RECENT CASES

Criminal law; false pretences

BALCOMBE v. DeSIMONI[1]

The accused was a book salesman. He falsely pretended to be a student in a competition for $1,000 and a trip abroad as a representative of the youth of Australia. He claimed, to a householder, that he would earn certain points for every book sold or subscription signed.

Petty sessions found this was a false pretence and further found it induced the householder to purchase a cook book for $6.50—the apparent value of the book—but, as the court also found, the householder would not have made the purchase in the absence of this inducement.

What disturbed the appeal courts was the failure of any specific finding by the magistrate of an "intent to defraud". Without making this finding expressed, the magistrate convicted the accused under section 409(1) of the Criminal Code of W.A.

> Sec. 409(1)—Any person who by any false pretence or by any wilfully false promise . . . and with intent to defraud obtains from any other person anything capable of being stolen . . . is guilty of a crime.
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> The statutory definition of 'false pretence' is in section 408:—
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> Any representation made by words or otherwise as a matter of fact, either past or present, which representation is false in fact and which the person making it knows to be false or does not believe to be true, is a false pretence.

The place of the "intent to defraud" in this offence has been left largely undisturbed since *O'Sullivan* in 1925[2] when the full court of the Victoria Supreme Court said:—

> It is an essential element of the offence that the goods should have been obtained by false pretence with intent to defraud. The intent to defraud includes in every case an intention on the part of the accused that the owner of the goods shall be, by such false state-

1 (1972) 46 A.L.J.R. 141.
2 [1925] V.L.R. 514.

ments, induced to do what he otherwise would not do—namely, part with the goods in question.[3]

The court went on to hold that the jury must be directed that intent to defraud is an essential ingredient in the offence. There is, nevertheless, and this is the ratio of *O'Sullivan,* an exceptional circumstance in cases where the intent to defraud is necessarily involved in the false statement itself. These exceptional circumstances, in fact, appear most common. Generally, the using of the thing obtained for purposes different from those the giver intended is in itself enough to raise the ingredient of intent to defraud.[4]

There is nothing new in this and it has been established law since the Bank of England first widely used the cheque system in the 1860s and 1870s and stimulated a virtual torrent of cases of obtaining goods by a valueless cheque which then (and now) could constitute this offence; although special sections now cover that. Again the wearing of a licensed bookmakers badge without authority constituted a false pretence in circumstance that by itself raises the intention to defraud.[5]

The magistrate in *Balcombe v. DeSimoni* by finding as he did left the appeal courts with room to decide as they saw fit. If the magistrate's decision implies that the facts before him were such as to enable him to read into them an intention to defraud without anything else, then the High Court by a majority of three to two agreed, reversing the decision of Supreme Court. The fine line being drawn is ironically illustrated by the use, with approval by both appellant and respondent of *R. v. Carpenter.*[6] Gibbs J. in the majority, and Barwick C.J. in the minority quoted the locus classicus:—[7]

> If the defendant made statements of fact which he knew to be untrue, and made them for the purpose of inducing persons to deposit with him money which he knew they would not deposit but for their belief in the truth of his statements, and if he was intending to use the money so obtained for purposes different from those which he knew the depositors understood from his statements that he intended to use it, then . . . we have intent to defraud . . .

This passage states the intention to obtain something by false pretence does not automatically provide evidence of intent to defraud and the necessary elements of the offence are (a) that a false pretence

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3 Ibid at 518.

4 R. v. Denning, [1962] N.S.W.R. 173.

5 R. v. Robinson (1884) 10 V.L.R. 131. The additional fact in this case was the knowledge of the person giving the money that the pretence was false.

6 (1911) 22 Cox C.C. 618.

7 Ibid at 624.

induced the obtaining of property and (b) that in so doing there was an intention to defraud and, of course (c) that property capable of being stolen was in fact obtained.

The criticism of the locus classicus and the analysis into the elements of the offence is firstly, it gives undue stress on the after use of the property and hence understresses that the offence can be made out even if at the time of obtaining the property, the accused intended to return it, said so and in fact did[8] and secondly, it fails to clarify the part played by an intention to defraud in the offence. To suggest it is a separate unique element ignores that line of authorities enabling a finding that some circumstances involving the use of false pretence necessarily involve an intention to defraud the person parting with the property. On the other hand, the passing of property induced by a false pretence does not alone make out the offence.[9] What else is needed is the intention on the part of the person making the false pretence to obtain the property by this means. The law, as it stands after this case, lies somewhere between these two extremes, the problem for all is that the court has left us without guideline as to when to expect the false pretence to necessarily include the intention to defraud, and when to expect them to be separate identities.

With this in mind it may have been of more benefit had it decided that intention to defraud must always be a specific finding—indeed it must always be a specific direction to a jury—allowing those special circumstances earlier referred to, to play an evidentiary part in establishing that finding. Moreover, it would have given proper weight to the conjunction on the phrase "by false pretence and with intent to defraud".

One final question redecided, was whether because the householder received equal value for the money obtained she was defrauded at all. The usual concept involves deceit by one and loss or injury by the other. This does not apply to section 409 of the Criminal Code. The concept of false pretence is inclusive of the notion of deceit but the requirement of loss or injury is replaced by a requirement that a course of conduct which would not otherwise have occurred is induced by the deceit. In this instance, it was satisfied by the parting with $6.50. It is immaterial that this money was the consideration to support a contract by which the householder received something of equal value. In other words this offence possesses a unique view of

8 Obiter, R. v. Kritz [1950] 1 K.B. 82 at 86.
9 The civil remedy alone seems appropriate.

fraud, which together with its somewhat unique use and application of "intention" and in its absence of loss or damage as an element that its place in the criminal law is in part the control of business practice and commercial morality perhaps because the civil law in these areas with its remedy of compensation is simply inadequate.

W. D. WILLESEE

Evidence: Corroboration and Accomplices

KAHN v. R.[1]

This case raises the problem of corroboration of evidence of accomplices in criminal trials. A dictum of Lord Simonds in *Davies v. Director of Public Prosecutions*[2] on this topic was rejected by the Western Australian Court of Criminal Appeal.

The position in Western Australia is succinctly expressed by Nevile J. who pointed out that in this State the position is that in a criminal trial it is the duty of the trial judge to give a warning to the jury that it would be dangerous for them to convict an accused unless the evidence of an accomplice was corroborated. His Honour said that this rule of practice has hardened into a rule of law with the consequence that if the trial judge fails to give the necessary warning any resultant conviction must be set aside unless the case fell within the proviso to s. 689(1) of the Criminal Code, being a case where there was no substantial miscarriage of justice.

It was accepted by the Court of Criminal Appeal that it is the duty of the trial judge to explain which persons may be classified as accomplices and that it is for the jury to decide who is in fact an accomplice. The Court decided that only a person who could be convicted as a principal offender can be said to fall into the category of an accomplice. In deciding this the Court felt itself bound by its own prior decision in *R. v. Lewis*.[3]

The concept of an accomplice has caused much perplexity and it is desirable to investigate the rationale of the rule. In *R. v. Baskerville*[4] the rule was said to have arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is a criminal. However valid this reason may appear, it is not in accord-

1 [1971] W.A.R. 44 (Virtue S.P.J., Nevile and Burt JJ.).
2 [1954] A.C. 378, 401.
3 (1906) 8 W.A.L.R. 83.
4 [1916] 2 K.B. 658.