

**RAMESH CHAND v STATE (HAA0003J of 2004S)**

HIGH COURT — APPELLATE JURISDICTION

5 SHAMEEM J

5, 12 March 2004

**10 Criminal law — appeals — obtaining money by false pretence — whether Appellant’s act amounted to false pretence — Penal Code (Cap 17) s 309(a).**

This was an appeal against conviction and sentence by the Appellant for the offence of obtaining money by false pretence.

15 On 3 March 1998–8 April 1998, Ramesh Chand (the Appellant) took from one Kamla Devi (Devi) the amount of \$4000 and promised to arrange a visa for the two daughters of Devi. The Appellant further promised to repay the said amount by 3 June 1998. However, when Devi inquired about the payment and the arranging of the visas, the Appellant responded that he was still in the process of arranging the said visas.

Devi reported the matter to the police and it was later discovered by the police that there was no application for visas for Devi’s two daughters in the Australian High Commission.

20 The Appellant admitted that he received \$4000 from Devi but was not able to repay it as promised upon knowing that Devi reported the matter to the police.

On 14 November 2000, the Appellant was charged with the offence of obtaining money by false pretence and pleaded not guilty.

25 On 23 May 2002, the Appellant asked for acquittal when the prosecution witnesses failed to appear but was refused. On another hearing, the Appellant did not appear because the production order had not been served and his counsel also failed to appear for no reason. Again on another hearing, the Appellant failed to appear despite the issuance of a production order. The counsel for the Appellant told the court, only when later asked by the court, that he was no longer representing the Appellant because of non-payment of fees. On 8 October 2003, the case continued and the Appellant pleaded guilty without a counsel representing him. The Appellant was convicted as charged and was sentenced to 30 2 years’ imprisonment.

The Appellant submitted that he pleaded guilty out of frustration and claimed that based on the facts, his acts did not amount to the offence charged against him. Thus, his plea was equivocal and his conviction should be set aside.

35 **Held** — (1) There was an unreasonable delay by the court for its failure to issue production orders while the Appellant was in prison and that counsel for the Appellant withdrew representation without informing the court. The Appellant cannot be blamed for pleading guilty out of frustration because the delay was caused by the court and he must have known that the longer the delay the better chances of lengthening his prison term even if a concurrent sentence were to be imposed.

40 (2) The prosecution must prove the elements of the offence with which the Appellant was charged. They must show evidence that the Appellant obtained money by false pretences for his own benefit or personal use. While it was true and the Appellant admitted that he received \$4000 from Devi, there was no evidence that the money was obtained for his own use. Instead, the evidence showed that the money was obtained in exchange for 45 the processing of the visas of Devi’s daughters. Further, the court said that “a false pretence is a representation of an existing fact which is false”. Thus, the act of the Appellant in obtaining money from Devi and offering to arrange visas in exchange thereof did not disclose an existing fact which was false.

Appeal allowed.

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**Case referred to:**

*R v Dent* [1955] 2 QB 590; [1955] 2 All ER 806

Appellant in person

5 A. Prasad for the State

**Shameem J.** This is an appeal against conviction and sentence. The Appellant pleaded guilty in the Nausori Magistrates Court to the following offence:

*Statement of Offence*

10 **OBTAINING MONEY BY FALSE PRETENCE:** Contrary to Section 309(a) of the Penal Code, Cap 17.

*Particulars of Offence*

Ramesh Chand s/o Mahesh Prasad, between the 3rd March 1998 to 8th April, 1998 at Nausori in the Central Division with intent to defraud, obtained \$4000 in  
15 cash from Kamla Devi d/o Shankar Nair pretending that he would arrange visa for her two daughters to Australia, such representation being false and he converted the money to his own use.

Although ordinarily there can be no appeal against conviction on a plea of guilty, the Appellant says that his plea was equivocal and this conviction should  
20 be set aside.

The grounds of appeal are as follows:

- (1) The trial magistrate erred in convicting because the plea was equivocal.
- (2) That the delay in continuation of trial after 2 years in February 2003 prosecution interview another witness which delayed the trial.
- 25 (3) That I appeal against delay in continuation of trial which was refused by senior court clerk of Nausori Magistrates Court on 12 June 2002.
- (4) That the money was loaned which was to be returned on 3 June 1998 according to the agreement.
- (5) That the trial magistrate erred in preparing his sentencing and not  
30 concentrating in what he is writing in sentencing.
- (6) The trial magistrate erred in law and not considering that I was unrepresented by counsel.
- (7) That the charge complaint by police is irregular.
- (8) That the conviction was unsafe and unsatisfactory.
- 35 (9) Sentence is harsh and excessive.

**The hearing**

The charge was filed on 14 November 2000. The case was first called on that day and the Appellant pleaded not guilty. The case was adjourned for disclosure,  
40 for the non-appearance of the Appellant, for the failure of the court registry to issue a production order, for non-appearance of the Appellant's counsel, for the prison department's failure to bring the Appellant to court on time, for the non-appearance of witnesses and for late disclosure by the prosecution. On  
45 23 May 2002 when the prosecution witnesses failed to appear, the Appellant asked for an acquittal but that application was refused. On another hearing date (11 April) the Appellant did not appear because the production order had not been served, but his counsel also failed to appear for no apparent reason.

On the next hearing date, again the Appellant failed to appear despite the issue of a production order. Mr A K Singh was contacted because he also had absented  
50 himself and he told the court clerk that he was no longer representing the Appellant "due to non-payment of fees".

The matter then proceeded on 8 October 2003, without counsel. This time the Appellant pleaded guilty. The facts were read out on 14 October 2003.

They were that Kamla Devi and Ram Kirpal were a married couple living in Wainibokasi. The Appellant promised to arrange for their daughters to travel to Australia and said he would arrange visas for them in exchange for \$4000. Kamla Devi gave \$4000 to the Appellant in the presence of Ram Kirpal in four instalments, from March 1998 to April 1998.

The facts then read:

Furthermore Ramesh Chand stated that the total of \$4000 given to him was to be repaid by 3rd June 1998 to Kamla Devi and Ram Kirpal. After June 1998 Kamla Devi have been enquiring with Ramesh Chand about repaying the \$4000.00 or even the results of processing the visas for her daughters. Ramesh Chand replied that it was still in the process.

The complainant then reported the matter to the police. The police discovered that no application for visas had ever been received by the Australian High Commission on behalf of Kamla Devi's daughters. Under caution the Appellant admitted taking the \$4000 but said that he had not repaid the money because Kamla Devi had reported the matter to the police.

The Appellant admitted the facts and 36 previous convictions. In mitigation he said that the case was very old, he was married with two children, that he had not offended since 1998 and that because of the delay in the case he should be given a concurrent sentence.

The learned magistrate then sentenced the Appellant to 2 years' imprisonment. The learned magistrate took into account the Appellant's mitigation, the sentences of the case, the delay in the hearing, the effect of the offending on the complainant who was in court at the sentencing hearing, and the Appellant's failure to pay back the money. He also took into account the plea of guilty. He ordered that the sentence run concurrently with his existing term of imprisonment.

### **The conviction**

The Appellant submitted that he pleaded guilty out of frustration and said that the facts did not disclose the offence. The history of this case shows a quite unacceptable degree of delay. Much of the delay can be attributed to the court system for failing to issue production orders when the court knew that the Appellant was in prison. The prosecution is also not exempt from blame. Why were statements still being disclosed 3 years after the charge was laid? Finally the Appellant's counsel appears to have voluntarily removed himself from the case without informing the court. Such conduct was not only discourteous. It was also responsible for further delay. In all of this delay, I find that the Appellant was largely unblameworthy. In the circumstances his frustration was understandable, particularly when he must have known, that the longer the delay the better the chances of a lengthening of his prison term even if a concurrent sentence were to be imposed.

I now turn to the facts. In order to establish an offence in obtaining by false pretences, the prosecution must lead evidence or read facts, which establish the following elements:

- (1) the accused obtained;
- (2) money or benefits;
- (3) for his own use;
- (4) by;

- (5) false pretences; and
- (6) with intent to defraud.

The Appellant agreed that he obtained \$4000 from the victims but it is not at all clear from the facts on what basis he obtained the money. On the one hand it was alleged that he obtained the money as a result of a verbal agreement to obtain visas. But on the other hand, the State referred to the money as a loan and said that the victim complained because he neither paid the money back nor processed the visas. If the State was saying that the money was taken to apply for visas then this could not be a false pretence. Anyone can apply for visas and any person has the capacity to do so. Further a future promise (I will get a visa for you if you give me \$4000) is not a false pretence. A false pretence is a representation of an existing fact which is false. In *R v Dent* [1955] 2 QB 590; [1955] 2 All ER 806, the appellant who carried on a business as a pest destructor, agreed to destroy vermin on a farm and received part-payment for the contract. He did no work at all. His conviction for obtaining money by false pretences, was quashed, on the ground that there was no misrepresentation of an existing fact. In what way did the facts in this case disclose an existing fact which was false? They did not disclose a false pretence and the reference to the paying back of the money causes further confusion. I find the facts to be ambiguous and I consider that they were incapable in law of establishing the offence charged.

In the circumstances the conviction cannot stand and must be quashed.

### Result

It is unnecessary to consider the other grounds of appeal. However I do observe that when a victim is in court and wishes to make submission about the impact of the offending on him or her, a court should *either* hear the evidence on oath thus giving the accused an opportunity to cross-examine, *or* require the prosecution to outline the impact on the victim in the facts outlined, so that the accused is able to dispute it if he/she disagrees. Either way the victim impact evidence is properly recorded. In this case there is no record of the victim appearing in court or giving evidence, but the court relied on what the victim said in the course of his sentencing remarks. Such a procedure is irregular and lacks transparency.

The conviction is a nullity and is quashed. This is a serious offence but the age of it (1998) and the fact that the Appellant is already serving a lengthy prison term thus rendering a consecutive term unlikely, persuade me not to order a re-hearing. The appeal against conviction succeeds.

*Appeal allowed.*

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