

A

RAJ MOTI LAL

v.

REGINAM

B

[SUPREME COURT, 1967 (Mills-Owens C.J.), 20th January]

Appellate Jurisdiction

C

Criminal law—perjury—affidavit sworn before Commissioner for Oaths by party to civil proceedings prior to hearing—Commissioner not a person authorised to record or authenticate statement within s.106(2) of Penal Code—deponent not a person sworn as a witness in judicial proceedings—Penal Code (Cap. 8) ss.106(1), 106(2), 107—Sale of Goods Ordinance (Cap. 198) s.6A—Magistrates' Courts Rules (Cap. 5) 0.6 r.8.

Criminal law—practice and procedure—perjury—whether offence under section 107 of Penal Code (Cap. 8) a minor offence in relation to offence under section 106.

D

Subsection 2 of section 196 of the Penal Code, does not itself create an offence but extends the operation of subsection 1 (which relates to false statements by a witness lawfully sworn in judicial proceedings) to statements made by a witness for the purposes of a judicial proceeding but made before some person other than the tribunal itself authorised by law to administer an oath and to record or authenticate the statement. A Commissioner for Oaths before whom an affidavit is sworn by a party to civil proceedings prior to the hearing is not such a person as he is not authorised to record or authenticate the statements in the affidavit, and the deponent is not a person lawfully sworn as a witness in those proceedings.

E

*Semble*: An offence against section 107 of the Penal Code, which relates to false statements on oath made otherwise than in a judicial proceeding, cannot *prima facie* be regarded as a minor offence in relation to an alleged offence under section 106.

F

Appeal from a conviction of perjury in the Magistrate's Court.

R. A. Kearsley for the appellant.

T. U. Tuivaga for the respondent.

The facts sufficiently appear from the judgment.

G

MILLS-OWENS C.J.: [20th January, 1967]—

H

In this case the appellant was convicted on three counts of perjury, contrary to section 106(2) of the Penal Code. The perjury was alleged to have been committed in two affidavits sworn by the appellant in certain civil proceedings in a Magistrate's Court. The appellant had been sued for the price of chickens alleged to have been sold and delivered to him and judgment was obtained against him by default. He applied to have the judgment set aside and for that purpose made the first of the affidavits which it is alleged contained perjured statements. The statement in question in that affidavit was to the following effect:

"8. I deny that I am indebted to the plaintiff in the sum claimed or in any sum at all."

In the result, the judgment obtained by default was set aside and the appellant then filed the second affidavit which is alleged to contain perjured statements. That is headed "Affidavit of defence" and no doubt was filed pursuant to rule 8 of Order VI of the Magistrates' Courts Rules; that is to say it was an affidavit intended to bring the case into the defended list for hearing on the merits. In that affidavit he stated:

"2. That I deny owing the Plaintiff the sum of £58.0.0 (Fifty Eight Pounds) as claimed or in any sum at all.

3. That I never purchased goods as stated in the Particulars of Claim of the Writ of Summons issued against me.

4. That I have had no dealings with the Plaintiff at any time at all."

On the hearing of the perjury proceedings, in respect of which this appeal is brought, a considerable body of evidence was adduced in an endeavour to establish that the appellant had in fact given an oral order to a member of the plaintiff company for chickens to be obtained by the plaintiff as commission agents from their principal company in Australia. Nothing whatever in writing was signed by the appellant either in relation to the ordering or the delivery of the chickens and the appellant gave evidence firmly denying that he had ever given such an order or received any deliveries. The learned Magistrate said that he preferred the evidence of the plaintiff company's manager and employees and the evidence of a clerk in the plaintiff company's solicitor's office who had testified that the appellant had admitted the debt to him; the Magistrate found it proved beyond reasonable doubt that the appellant had placed the order and obtained delivery. It may be noted that one of the main witnesses for the plaintiff company had a prison record and that he had been discharged from a previous employment at the instigation of the appellant.

On this appeal it is submitted by Mr. Kearsley that a conviction for perjury in respect of paragraph 8 of the first affidavit and paragraph 2 of the second affidavit (the denials of indebtedness) should not have been had; these paragraphs were not to be construed as false statements because the appellant was in fact denying indebtedness; the paragraphs were in the nature of pleadings — in other words the appellant was taking a legal stand. In view of certain circumstances to which I shall shortly allude it is not necessary for me to make a final decision on this argument. Clearly it does have considerable merit. It illustrates the rule that affidavits should state facts, not make assertions. As it appears to me, a defendant who swears in an affidavit that he is not indebted to the plaintiff is, in effect, making an assertion of mixed fact and law; the relevant paragraphs of the two affidavits could well be said to amount to no more than saying "I deny that I am liable etc." Similarly in a pleading, a mere denial of indebtedness is insufficient in that it fails to plead facts such as a denial of ordering the goods or a denial of delivery. However this may be, in the circumstances of the present case the prosecution was bound to fail in respect of the assertions of non-indebtedness for the reason that even if the appellant had ordered the chickens and obtained delivery the transaction was rendered unenforceable by virtue of section 6A of the Sale of Goods Ordinance (Cap. 198) which

A provides that a retail sale on credit is unenforceable by action unless an invoice is made and the same or a copy thereof is delivered to the buyer. It had been accepted in the Court below and was conceded by the Crown on the appeal that no civil action could have succeeded by reason of those provisions, and it follows that there was no indebtedness.

B The other statements are in a different category as they deny purchase of the goods and deny all dealings with the plaintiff company, although it is arguable that if there was a sale and delivery unenforceable by reason of the provisions of the Sale of Goods Ordinance then it was not improper to deny "purchase" of the goods; purchase implying an obligation to pay. But the whole prosecution failed, in my view, upon a much more important ground. The perjury counts charged offences contrary to subsection (2) of section 106 of the Penal Code. The section reads as follows:

C "106. (1) Any person lawfully sworn as a witness or as an interpreter in a judicial proceeding who wilfully makes a statement material in that proceeding which he knows to be false or does not believe to be true is guilty of the misdemeanour termed perjury, and is liable to imprisonment for seven years.

D (2) Where a statement made for the purpose of a judicial proceeding is not made before the tribunal itself but is made on oath before a person authorized by law to administer an oath to the person who makes the statement and to record or authenticate the statement it shall, for the purposes of this section, be treated as having been made in a judicial proceeding.

E (3) The question whether a statement on which perjury is assigned was material is a question of law to be determined by the court of trial."

F Obviously there is no such things as an offence contrary to subsection (2); that subsection merely extends the operation of subsection (1). This in itself might not, however, be regarded as a very serious matter. What is abundantly clear is that the section relates only to perjury committed by a person lawfully sworn as a witness or interpreter, and that it must be perjury committed in a judicial proceeding. The object of subsection (2), quite clearly, is to extend the provisions of subsection (1) to a statement made, by a witness, for the purpose of a judicial proceeding before some person other than the tribunal itself. The obvious case is where the statement in question is made in the course of evidence taken on commission (that is, where evidence is taken out of Court before an examiner or commissioner). The two affidavits were sworn before Mr. Whippy merely in his capacity as a Commissioner for Oaths, that is as a person authorised to attest the signature of a deponent. It is quite clearly not the fact that Mr. Whippy was, in this case, in the terms of subsection (2), a person authorised to record or authenticate the statements made by the appellant in those affidavits. A Commissioner for Oaths does not, as such, record or authenticate statements, although he may of course be specially appointed as an examiner or commissioner to take the evidence of a witness, as, for example, for the purpose of proceedings abroad. And by no stretch of imagination could the appellant be said to be making any statement as a "person lawfully sworn as a witness". The affidavits were made by him, unequivocally, in the

capacity of a party to the suit, namely as the defendant; he was not giving evidence as a witness; he had never been sworn as a witness; the civil proceedings had not yet reached the stage at which the evidence of witnesses was required to be given; the action never came to trial because it was discovered that the 'debt' was unenforceable. It follows that the prosecution was brought under a section which has no application to the case, and it is too late to alter the charges. The Crown make no application for a verdict to be substituted under the terms of any other relevant section of the Penal Code so that it is unnecessary for me to enter upon the question whether there was some minor offence in respect of which a verdict could be substituted. It is sufficient to say that prima facie the offence of making a false statement in an affidavit is not an offence which can be regarded as a minor offence where the alleged major offence is the making of false statements as a witness in a judicial proceeding; section 106 and section 107 (which relates to false statements on oath made otherwise than in a judicial proceeding) appear quite clearly to deal with entirely different sets of circumstances. In the circumstances the appeal must be allowed, the convictions quashed and the appellants discharged.

*Appeal allowed.*