

**Pointe v Republic
(1999) SLR 144**

Antony DERJACQUES for the appellant
Romesh KANAKARATNE for the respondent

Judgment delivered on 30 July 1999 by:

ALLEEAR CJ: The appellant, Rodney Pointe, was charged with 14 counts of cheating contrary to and punishable under section 299 of the Penal Code and 14 counts of uttering a false document contrary to and punishable under section 339 of the Penal Code. He was also charged with 14 counts of conspiracy to defraud contrary to and punishable under section 301 of the Penal Code.

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The appellant pleaded not guilty to all the charges. He was convicted on 14 counts of cheating and 14 counts of uttering a false document contrary to section 339 of the Penal Code. He was acquitted of all the conspiracy counts. He was sentenced to undergo a prison term of 18 months in respect of the 14 counts of cheating and 2 years imprisonment in respect of the 14 counts of uttering a false document contrary to section 339 of the Penal Code.

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velled against him.
of the 14 counts of
of uttering a false

The appellant now appeals against his conviction and sentence on 8 grounds of appeal, namely:

There are 8 grounds

1. The learned Magistrate erred in law in failing to find that the Appellant was operating under procedures introduced by the management of the complainant vis a vis the first

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2. The learned Magistrate erred in law in failing to find that the person 'cheated' or suffered pecuniary loss vis a vis the

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it 14 counts.

3. The learned Magistrate erred on the facts in finding that the Appellant carried or practised deceit for pecuniary gain.

the Appellant

4. The learned Magistrate erred in law in failing to apply the standard of proof required for "uttering a false document" as per section 339 of the Penal Code.

the evidence

5. The learned Magistrate erred in finding that the Appellant had the required intention as per section 339 of the Penal Code.

6. The learned Magistrate erred on the facts in finding the Appellant guilty beyond a reasonable doubt in that there is insufficient evidence.

7. The learned Magistrate erred in principle in failing to appreciate the inconsistencies and discrepancies in the prosecution's case.
8. In all the circumstances of the case, the conviction is unsafe and unsatisfactory.

Two grounds have been raised against sentence. They are as follows:-

1. The Magistrate erred in principle in failing to apply a short, sharp term of imprisonment.
2. The sentences of 18 months imprisonment for the first 14 counts, to run concurrently, and the sentences of 2 years' imprisonment to run concurrently, are harsh and excessive in all the circumstances of the case.

With regards to ground one of his written submission, counsel for the appellant stated that the management of SMB, the complainant, was primarily concerned that the work to be done was done properly. Administrative guidelines on mode and method of payments were flexible in the extreme. The cheques were ordinarily made in the name of the appellant who went to cash them and then proceed to make payments to the workers. In other words, the kernel of Mr Derjacques' submission is that strict accountancy procedures were not followed.

It was also argued by Mr Derjacques that the complainant had failed to prove that they had lost property through theft or they had been falsely induced, deceived or cheated by the acts or omissions of the appellant. It is alleged that the senior magistrate erred in imputing mens rea to the appellant. It is claimed that the appellant was not fraudulent or committed the acts "knowingly".

With regards to ground 2, it was urged that the appellant had no mens rea and SMB was not deceived. As stated, the submissions advanced in favour of the appellant against his conviction were that the appellant had not uttered a false document knowingly or fraudulently. He had not deceived by means of fraudulent tricks or obtained from SMB a sum greater than would otherwise be payable to him. Hence, it was argued that the convictions were unsafe and unsatisfactory.

Against sentence, it was argued that for a first offender a non-custodial sentence ought to have been imposed. However, if the senior magistrate was minded to impose a prison sentence, then a maximum of 3 to 6 months ought to have been imposed.

Counsel representing the respondent, ie the Republic, supported the senior magistrate's finding of conviction and sentence imposed. At page 8 of the judgment counsel stated that the senior magistrate made the following observations:

...the defendant used or applied a fraudulent trick or device and thereby the deceived acted upon it and delivered anything capable of being stolen or money.

Counsel stated that the appellant knew of the falsehood when he prepared the invoices requesting the cheques from the complainant company. In his extra-judicial statement, admitted without objections, the appellant had stated that Edwin Port-Louis did not perform any work for SMB, yet he prepared invoices in favour of Edwin Port-Louis and received cheques which he cashed and kept the cash for himself. Hence the fraudulent tricks or device were the making of the invoices for payment to Edwin Port-Louis for work the latter did not perform.

The appellant had also stated that Edwin Port-Louis had never transported or spread manure in the plantation. This was confirmed by Louis Medine, PW8, who had never seen Edwin Port-Louis in his plantation.

Counsel referred to the case of *R v King & Ors* and stated that the trick or device must have operated on the mind of the complainant. He said SMB would not have issued the cheques for payment had they known that Edwin Port-Louis had not carried out any work for them.

Edwin Port-Louis was employed by the Division of Environment and hence was not entitled to any payment from SMB. The fact that SMB prepared cheques for payment to Edwin Port-Louis clearly showed that they were deceived and tricked by the appellant, counsel added.

With regards to grounds 4 and 5, the appellant admitted that he was well aware that the invoices contained falsehood, so it cannot be said that the element of knowingly and fraudulently had not been proved beyond reasonable doubt by the prosecution.

Counsel representing the State supported the sentence passed by the senior magistrate and stated that the appellant was occupying a position of trust and was engaged in repeated fraudulent acts.

According to counsel the senior magistrate must have also taken into consideration the amount of money stolen which was considerable when he passed the sentence.

The evidence against the appellant was overwhelming. All the elements of the offences for which the appellant was convicted had been established beyond doubt. See page 8 of the judgment. The defendant used or applied a fraudulent trick or device and the deceived acted upon it and delivered anything capable of being stolen or money.

The senior magistrate emphasised that the deception created by that trick or device must have had a bearing on the mind of the deceived. He therefore came to the irresistible conclusion that the appellant must have known the falsehood when he prepared and uttered the invoices requesting the cheques.

The evidence clearly shows that the appellant knew that Edwin Port-Louis did not perform any work for SMB. Yet he prepared invoices in favour of Edwin Port-Louis for payment, received the cheques from SMB and cashed them and pocketed the money. The fraudulent trick or device is the making of invoices for payment to Edwin Port-Louis for work that the latter never performed. In his own voluntary statement admitted without objections, the appellant states:

I gave him (Edwin Port-Louis) R500. Edwin never questions me on the cheque and he had never bring manure (sic).

The said statement is corroborated by the evidence of Louis Medine, PW8 who stated at page 16 of the record:

I have never seen Edwin Port-Louis in my plantation. I have never seen Edwin Port-Louis delivering any manure.

The appellant had falsely stated that Edwin Port-Louis had spread manure on the plantation of Louis Medine. This was a fraudulent declaration which induced SMB to prepare cheques for payment. SMB would have never prepared a cheque but for the trick and fraudulent declaration of the appellant.

Section 339 of the Penal Code is couched as follows:

Any person who knowingly and fraudulently utters a false document is guilty of the offence.

In his statement admitted in evidence, the appellant conceded that he was aware that the invoices he had prepared contained falsehood. The intention in preparing these invoices was to obtain money from SMB for work not performed by Edwin Port-Louis. The intention to defraud SMB is patent. The senior magistrate rightly considered it, see page 10 of the judgment. That there was a fraudulent deception by the appellant and that SMB acted upon is clearly manifest.

The evidence of one Cyril Julie was rightly ignored by the learned senior magistrate. That witness had been turned hostile. The magistrate was right in convicting the appellant as he did on all the charges referred to above.

The appeal against conviction on all counts is accordingly dismissed.

An appeal court will only alter a sentence imposed by the trial court if it is evident that it has acted on a wrong principle or overlooked some material fact or if the sentence imposed is manifestly excessive or harsh in all the circumstances of the case. The appeal Court is not empowered to alter a sentence on the mere ground that if it had been trying the case it might have passed a somewhat different sentence. See the case

of *Dingwall v R*.

The appellant in this case was a first offender. It does not always mean that a first offender should never be given a custodial sentence or that he should necessarily be given a short prison term. The nature of the offence, the conduct of the person convicted, the position of trust which he enjoyed and the amount of money stolen, the means of deception used, the number of occasions on which the deception were practised must necessarily be taken into account.

The senior magistrate must have taken all these into account and therefore I do not think that he erred in any way. I believe that the appellant got his just desert. A court in imposing sentence must sometimes bear in mind the deterrent effect that that sentence will have on potential offenders.

This was not an isolated or single act of cheating and uttering false document by the appellant. As can be seen from the charges levelled against him, the appellant committed several offences. The maximum term of imprisonment for an offence of cheating contrary to and punishable under section 299 is three years imprisonment.

The senior magistrate imposed a term of 18 months. It cannot be said that the said sentence is manifestly harsh or excessive or wrong in principle. It will be recalled that the appellant occupied a position of trust with SMB and for that kind of offence, a prison term is warranted. I do not think that the senior magistrate erred in any way. Hence the appeal against conviction and sentence is dismissed.

Record: Court of Appeal (Criminal No 16 of 1998)