

IN THE SEYCHELLES COURT OF APPEAL

HELM SOONARDIN

APPELLANT

VERSUS

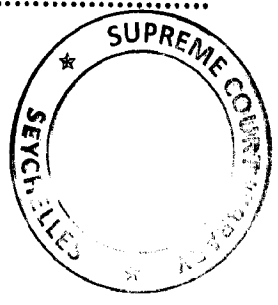
THE REPUBLIC

RESPONDENT

Criminal Appeal No: 2 of 2001

[Before: Ayoola, P., Pillay & Matadeen, JJ.A]

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Mr. B. Georges for the Appellant
Mr. R. Govinden for the Respondent



JUDGMENT OF THE COURT

(Delivered by Pillay, JA.)

This is an appeal against a judgment of the Supreme Court whereby the appeal of the appellant from the Magistrate's Court was dismissed. The Magistrate's Court had convicted the appellant of the offence of obtaining money by false pretences contrary to, and punishable under, Section 297 of the Penal Code and sentenced him to undergo 18 months' imprisonment and ordered him to compensate the two victims of the offence in the sum of SR.99,000/- upon his release from prison.

The appellant is challenging his conviction on two basic grounds:-

- a) the particulars of the offence with which the appellant had been charged did not reveal that he had been charged under the proviso to section 296 of the Penal Code, but rather revealed that he had been charged under the substantive part of the section;
- b) there was no evidence adduced against the appellant to support a conviction on an offence based on the proviso to section 296 of the Penal Code.

The particulars of the offence allegedly committed by the appellant were to the effect that the appellant "with intent to defraud Hermant Jivan and Dinesh Jivan (the complainants) obtained from Hermant Jivan the sum of Ninety-Nine Thousand Rupees, by falsely pretending that he would sell the said Ninety-Nine Thousand Seychelles Rupees, for and on behalf of Hermant Jivan and Dinesh Jivan, for Seventeen Thousand United States Dollars".

Section 297 of the Penal Code states as follows:-

"Any person who by any false pretence, and with intent to defraud, obtains from any other person anything capable of being stolen, or induces any other person to deliver to any person anything capable of being stolen, is guilty of a misdemeanour, and is liable to imprisonment for three years."

Section 296 of the Penal Code lays down that:-

"Any representation made by words, writing or conduct, of 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:

Provided however that, a person who enters into a contract without intending to perform his obligations thereunder shall be deemed to make a false pretence."
(The underlining is ours)

We shall first examine the second ground of appeal. Obviously it would have been better, in our view, if the particulars of the offence laid against the appellant had been in conformity with the express wording of the proviso to section 296 of the Penal Code.

But even on the assumption that the particulars of the offence were based on the proviso to section 296 of the Penal Code, namely that the particulars of the charge amounted to an agreement *de futuro* on the part of the appellant to sell SR.99,000/- on behalf of the two complainants in exchange for USD.17,000/-, the prosecution had to prove beyond reasonable doubt that the appellant had the intention to defraud the complainants at the time he made the agreement with them and took their money. Otherwise, any person who acts in breach of an agreement for any reason whatsoever, whether it is beyond his control or not, will be liable to be prosecuted and convicted under section 297 of the Penal Code.


In the present case, the prosecution had not, in our opinion, proved beyond reasonable doubt that the appellant had the intention to defraud the complainants at the time he made the agreement with them and took their money.


All that the complainants said was that the appellant took from them the sum of SR.99,000/- and undertook to have it exchanged for US dollars with a lady at Barclays Bank and never returned. There was no evidence on record as to what was done with the money after the appellant took it from the complainants. No bank official deponed as to whether the appellant had made any arrangements or not with the bank to have local currency exchanged for foreign currency.

It is also to be noted that the appellant did not adduce any evidence at the trial and did not give any statement to the police. All that he said to a Police Superintendent was that he had gone to the bank with a third party, had given the SR.99,000/- to the third party to be exchanged but the latter had absconded, with the money. The appellant also stated that if one of the complainants, one Dinesh, were to sue him, he would deny having received any money, the more so as Dinesh had sacked him for being untrustworthy and yet had given him SR.99,000/- to be exchanged for US Dollars.

In the light of the evidence on record, highlighted by us, we consider that the benefit of the doubt should have been given to the appellant, since it could very well be that the appellant had intended at the beginning to exchange the local currency for dollars but had been unsuccessful in doing so. Moreover, it is not disputed that the Learned Senior Magistrate who heard and saw the witnesses depose did not examine the evidence adduced against the appellant to support a conviction of an offence based on the proviso of section 296 of the Penal Code but rather under the substantive part of the section.

In the light of our conclusion, we need not examine the first ground of appeal. We accordingly allow the appeal and quash the conviction and sentence of the appellant and the restitution order made by the Magistrate's Court. The appellant, however, indicated to this Court, through his counsel, that he undertook to return the SR.99,000/- to the two complainants.


E. O. AYoola
PRESIDENT


A. G. PILLAY
JUSTICE OF APPEAL


K.P. MATADEEN
JUSTICE OF APPEAL

Dated at Victoria, Mahe this 2nd. day of *August* 2001.