

PERERA
v.
THE ATTORNEY-GENERAL

COURT OF APPEAL.

H. A. G. DE SILVA, J., ABEYWARDENE, J. AND JAYALATH, J.

C.A. 115/82 – H. C. COLOMBO 3137.

MAY 13 AND 14, 1985.

Criminal Law – Cheating – Penal Code section 403 – Dishonest inducement – Delivery of property by third party other than party induced

On the authorisation of K. C. de Silva who acted on behalf of the Director, Small Industries, the officers of the powerloom centres which were under the control of the said Director delivered to the accused-appellant three lots of textiles. But for the authorisation by K. C. de Silva the officers of the powerloom centres would not have delivered the textiles to the accused-appellant. On three counts in respect of the three

lots of textiles the accused-appellant was charged with dishonestly inducing K. C. de Silva to deliver the textiles in question to him by falsely representing that they were meant for distribution to Co-operative Societies for sale to consumers but in fact the accused-appellant sold them at a profit to private traders. The accused was convicted on all three counts and sentenced to two years' rigorous imprisonment on each count – sentences to run concurrently. In appeal the facts were not disputed but as a matter of law it was argued that where the delivery of the goods was not by the person dishonestly induced the charges were not made out.

Held –

It is the inducement and not the delivery that constitutes the gist of the crime. The words "induces the person so deceived to deliver any property to any person in the Penal section" are wide enough to include not only property in the ownership or possession of the person so induced but also any property under the control of the person so induced on whose authorisation the property shall be delivered. This amounts to constructive delivery of the goods. K. C. de Silva gave his authorisation being deceived by the false representation made by the accused-appellant. The ingredients of the crime of cheating were thus proved beyond reasonable doubt.

APPEAL from judgment of the High Court of Colombo.

Dr. Colin R. de Silva with *U. A. S. Perera* for accused-appellant.

Asoka de Silva, S. S. C. for Attorney-General.

Cur. adv. vult.

June 12, 1985

JAYALATH, J.

The accused-appellant in this case was convicted on three counts by the learned High Court Judge of Colombo on 3.4.1980 and sentenced to 2 years' rigorous imprisonment on each count, sentences to run concurrently.

The three charges were under section 403 of the Penal Code as follows :–

- (1) that the accused-appellant on or about the 5th June, 1974, dishonestly represented that he was purchasing 20,000 yards of textiles valued at Rs. 83,000 for the Dandugamperuwa Multi-Purpose Co-operative Society and thereby deceived K. C. de Silva and fraudulently induced K. C. de Silva in that manner for the purpose of getting the said quantity of cloth delivered to the accused-appellant and thereby committed an offence punishable under section 403 of the Penal Code.

- (2) that the accused-appellant on or about the 18th June, 1974 dishonestly represented that he was purchasing 50,000 yards of textiles valued at Rs. 220,750 for the Dandugamperuwa Multi-Purpose Co-operative Society and thereby deceived K. C. de Silva in that manner for the purpose of getting the said quantity of cloth delivered to the accused-appellant and thereby committed an offence punishable under section 403 of the Penal Code.
- (3) that the accused-appellant on or about the 9th July, 1974 dishonestly represented that he was purchasing 250,000 yards of textiles valued at Rs. 996,000 for the Dandugamperuwa Multi-Purpose Co-operative Society and thereby deceived K. C. de Silva in that manner for the purpose of getting the said quantity of cloth delivered to the accused-appellant and thereby committed an offence punishable under section 403 of the Penal Code.

The accused-appellant was also charged with two others, the 2nd and 3rd accused in this case, in that they did between the 24th May, 1974 and 8th August, 1974 deceive K. C. de Silva and conspire with the other two accused to take delivery of a quantity of textiles, an offence punishable under section 113 B read with section 403 of the Penal Code.

The 2nd and 3rd accused were also charged with aiding and abetting the accused-appellant. The learned trial Judge found the three accused not guilty of the charge of conspiracy, and the 2nd and 3rd accused were also acquitted of the charges against them.

It would be appropriate to state the facts of this case briefly in order to appreciate the only submission raised by the learned Senior Counsel for the accused-appellant on a point of law.

The accused-appellant was employed by the Dandugamperuwa Multi-Purpose Co-operative Society as a Supplies Officer between the relevant dates of 24th May, 1974 and 8th August, 1974.

The 2nd accused was the General Manager of the aforesaid Co-operative Society and the 3rd accused was an Inspector in the Co-operative Department stationed at Gampaha. The Dandugamperuwa Multi-Purpose Co-operative Society was within his area.

There were large stocks of long cloth and matt cloth available at powerloom centres in various parts of the country. These stocks were normally purchased by the Salu Sala, and sold through the Department of Small Industries. In 1974, however the Salu Sala had informed the Department of Small Industries that it would not purchase the long cloth and matt cloth that year.

The Department of Small Industries then called for tenders for the purchase of the available stock from private tenders. The highest bid was Rs. 4.15 cts. per yard. This Department later decided to sell the cloth to Co-operative Societies at Rs. 4.15 cts. per yard to enable them to distribute it to consumers. The Department of Small Industries decided to limit the distribution to 5,000 yards for each Co-operative Society which had to get the approval of the Assistant Commissioner of Co-operative Development of the area. A circular marked and produced as 1 D 1 was sent by the Department of Small Industries to all powerloom centres to give effect to this limitation of sales.

K. C. de Silva, Textile Technologist of the Department of Small Industries gave evidence for the prosecution in this case and said, however, that the circular applied to the powerloom centres only and not to the Small Industries Department that sent the circular. As such he said he had the power to permit a larger quantity of textiles to Co-operative Stores at his discretion.

The accused-appellant has in his evidence admitted that he prepared the three documents P 1, P 2 and P 3 which were produced at the trial. They were prepared by him for the purpose of obtaining the various quantities of textiles through the Department of Small Industries.

P 1 was a letter dated 24.5.1974 signed by the 2nd accused who was the General Manager of the Dandugamperuwa Co-operative Society addressed to the General Manager, Power Loom Centre, Small Industries at Lewella or Matale through the Assistant Commissioner of Co-operative Development, Gampaha requesting the issue of 20,000 yards of long cloth to the Dandugamperuwa Multi-Purpose Co-operative Society. The application was recommended and signed by the 3rd accused who was the Inspector, Co-operative Department and stationed at Gampaha at the time. This letter was endorsed by K. C. de Silva, for the Director of Small

Industries authorising the issue of 20,000 yards of long cloth or a lesser amount from the Power Loom Centre at Matale to the aforesaid Co-operative Store marked and produced as P 1 a.

P 2 was a letter dated 31.5.74 purported to have been sent by the General Manager, Dandugamperuwa Multi-Purpose Co-operative Society to the General Manager of the Power Loom Centre, Matale through the Asst. Commissioner Co-operative Development, Gampaha requesting the issue of 50,000 yards of long cloth to the aforesaid Co-operative Society. This letter contained a recommendation by the 3rd accused that the cloth should be issued to the aforesaid society. Below was an endorsement of K. C. de Silva to the General Manager, Power Loom Centre, Nuwara Eliya that he "may sell 25,000 yards of matt cloth at Rs. 4.15 cts. a yard, and 25,000 yards of long cloth at Rs. 4.70 cts. a yard." This was produced as P 2 a. The accused-appellant admitted that he wrote the signatures of the General Manager of the aforesaid Co-operative Society in P 2.

P 3 was a letter addressed by the General Manager, Dandugamperuwa Multi-Purpose Co-operative Society to the Director of Small Industries through the Asst. Commissioner, Co-operative Development, Gampaha requesting him to issue damaged saree cloth to the aforesaid Co-operative Society to be distributed among consumers of the society. This application too was recommended by the 3rd accused. K. C. de Silva had endorsed it on behalf of the Director of Small Industries and authorised the issue of damaged saree cloth to the aforesaid Co-operative Society.

It had first been addressed by K. C. de Silva to the Velona Power Loom Centre, but as their stocks were exhausted, it was addressed to the Kurunegala Power Loom Centre. It is in evidence that 250,000 yards of matt cloth valued at Rs. 996,000 had been purchased on this letter.

It is in evidence, and it was admitted by the accused-appellant that all the textiles issued on the letter P 1, P 2 and P 3 were obtained by the accused-appellant and other than 465 yards of these textiles sent to the Dandugamperuwa Multi-Purpose Co-operative Society, the balance was sold to the private traders by the accused-appellant through a broker by the name of Karunaratne. Karunaratne, a witness

for the prosecution stated that he went to the power loom centre with the accused-appellant to take delivery of the textiles from the power loom centres having paid for them. He said that the accused-appellant was paid 15 cts. for every yard of cloth purchased.

K. C. de Silva who also gave evidence for the prosecution said that he would never have authorised the power loom centres to issue the cloth had he known that these textiles were to be sold to private traders.

There is no dispute between the prosecution and defence as to the facts in this case. At the very outset the learned Senior Counsel for the accused-appellant stated that he was not disputing any of the facts in this case. The only legal point he was raising in this case was that the three charges in the indictment on which the accused-appellant had been convicted were defective, and therefore the conviction cannot be maintained. He stated that the evidence led by the prosecution did not support the charges. He said that the defective part of each charge read as follows :

"and thereby deceived K. C. de Silva and induced fraudulently the said K. C. de Silva to deliver to you the said quantity of cloth."

He submitted that according to the evidence led by the prosecution the goods were delivered to the accused-appellant by the officers of the power loom centres, as the goods were in their possession and not in the possession of K. C. de Silva. He said that the charge had apparently been framed to cover the first limb of section 403, or the first limb of section 398 which defines cheating.

Learned Senior Counsel for the accused-appellant based his argument on the English translation of the charges from the Sinhala record of the case.

I have carefully perused the indictment dated 20.3.1980 in the Sinhala record, on which the accused were tried which varies from the English translation.

The relevant words used in the three charges in Sinhala are as follows :

“කේ. සී. ද සිල්වා රැවටීමෙන් එමගින් එකී රෙදි ප්‍රමාණය ප්‍රශ්මයට කර දීම සඳහා එකී කේ. සී. ද සිල්වා වැඩිපිටතට පෙදුණුවීමෙන් දණ්ඩ නීති සංග්‍රහයේ 403 වන වගන්තිය යටතේ දඬුවම් ලැබීම කැපී වරදකට ප්‍රමුඛතා වරද කරු බවට.”

The correct translation of these words is as follows :

“and thereby deceived K. C. de Silva and fraudulently induced K. C. de Silva in that manner for the purpose of getting the said quantity of cloth delivered to you and thereby you have committed an offence punishable under section 403 of the Penal Code”.

It is therefore clear that the words in the English translation ‘and thereby deceived K. C. de Silva to deliver to you the said quantity of cloth’ is an erroneous translation.

In order to prove a charge of cheating the prosecution must establish the following ingredients :—

- (1) the deception of any person,
- (2) (a) by fraudulently or dishonestly inducing that person,
 - (i) to deliver any property to any person, or
 - (ii) to consent that any person shall retain any property, or
- (3) intentionally inducing that person 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 learned Senior Counsel for the accused-appellant also submitted that section 403 of the Penal Code contemplates a delivery by the person induced by the representation and by nobody else.

In my view the words ‘to deliver any property to any person’ have a very wide application in a charge of cheating. In construing the words ‘induces the person so deceived to deliver any property to any person, *inducement* and not the delivery of the property should be construed as the gist of the crime. (Vide *Gour-Penal Laws of India, 8th edition p.3013.*)

As such the words 'for the purpose of getting the said quantity of cloth delivered to you' is construed in this instance to mean 'for the purpose of causing the said quantity of cloth to be delivered to you.'

Further, it is my view that the words 'induces the person so deceived to deliver any property to any person' include not only property in the ownership or possession of the person so induced but also any property under the control of the person so induced, on whose authorisation the property shall be delivered, which amounts to a constructive delivery of the goods.

In this case the long cloth and the matt cloth delivered to the accused-appellant by the officers of the power loom centres were under the direct control of the Director, Small Industries on whose behalf K. C. de Silva acted. The officers of the power loom centres had no option but to carry out K. C. de Silva's order. But for this authorisation made by K. C. de Silva the goods would not have been delivered to the accused-appellant by the officers of the power loom centres. As stated earlier the accused-appellant admitted that K. C. de Silva acted on his representation.

The learned trial Judge has sifted the evidence led at the trial very carefully and come to the following conclusion :

'The 1st accused had sold cloth to the private sector through Karunaratne at the rate of Rs. 4.30 per yard. By that he had earned a large profit. The 1st accused has accepted all these facts. According to the evidence of the 1st accused, applications P 1, P 2, and P 3 show that the 1st accused indicated to K. C. de Silva that he is buying the cloth for the Co-operative Society. According to the evidence of Mr. Silva, if he did not make such an indication he would not issue these permits. The 1st accused admitted that he fraudulently put the signature on P 2. Accordingly without any doubt it appears that the 1st accused obtained cloth by deceiving Mr. K. C. de Silva, that he was buying the cloth for the Co-operative Society and sold them to the private sector at a profit. Therefore in my opinion the charge of cheating against the 1st accused is proved beyond doubt.'

We have no reasons to intertere with the finding of the learned trial Judge.

The sentence of 2 years' rigorous imprisonment for each count in our opinion is a lenient one, considering the nature of the offence.

We accordingly dismiss the appeal and affirm the conviction and sentence imposed by the learned trial Judge.

H.A.G. DE SILVA, J. – I agree.

ABEYWARDENE, J. – I agree.

Appeal dismissed.
