accused to cheat Mr. Hermon, and he is guilty of abetment of cheating under sections 109 and 403 of the Penal Code. The conviction of the first accused of abetting the second accused to cheat Mr. Hermon raises a difficulty with regard to the conviction of the second accused. The offence of cheating not having been committed, it seems to be impossible to deal with the second accused under any section of the Penal Code. In India this omission has been made good by the addition of certain sections included in chapter V. A of the Penal Code. These sections render all persons, principals and accessories, engaged in a conspiracy, guilty of an offence. These sections have not been added to our Penal Code. Therefore I am compelled to allow the appeal of the second accused. This, however, is not a matter for much regret, as the second accused is a pauper picked up by the first accused from the highway, and made to pose as a wealthy Chetty. The first accused is the principal offender, and, evidently the only person who stood to benefit by the cheating.

I alter the verdict, and find the first accused guilty of abetment of cheating under sections 109 and 403 of the Penal Code. The sentence of one year's rigorous imprisonment passed on him is confirmed. The second accused is acquitted.

I regret that absence on circuit has delayed the preparation of this judgment.

Varied.