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MORARI LAL

v.

B

REGINAM

[COURT OF APPEAL, 1969 (Gould V.P., Hutchison J.A., Marsack J.A.) 20th, 27th June]

Criminal Jurisdiction

C *Criminal law—false pretence—attempting to obtain money by—claim for value of motor vehicle under insurance policy—vehicle deliberately damaged by insured—evidence negativing attempt merely to obtain repair—false pretence comprising words and conduct—Penal Code (Cap. 11) s.342 (a)—Criminal Procedure Code (Cap. 14) s.120.*

Criminal law—charge—false pretence—indictment giving accused all reasonable information as to nature of offence—Criminal Procedure Code (Cap. 14) s.120.

D The appellant was convicted of attempting to obtain money by false pretences. The subject matter of the charge was the sum of £980 claimed by him from his insurance company as the value of his damaged motor vehicle in answer to a question in the company's "Accident Report and Claim Form" beginning "If you consider the vehicle unrepairable . . . ". The pretence alleged was that the appellant falsely represented to the insurance company that damage caused to his vehicle was acci-
E dental, whereas it was established at the trial that the appellant had deliberately driven the vehicle over a steep bank into a stream. There was evidence that, shortly before the occurrence, the appellant had tried to sell the vehicle, first asking £900 and later £750.

Held: 1. That though a contract of insurance is one of indemnity
F under which an insurance company may merely repair a vehicle, it was inconceivable that the appellant would perform an act which might well be expected to damage a vehicle beyond possibility of repair merely in order to have it restored to its original condition. There was evidence upon which the trial court could find that what the appellant attempted to obtain was a sum of money, and not the repair of the vehicle.

G

2. Though the appellant, in his description of the occurrence in the claim form, did not use the word "accident", a false pretence may be made by conduct and actions, and the inference was irresistible that he intended the company to believe that what took place was an accident; the indictment gave the appellant all reasonable information as to the nature of the offence charged.

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Cases referred to:

R. v. Barnard (1837) 7 C. & P. 784; 173 E.R.342: *R. v. Wallwork* (1958) 42 Cr.App.R.153; 122 J.P.299.

Appeal from a conviction and sentence by the Supreme Court.

S. M. Koya for the appellant. A

G. N. Mishra for the respondent.

The facts sufficiently appear from the judgment of the Court.

Judgment of the Court (read by MARSACK J.A.): [27th June, 1969]—

This is an appeal against a conviction for attempting to obtain money by false pretences, contrary to section 342(a) of the Penal Code, and also against sentence of 18 months' imprisonment imposed on that conviction. B

The facts may be shortly stated. Appellant was the owner of a motor car registered No. S.136 which he used as a taxi, and which was covered by a comprehensive insurance policy with the Southern Pacific Insurance Company for the sum of £1,000. The car was subject to a bill of sale in favour of Morris Hedstrom Limited securing a balance of £690.19.2d. On the 7th March, 1968, appellant drove this vehicle, empty but for himself, along the King's Road to a point some 20 miles north of Suva. The car left the road near the Lukuya Bridge and plunged some 25 feet down the bank into the stream, where it was very severely damaged. Appellant jumped out of the car as it left the road. On the 9th March appellant completed an "Accident Report and Claim Form" in which he gave the following description of how the damage to the car occurred :— C D

> "I was going from Suva to Tailevu to pick passenger to take them to Vatukoula, when I reached the about 20 miles away from Suva, there was a rolling road of about 5 chains, I applied brake, she never catch (about 1 chain from place of impact) as there was no safe wall toward my left, I tried to stop against right wall, but she never stop, when I reached about 2 yards to go in the stream I left the car and jumped off I was too late to jump I went with car to the stream, I found myself two yards away from car I was taken by a Fijian man out of there then." E

In answer to the printed question: "If you consider the vehicle unrepairable what amount do you intend to claim?" appellant wrote in the answer: "£1,000". F

The case for the prosecution was that the damage to the car had not been caused by accident, but that the car had been deliberately driven off the road by appellant. In support of this, evidence was called from an insurance assessor and a motor mechanic to the effect that the brake hose on the car had been cut in several places; that these cuts could not have been accidentally caused; and that with the brake hose so cut the brake could not function at all. The Assistant Controller of Transport in Fiji gave what must be considered expert evidence to the effect that the cuts had been caused, in his opinion, by some sharp instrument such as a knife; that the brake would be rendered ineffective; and that this would be apparent to the driver at any time he required to slow down. It is clear that if the brake hose had been in that condition when appellant left Nausori he could not have travelled as far as he did without realising that his brakes were not working. G H

Some time prior to the occurrence which caused damage to the car two police constables saw the car S.136 parked at the side of the road, not far from the Lukuya Bridge, empty. Appellant was one or two chains away from the vehicle at the house of a Fiijan, Josese. One constable asked appellant why the car was there, and appellant replied that the brake had failed. Appellant stated that he did not require any assistance as he could manage.

There was further evidence from three Fijians in the locality that after the police vehicle drove away appellant came down from his parked car to the bridge and walked to and fro on the bridge two or three times before returning to the car. A little later they saw the car coming slowly down towards the bridge; the car left the road and as it did so appellant opened the door and jumped out and the car plunged down the bank into the stream below. There was no other traffic on the road.

On this evidence, which was accepted by the assessors and the learned trial Judge, the Court came to the conclusion that it had been proved beyond reasonable doubt that the damage to the vehicle had been deliberately caused by appellant.

The false pretence alleged against appellant is that he falsely represented that the damage caused to the vehicle on the 7th March, 1968, was accidental and resulted from a mechanical failure of the braking system, whereas in fact the damage had been caused not accidentally but deliberately. The money which appellant was charged with fraudulently attempting to obtain was stated as £980, representing the insured value of £1,000 less the amount of franchise £20 which was actually paid by appellant to the Insurance Company.

A number of grounds of appeal were put forward but it is not necessary to set these out in detail. Some of the grounds we find to have no merit. Those that require consideration by this Court may be summarised as follows :—

1. That no attempt was made to obtain from the Insurance Company the sum of money stated, as the claim was for repairs only;
2. That the evidence adduced by the prosecution did not establish the facts alleged in the "Particulars of Offence" set out in the charge.

At the outset it must be stated that in the opinion of this Court there was ample evidence, accepted on good grounds in the Court below, to establish the fact that the damage to the car was deliberately caused by appellant; and that must be accepted as the basis upon which this appeal falls to be determined.

With reference to the first ground of appeal set out above, counsel for appellant stressed the principle that an insurance policy is one of indemnity only, and that basically the liability of the Company in circumstances such as these is to have the damaged vehicle restored to its former condition. This argument, in our view, is sound as far as it goes. It is, however, clear that if the vehicle is in such a condition that it cannot be so restored, or, as the claim expresses it, that the vehicle is not repairable, then the obligation of the Company is to pay the assured

in cash the value of the vehicle at the time immediately before the damage was caused. Appellant, by his written answer, stated that in these circumstances his claim would be for £1,000. This would, of course, be less the amount of franchise £20 which he actually paid.

The learned trial Judge held it established beyond all reasonable doubt that the appellant did what he did in an attempt to obtain £980 from the Company. In his judgment the learned trial Judge does not expressly set out his reasons for reaching this conclusion. It seems clear, however, that the inference which he drew from the whole of the evidence was, in his opinion, inescapable. Driving a car over a steep bank on to the bed of a stream below might well be expected to damage the vehicle beyond the possibility of repair. It is not conceivable that the owner of a car would deliberately cause such extensive damage to it merely to have it restored to its original condition at the expense of the Insurance Company. The only feasible explanation is that which was accepted by the learned trial Judge, and presumably by the assessors, that the purpose of appellant's action was to obtain financial recompense for the loss of the car. In these circumstances the amount claimed by appellant — which, in our view, he tried to obtain from the Company — was the amount set out in his claim, £1,000, less the amount of franchise £20.

There is evidence that appellant was anxious to obtain cash for his car. Senior Inspector Koya deposed that two or three months before the crucial date 7th March, and again in the first week of March itself, appellant had tried to sell his car to the witness; asking first £900, and coming down to £750 a day or two before the car was damaged in the way described.

In our opinion, therefore, there was evidence upon which the Court below was entitled to find, as it did find, that what appellant attempted to obtain from the Southern Pacific Insurance Company was not the repair of his car, but a sum of money, which was correctly stated to be £980. This ground of appeal, therefore, accordingly fails.

The greater part of the argument of counsel for appellant was directed towards what he described as the failure of the prosecution to prove the particular false pretence alleged in the indictment. In counsel's submission the principle to be applied is correctly set out in *Archbold's Criminal Pleading Evidence & Practice* (36th Ed.) para. 1943:—

> "The prosecutor must prove the making of the pretence, as stated in the indictment; and any variance in substance between the pretence laid and that proved will be fatal."

The use of the phrase "variance in substance" is important. It indicates that slight verbal or other trivial variations will not suffice; any difference relied on must go to the root of the matter. In para. 1956 *ibid* it is said :—

> "The statement of existing fact whether made verbally or in writing need not be made expressly; it is sufficient if the statement may be naturally and reasonably, though not necessarily, inferred from such words or writing."

The false pretence alleged in the indictment is that in his claim on
A the Insurance Company appellant alleged that the damage had been caused to his vehicle accidentally, whereas in fact it had been caused by the deliberate action of appellant. It is true that in his claim appellant does not use the word "accident"; but no other inference is possible from the statement made by him in support of his claim. It must be remembered that, in any event, the false pretence need not be by words; the conduct and acts of the party will be sufficient: *R. v. Barnard*
B 7 C. & P. 784. From the whole conduct of appellant in the presentation of his claim to the Company the inference is irresistible that he intended the officers of the Company to believe that what took place on the afternoon of 7th March was an accident for which he was in no way responsible. The indictment sets out reasonable particulars of the false pretence alleged and we are satisfied that the charge complies with the requirements of section 120 of the Criminal Procedure Code in that it
C gives to the accused person all reasonable information as to the nature of the offence charged. To adapt the words of Lord Goddard, L.C.J. in *Wallwork* (1958) 42 Cr.App.R. 153 :—

> "There is nothing in the form of the indictment which would cause the prisoner any embarrassment or difficulty."

In the result we conclude that the indictment adequately sets out the
D alleged facts upon which the charge against appellant was brought; that those facts, if proved, would fully support a conviction for the offence with which he was charged; that there was ample evidence, accepted in the Court below, justifying a finding that those facts had been proved; and that, therefore, appellant was properly convicted of an attempt to commit the offence set out in section 342 (a) of the Penal Code.

E For these reasons the appeal against conviction will be dismissed.

With regard to the appeal against sentence, counsel for appellant urged that this was excessive in view of the fact that the maximum penalty for the offence is two years' imprisonment and appellant is, in this respect, a first offender. Although it cannot be suggested that the learned trial Judge applied a wrong principle in assessing the sentence,
F yet in view of the maximum term fixed by law, we are inclined to the opinion that the sentence of 18 months' imprisonment is, in all circumstances of the case, excessive to some degree. Accordingly we allow the appeal against sentence, quash that of 18 months' imprisonment, and substitute therefor one of 12 months' imprisonment.

Appeal against conviction dismissed — against sentence allowed.