

R. v. EDWARD PATRICK SMITH.

A CRIMINAL REVIEW CASE OF 1937.

Penal Code section 280—cheating (obtaining by some fraudulent trick or device)—prosecution must show obtaining directly due to such trick or device—Public Prosecutor should decline to prosecute in doubtful cases—complaint should ordinarily be signed by person making the complaint and not by the police officer to whom complaint is made.

In the present case the accused arranged with a firm dealing in motor cars for the purchase of a motor car on a contract known as "Hire Purchase"; the prosecution alleged that the accused represented having a banking account with a local bank and that, on the strength of this representation, the firm entered into the contract; it was manifest, however, upon hearing the evidence of the manager of the complainant firm that the accused's representation with regard to having a banking account (although false) had nothing to do with the making of the contract and the Public Prosecutor offered no further evidence.

For a consideration of the essentials of the offence of cheating contrary to section 280 of the Penal Code, see *R. Mukese v. The Queen* 1958 R. & N. 366 and *R. v. Mubwana* 1958 R. & N. 980. The judgments in these two cases conflict. In *Ali v. The Queen* 1959 R. & N. 14, SPENCER WILKINSON, C.J. refers to both these judgments in considering the proper interpretation of section 319 of the Nyasaland Penal Code which is identical in wording to section 280 of the Penal Code of Northern Rhodesia.

As to the desirability for the true complainant to sign the complaint see *R. v. McLennan Kumwembe* 2 N.R.L.R. 108 at p. 110.

As to the necessity of proof believed to be sufficient for a conviction being available before a charge is drawn see *R. v. Jali Kachipili* p. 90 ante; *R. v. Kempton* p. 148 post; *R. v. McLennan Kumwembe* 2 N.R.L.R. 108 and *R. v. Muchuma* 4 N.R.L.R. 64.

Resident Magistrate, Ndola: This case was tried and disposed of immediately after I had given judgment in the case of *Rex v. Ian Shaw Kempton* on an exactly similar charge [reported at p. 148 post—Editor].

In the case now reported upon at the conclusion of the evidence of the principal witness for the prosecution the public prosecutor offered no further evidence and the accused was accordingly found not guilty and discharged.

I have already in reporting upon the case against Kempton expressed my opinion as to the desirability of leaving charges of this kind to be prosecuted ordinarily by the person making the complaint and I need not repeat my opinion here.

Of the present case it is sufficient to say that there was even less substance in this charge than there was in the charge against Kempton and that it should have been obvious to anyone investigating the evidence in support of the complaint that the charge could not be substantiated.

It seems likely that the complainant company realising it would be "throwing good money after bad" (to use the words of Mr. W.—the company's manager) to sue the accused civilly for the purchase price of the motor car which he obtained from the company on the hire purchase system decided to lay a criminal charge against him, having every reason to believe that the public prosecutor would accept the charge and conduct the prosecution; the complainant company had thus nothing to lose by making the complaint. It seems right and proper that the prosecution in such circumstances should be left in the hands of the complainant company who would then have to consider whether even criminal proceedings might not be "throwing good money after bad", and it would no doubt decide not to lay or prosecute a charge which had no reasonable prospect of success.

Francis, J.: The note and judgment of the Magistrate in these two cases should be transmitted to the Chief Secretary for such action as may be deemed expedient.

I agree with the Magistrate's comments on these cases [the present case and *R. v. Kempton* p. 148 *post*—*Editor*], and would observe that since the Crown is protected against any order of costs in criminal prosecutions, it is reasonable to expect that care should be taken before invoking the machinery of the courts.

As it may be necessary for me to deal with this question again, I should be glad to be informed in due course what action has been taken to avoid a recurrence of the cause for the Magistrate's complaint.