R. v. IAN SHAW KEMPTON.

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.

The facts of this case appear from the judgment of the Subordinate Court reproduced hereunder.

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. 890. 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 the charge is drawn see *R.* v. *Jali Kachipili* p. 90 *ante*; *R.* v. *Smith* p. 146 *ante*; *R.* v. *McLennan Kumwembe* 2 N.R.L.R. 108 and *R.* v. *Muchuma* 4 N.R.L.R. 64.

Resident Magistrate, Ndola: In this case the charge against you, Kempton, is that by means of a fraudulent device you obtained a motor car; that is to say, you represented that you had a banking account at the Standard Bank of South Africa Ltd. at its Ndola branch, thereby obtaining from the X——Y Co. Ltd. a motor car, and it is necessary for the Court to be satisfied on this charge that you in fact obtained the motor car from the X——Y Co. Ltd. by means of the fraudulent device alleged by the prosecution.

It is not sufficient for the prosecution to show that you obtained a motor car from the X——Y Co. Ltd. and that at the time, i.e., immediately before obtaining it you made use of some fraudulent device or trick, but the prosecution must show that the fraudulent device or trick led to the obtaining of the motor car. In this case there is not the slightest doubt that you made use of a fraudulent device, or rather you made a false representation in stating that you had an account at the Standard Bank at Ndola and there is equally no doubt that you on that day, and soon after making use of that fraudulent device, obtained from the X——Y Co. Ltd. a motor car, but can it be said that it was because of that fraudulent device or trick that you obtained the car ? Was it that only, or chiefly, which led the manager of that company, Mr. T., to allow you to have the car ? I have thought about the case a good deal and, remembering the

very remarkable evidence which I heard here on Wednesday with regard to the circumstances under which you obtained the car, I have come to the conclusion that it would be wrong to say that you obtained the car by means of that fraudulent device.

There is some conflict between Mr. T.'s evidence and that of Mr. M. as to just when you and Mr. T. signed the hire purchase agreement and when you signed the so-called promissory note authorising the bank to make payment to the X——Y Co. Ltd. each month of the instalments arranged under the hire purchase agreement.

Mr. T. says that the hire purchase agreement was not signed until after Mr. M. had come back from the Standard Bank with information which clearly meant that you had no account with the Ndola branch of the Standard Bank although Mr. G., accountant of the bank, was not authorised to say and did not say in as many words, " This man has no account at this bank ". Mr. M. went back to the X——Y Co. Ltd. and informed you and Mr. T. of what he had learnt at the bank. Mr. T. says that it was after Mr. M.'s return that you and he signed the hire purchase agreement. Mr. T. also stated in evidence that when you and he signed the agreement he was suspicious and he doubted whether your story of having money in the bank was true, but that at the same time it was a pity to miss an opportunity and he could not wait until Monday morning to verify your statement so he took a chance. Mr. M., of course, says that he is quite sure that the hire purchase agreement was signed *before* he went to the bank and got the information. There is conflict of evidence on this point and the law is that the benefit of every doubt is to be given to an accused person. So here I must give you the benefit of the doubt and find that the agreement was signed *after* Mr. M. came back from the bank. After hearing what Mr. M. had learnt at the bank, Mr. T. let you have the car although he was suspicious and doubted whether a further explanation you then gave, viz., that you expected money to be transferred from the Broken Hill branch of the bank was true. This shows the state of mind of Mr. T. when he allowed you to take the car and I am sure that if I were sitting here with a jury, the jury would say, " We are not going to say a man is guilty of the present charge under these circumstances ".

Mr. T. did not want to miss a sale; he had learnt from you that you were in employment on the railways here, apparently he thought you were older and earning more money than you do and the evidence suggests that he thought that if you did take the car and he did not receive the money he could get the car back very easily, as in fact he did a few hours afterwards. It is true that Mr. T. has said that the mere fact of registration of a car upon sale leads to depreciation of the car amounting in the present case to £40 or £50, but it is very doubtful whether the car did or was likely to depreciate simply by being kept one or two hours in your hands. I have little doubt that Mr. T. was actuated not entirely by your story of a bank account, by that fraudulent representation which you made; he doubted your statement but he seems to have said to himself " supposing it is true I will miss a chance of business and if I let this man have the car it will be a very small risk indeed since I can easily get it back again almost immediately if I find the story to be false ".

All the circumstances of this case are extraordinary; there was an amazing lack of inquiry, an absence of questions which a prudent business man is surely going to ask, not only such a question as where a man is employed, but the "101" questions going to the root of the matter, "Is this man capable of fulfilling the contract into which we are about to enter?" Mr. T. did not ask those questions nor did he even, as he could have done, ring up the stationmaster. He had the phone at his side, but he only rang up the stationmaster later on, after you had been allowed to take the car away. Yet so suspicious was Mr. T. that, when Mr. M. returned to the office after showing you the controls of the car and seeing you drive away, he found Mr. T. just finishing a telephone conversation with someone at Broken Hill on the question whether you had a banking account at that place.

One thing more before I finally dispose of the case:

I feel that, in cases of this nature, the police should be careful in receiving a charge and that they should be reluctant to prosecute unless they are absolutely satisfied a reasonable prima facie case will be set up at the trial. I know it has been the practice in this Territory for the police, generally speaking, to take up any charge which is laid at the police station, but I have always been strongly opposed to this practice and I am continually drawing attention to the fact that this practice is likely to lead to hardship. I know that individual police officers are not responsible for the existence of this practice, which appears to have existed since the early days of the Territory; I am in no way criticising any police officer but I do call attention to a practice which amounts to a policy of accepting too readily the conduct of prosecutions which should rather be left to the private individual to conduct at his own expense.

In the present case, perhaps all the facts were not known, but I do think the investigation might have been more thorough, in which case the police might well have said to the manager of the complainant company, "We think that this is a case where the prosecution should be undertaken privately," or, "We are not prepared to take up this case without referring the matter to the Attorney-General to ascertain whether he thinks this prosecution should be brought at the instance of the Public Prosecutor".

In this particular case a man was arrested on the sworn information of a police officer who I presume had satisfied himself that at least a prima facie case had been disclosed. I think it would be as well in these cases for the police officer taking the charge to require the person laying the charge to make the sworn information.

As it is, a private prosecutor makes a complaint—he feels that he has been deceived in some way and that this sort of thing has happened before; he thinks that something ought to be done, reports the matter to the police and the prosecution is undertaken at the public expense. It puts the complainant to no expense, but if he had to employ a solicitor to conduct the prosecution of the case and had all the trouble and expense connected with a prosecution, he would be more careful in bringing a complaint before the Court.

Moreover, in the case of a private prosecution the private prosecutor can be made to pay the costs of the accused person if the charge is dismissed and the Court finds that the prosecution was not brought on reasonable grounds. In charges brought by the public prosecutor, the person who laid the charge, however frivolous, cannot be ordered to pay the accused person's costs.

I make these remarks, not in criticism of any police officer here present, but because I wish to call the attention of the Government to the present practice.

Everyone at present runs to the police and the police are expected to be here, there and everywhere, and do everything. Where a charge is laid, the complainant says, " You must take it up, I insist; if not I shall report the matter." This has got to stop. At least, as far as I am concerned I shall make every effort to see that it is stopped.

Now, Kempton, you have been dishonest and foolish, you have been under arrest, imprisoned for two or three nights, and I hope that this will be a lesson to you.

What you had in mind when you made your fraudulent statements I cannot imagine; you must have known you would be found out almost at once.

Fortunately, although you have been most dishonest, I am not satisfied that the charge has been proved and for that reason I find you " Not Guilty ", you are discharged.

(In forwarding the record of the case to the High Court the Resident Magistrate added the following note):

The accused, a European employed by the Rhodesia Railways and aged 18 years, was arrested on the 5th October, 1937, upon a warrant issued that day on information sworn by a police officer at Ndola informing that the accused had committed the offence of cheating contrary to Penal Code section 280.

On the 6th October, 1937, the accused appeared before me and was tried summarily; the evidence in the case was concluded during the day but I reserved judgment as I was extremely doubtful whether a conviction should be recorded.

On the 8th October, 1937, I gave judgment and found the accused not guilty. I gave in open court the reasons for this decision and a shorthand note was taken of what I said; copy of the transcript of this note is attached.

While I am quite satisfied that the police action in applying for a warrant for the arrest of the accused and charging him with the offence in question was bona fide, I feel that I must call attention to the unsatisfactory evidence which was given at the trial in support of the charge and I bring the case to the notice of the High Court in the hope that the attention of Government will be directed to the ease with which any member of the public can at the present time secure the arrest and trial of some other person upon a serious charge.

In my opinion no person whether he be European or native should be arrested and brought to trial unless there is reasonable ground to expect a conviction. When a member of the public makes a complaint to the police against some other person and it becomes necessary to consider whether a warrant or a summons should be issued, I would suggest that ordinarily the person making the complaint should be advised to apply for such warrant or summons and that a police officer should only make such application in cases where there can be no doubt that the offence in question has been committed or at least that there is a strong prima facie case. (Criminal Procedure Code section 83.)

If this course is followed and the application for the warrant or summons is ordinarily made by the party making the complaint it will still be possible for the public prosecutor to take over the prosecution if desired, while if it is not so desired, the prosecution will remain in the hands of the person who made the complaint.

The advantage of this will be that, if at the trial the court acquits the accused, the private prosecutor (i.e., the person who made the complaint) can be ordered to pay to the accused such reasonable costs as to the court may seem fit if the court considers that the private prosecutor did not have reasonable grounds for making his complaint, and this will be so even if the prosecution has been taken over from the private prosecutor by the public prosecutor (see Criminal Procedure Code section 160 (2)).

Even where the Court on acquitting the accused makes no order for the payment of the costs of the accused by the private prosecutor the latter will at least have had to bear the expense and the burden of the prosecution and this is likely to have the effect of discouraging members of the public making complaints to the police which have no real substance.

In the present case it is admitted that the accused behaved in a manner which was far from honest or straightforward but on the other hand the manager of the complainant company showed a complete disregard for ordinary prudent business methods, and his methods of business are an invitation to any unscrupulous person to adopt dishonest means of obtaining goods. In circumstances such as this the police are not called upon to take action or at least should not take action without close investigation and without referring the question of prosecution to the Commissioner of the Police or some Crown Law Officer.

Francis, J.: The note and judgment of the Magistrate in these two cases [the present case and *R.* v. *Smith* p. 146 *ante—Editor*] 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, 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.