A

ISIKELI TAVAGA

v.

DIRECTOR OF PUBLIC PROSECUTIONS

[COURT OF APPEAL, 1976 (Gould, V. P., Marsack J. A., Spring J. A.),
B 19th, 26th November]

Criminal Jurisdiction

Criminal law—false pretences—obtaining money by—ingredients of offence—both false representation and the intent to defraud must be proved—Penal Code (Cap. 11) *s.* 342*(a).*

C

Criminal law—evidence and proof—finding of fact by court—conclusion drawn by judge or magistrate must be based on evidence and not on mere assumptions or inferences on his part.

The appellant was a bailiff on the staff of the Magistrate's Court at Ba. He had
D visited two debtors with writs of Fieri Facias. Both debtors had handed the appellant money in consideration of his not executing the writs immediately, but of allowing them time to find the money claimed and to seek legal advice. The appellant contended that the money received was to cover his travelling expenses on the second visit if he were obliged to return to execute the writs.

In the Magistrate's Court the appellant was acquitted, but on appeal by the
E Director of Public Prosecutions, the judge set aside the acquittal and convicted the appellant on two counts of obtaining by false pretences.

Held: 1. There were two essential ingredients of the offence, the false representation and the intent to defraud. There may have been a false representation but there was no evidence that the debtors had been, in fact, deceived. The judge had
F drawn certain conclusions which were based on assumption and were not supported by the evidence.

2. The intent to defraud consisted of the appellant's intention not to do what he had undertaken to do in return for money. In this case the appellant had done what he had promised to do in return for payment, namely grant the debtor delay in exercising the writs of Fieri Facias. This act, albeit a grave dereliction of duty, did not
G amount to a defrauding of the debtors concerned.

Cases referred to:

Grail (Hartley George) v. R. (1945) 30 Cr. App. R. 81.
London & Globe Financial Corp. Ltd. In re [1903] Ch. D. 728.
Hammerson v. R. (1914) 10 Cr. App. R. 121.
H *Bracegirdle v. Oxley* [1947] K.B. 349; [1947] 1 All E.R. 126.
Hemns v. Wheeler [1948] 2 K.B. 61; 64 T.L.R. 236.
R. v. Kritz [1949] 2 All E.R. 406; 33 Cr. App. R. 169
R. v. Carpenter (1911) 76 J.P. 158; 22 Cox, C.C. 618.

Appeal against a judgment of the Supreme Court sitting in appeal from a judgment of the Magistrate's Court. A

S. Sahu Khan with S. D. Sahu Khan for the appellant.
D. Adams for the respondent.

Judgment of the Court: (read by MARSACK J.A.) [26th November 1976]—

This is an appeal against a judgment of the Supreme Court sitting in appeal from a judgment of the Magistrate's Court; and by section 22(1) of the Court of Appeal Ordinance is limited to questions of law only. B

The appellant was originally charged in the Magistrate's Court sitting at Tavua on two counts of embezzlement and, in the alternative, two counts of obtaining money by false pretences. The learned magistrate held that there was no case to answer on the embezzlement charges, which were dismissed at the conclusion of the case for the prosecution. After hearing evidence for the defence on the charges of false pretences the learned magistrate acquitted the appellant on both counts. The Director of Public Prosecutions appealed to the Supreme Court, and on the 5th July 1976 the judge set aside the magistrate's finding of not guilty on the false pretences counts and replaced it with a conviction on each count, passing sentence of nine months' imprisonment. It is against that judgment that this appeal is brought. C D

The relevant facts may be shortly stated. The appellant was a bailiff on the staff of the Magistrate's Court at Ba. In June 1975 and in December 1975 writs of Fieri Facias were issued against Sat Narayan of Rabulu, Tavua and Bal Naidu of Rakiraki respectively, and handed to the appellant for execution. When he approached Sat Narayan in June 1975 the debtor said he had no money but could pay after two weeks. The appellant agreed to give him the time, provided that he paid $10 for expenses. This money was paid. The writ was never executed in his case, and the judgment debt was subsequently paid. Bal Naidu in respect of whom the writ covered a sum of $637.70 paid the appellant $20 in December 1975 to give him time; according to the appellant's evidence this was stated to be to enable the debtor to consult his solicitor. Legally a bailiff has no right to grant time to any debtors in such circumstances; his duty is to execute the writ without delay. E

The basis of the judgment in the Supreme Court was that the debtors were deceived by the appellant into thinking that he could lawfully make a second visit; and that he could grant them the time they asked for if they paid him a sum of money to defray the expenses of that second visit. It is very difficult to ascertain in detail what was said by the witnesses at the trial in the lower court, the magistrate's notes being, as the learned judge pointed out, scanty in the extreme. It does however appear that the appellant said in his evidence: F G

> "Money of $20 was for second visit. I received my travel (travelling expenses?) for this visit from Government. I have used the $20 on beer."

The grounds were set out in the notice of appeal against conviction. These overlaped to a certain degree and some, in our opinion, had no substance. The main argument on the appeal was based upon a ground which could be shortly stated thus: Did the facts found in the court below suffice to establish a false pretence and an intention to defraud? Counsel for the appellant argued that each debtor in turn, and the appellant, knew exactly what the arrangement was between them: that the H

debtors would, as counsel put it, "buy time" by paying the appellant a small sum of money. In the result they were given time; and thus there was no intent to defraud. As is pointed out in *H. G. Grail* (1945) 30 Cr. App. R. 81 at p. 82:

> "The most essential ingredient of the offence of false pretences is the intent to defraud."

It may well be, counsel contended, that a bailiff would not have been called upon to pay his own travelling expenses for a second visit; in that case to describe the money paid to the bailiff as travelling expenses would be mere camouflage. The debtors were each paying a small sum of money to the bailiff in return for an indulgence in the form of time. No matter what this money was called they paid it to the bailiff on the understanding that they would get something in return; that is to say, that he would not then execute the warrant in each case, but would give the debtors time either to find the money to pay the debt (Sat Narayan) or to consult a solicitor (Bal Naidu). In each case the debtors received what they paid for and therefore, in counsel's submission, there was no proof of intent to defraud.

In replying to this contention Crown counsel referred to the judgment of the Court of Criminal Appeal in *Hammerson* 10 Cr. App. R. 121 at p. 122 in which it is stated:

> "Where the money is obtained by pretences that are false, prima facie there is an intent to defraud. This presumption, it is true, may be displaced; but here there is no suggestion of this, except the fact that value was given."

He further cited *in Re London & Globe Financial Corporation Limited* [1903] Ch. D. 728 at p. 732:

> "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put that to deceive is by falsehood to induce a state of mind: to defraud is by deceit to induce a course of action."

In the case of Bal Naidu, there appears to have been some confusion in the use of the phrase "travelling expenses." Bal Naidu, in his evidence said that the appellant had told him that under Government regulations travelling expenses were $10 for every $100; that he was not prepared to pay this amount and offered $20 which was accepted by the appellant. The appellant in his evidence stated:

> "I said if I take an inventory now I will charge you $10 in every $100 for poundage, walking possession fees. That money to Government. No money coming so he came close and asked if I would take $20 as travelling so he could see his solicitor."

The learned magistrate in his judgment finds that Bal Naidu's evidence of a demand for $66 "was in confusion for poundage and walking possession as explained by the defendant." This would appear to indicate that the magistrate accepted the appellant's explanation in preference to the evidence of Bal Naidu which he found "totally unrealiable in some aspects."

In his judgment the learned judge correctly sets out the practice of appellate courts with regard to findings of fact made by the court below. He says:

> "It is well established that appellate courts will only interfere with a lower court's findings of fact after very careful consideration and only with reluc-

tance. The mere fact that I would have arrived at a different conclusion is not sufficient to justify such interference. It has to be apparent that a reasonable tribunal would not have come to the same conclusion as the magistrate." A

It is to be noted that the false pretence set out in the charge against the appellant is expressed in these words:

"By falsely pretending that he was entitled to collect the said amount..... as travelling expenses." B

The learned judge in the Supreme Court says in his judgment:

"There was ample evidence revealing an intention to defraud.... I have considered whether the false pretence was adequately set out in as much as it was apparent that the accused also pretended that he could defer execution for two weeks. . . . I regard the particulars in each count adequately reflected the false pretence." C

But the appellant was not called upon to answer a charge that he had falsely pretended that he was entitled to defer execution for two weeks. The false pretence alleged, as has been stated, that he required the sums specified as travelling expenses. In support of this in the case of Bal Naidu Crown relied on a document signed by the appellant and Bal Naidu which reads as under:

"TO WHOM IT MAY CONCERN D
I Bal Naidu (s/o Ranga Sami Naidu) of Vaileka Ra, gave Mr Isikeli Tavaga Sheriff Officer of Ba the sum of $20.00 for his travelling expenses due to above cause.

Sgd Sgd

MR ISIKELI TAVAGA MR BAL NAIDU" E

In his evidence the appellant frankly admits he knew he had no authority to take money but says this $20 "was for second trip if I gave them time." He also points out that it would have cost Bal Naidu much more if he had taken the inventory.

In his judgment the learned judge correctly states that the motives and intentions of an accused person can be deduced only from his actions, words and conduct at the time of the alleged offence in relation to the surrounding circumstances. But he goes on to make what seems to this court, an unfortunate comment when he says: F

"An accused's subsequent protestations of innocence during his trial are not evidence; they are simply denials of guilt."

It is difficult to understand just what the learned judge had in mind when he said this. It is perfectly clear that evidence given by an accused person at his trial, whether "protesting his innocence" or not, is evidence and should be considered as such. It is of course open to the trial judge so dis-believe that evidence; but that in itself does not mean that it is any the less evidence. G

It is well established that there are two essential ingredients in the offence of which the appellant has been convicted. The first is the false representation, and the second is the intent to defraud. Allowing that the appellant falsely represented to the two debtors that he would require travelling expenses paid to him if he were to withhold execution of the writs for the time they required, it is still necessary to prove H

beyond reasonable doubt that he had the intention to defraud, that is to say, "to induce a man to act to his injury."

The question arises whether the debtors were, in each case, deceived by the representations of the appellant to the extent that they actually believed *(a)* that he had power to withhold execution of the writ for a time and *(b)* that if he did so, he would be forced to make a second visit and pay for this out of his own pocket.

It is necessary to look at the judgment of the learned to ascertain exactly what facts he found to be proved. Such of these facts were based on the evidence given at the hearing before the magistrate, must remain unchallenged on this appeal which, as has been pointed out, is limited to questions of law. But if it appears that any such finding of fact is a mere assumption by the learned judge and is not based on evidence, than as a matter of law we are entitled to hold that such a finding should not stand: *Bracegirdle v. Oxley* [1947] K.B. 349 at p. 353; *Hemns v. Wheeler* [1948] 2 K.B. 61 at p. 65.

In the course of his judgment the learned judge says:

> "The judgment debtors were not expressly asked whether or not they believed the accused's statement that he required the money for expenses. However, they knew he had come to collect the debt. They must have accepted that he could lawfully make a second visit; it is unlikely they would have paid had they realised that if the sheriff found the writ unexecuted he would be obliged to execute it, even if this were on the very next day. There was in my view evidence on which the magistrate could and should have found that the judgment debtors were deceived."

It is clear from this passage that the conclusion drawn by the learned judge that the debtors were in fact deceived, is a matter of assumption or inference only and does not depend on questions of credibility or acceptance of evidence. A little further on in his judgment the learned judge says:

> "There was evidence which the magistrate should have accepted showing that they were deceived into thinking they were covering the expenses which the accused would legitimately incur by returning at a later date."

It must be remembered that the magistrate had had the advantage—which the learned judge had not—of hearing the witnesses give their evidence and observing their demeanour. It is therefore difficult to say on what basis the learned judge was entitled to form the opinion that the magistrate should have accepted certain evidence. In the course of his judgment the magistrate said:

> "The prosecution's chief witnesses, namely the two judgment debtors, were totally unreliable in some aspects."

We are unable to find any evidence that the debtors were in fact deceived; and, in that case, as a matter of law, the learned judge was not entitled to make any such finding. The judge further finds that the appellant "was untruthful in purporting that he could give any time." Legally, it can be said, that he was not entitled to do so; but in fact, he did give the time which the judgment debtors desired to buy. The judge further says:

> "Consequently, the judgment debtor was not only paying for something he need not have paid for, but in so doing, could not claim repayment from the sheriff."

This finding is not quite accurate. What the judgment debtor was paying for was a temporary stay of execution of the writ. He could not have obtained that stay of execution in the circumstances, without paying for it as he did.

In the result we are impelled to the conclusion that as a matter of law one of the essential factors necessary to establish the offence with which the appellant was charged, namely the deceit, has not been established on the evidence in the present case. There is the further point that the appellant did what he promised to do when the debtors handed over the money: to withhold execution of the writ for a period of time. In *R v. Kritz* [1949] 2 All E.R. 406 at p. 409 Lord Goddard says:

> "You are not defrauding him of the money if you eventually do repay it, but you are defrauding the man because you are giving him something altogether different from what he thinks he is getting, and you are getting his money by your false statement. In such a case as that the false statement would not be honestly made, and this question as to the intent to defraud substantially comes to this: whether or not the statements were honestly made."

This is part of an extract from *R. v. Carpenter* which Lord Goddard refers to as the *locus classicus* on the subject of "intent to defraud". This present case is distinguishable in that the appellant gave the debtors exactly what they thought they were getting from the payment of the money. If then it is of the essence of the intent to defraud that the payer of the money should receive something altogether different from what he thought he was getting, then the evidence in this case does not establish an intent to defraud.

The fact that the person who parted with the money following misrepresentation received something of real value for that money does not necessarily show that there was no intent to defraud: *Hammerson* (supra). But in all the cases cited to this court, where intent to defraud was held to be proved, the victims did not receive from the accused what they were led to believe they would receive if they paid the money demanded. The intent to defraud consisted of the accused's intention not to do what he undertook to do in return for the money. In this case there is no dispute as to the fact that the debtors paid the money for the purpose of obtaining some delay in the execution of the writ of Fieri Facias; and that—whether he was legally entitled to or not—the appellant carried out what may be regarded as his side of the bargain. Accordingly, it cannot be said that in law his action amounted to a defrauding of the other persons concerned. That being so, as we have already concluded that it has not been shown that the debtors were deceived, we are impelled to hold that the proved and admitted facts while undoubtedly showing that the appellant was guilty of a grave dereliction of duty, do not, in law, establish the essential ingredients of the offences of which the appellant stands convicted, namely, the deceit and the intent to defraud. For these reasons, we hold that the appeal must be allowed and the conviction quashed.

Appeal allowed.