

Emperor Vs. Ebrahimji Mulla Jeevanji

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Court : Mumbai

Decided On : Dec-04-1912

Reported in : (1913)15BOMLR297; 19Ind.Cas.328

Judge : Batchelor and ;Rao, JJ.

Appeal No. : Criminal Appeal Nos. 327 and 340 of 1912

Appellant : Emperor

Respondent : Ebrahimji Mulla Jeevanji

Judgement :

Batchelor, J.

1. The appellants before us have been convicted by the learned Third Presidency Magistrate of the offence of cheating and have been sentenced to one day's simple imprisonment and a fine of Rs. 750. The appellants are the agents and directors of a Steamship Company called the Bombay Hajaz Steam Navigation Company which is occupied in the conveyance of pilgrims between Bombay and Jeddah. Another Company which engages in similar business is known as the Persian Steam Navigation Company and is the trade rival of the appellants' Company. The appellants have a steamer named the ' Shah Jahan,' which on the 24th of August 1911 left Bombay for the outward voyage to Jeddah. On the 5th of September it appears that she arrived at Aden and was there boarded by the

witness Green, the Master of a steamship belonging to the Persian Company. Green inspected the ' Shah Jahan ' and saw that she had suffered some damage owing to high seas on her voyage from Bombay. The repairs, however, which in his opinion would be required were repairs capable of being executed within a period of about five days. , .

2. It seems that on the 15th September Green arrived in Bombay and communicated his knowledge of the disrepair of the 'Shah Jahan ' to various interested persons. It is the case for the prosecution that some knowledge of such communications must have filtered through to the present appellants.

3. On the 21st September, by Ex. D., the appellants gave notice to the Commissioner of Police under Section 11 of the Pilgrims Protection Act II of 1887 that the latest date of sailing of the ' Shah Jahan ' would be the 20th of October, ' or about ' that date. It is material to observe that no objection was taken by the Commissioner to the insertion of the words ' or about ' in this letter, and the same words, we notice, occur in the printed portion of the tickets used by the Company to their customers. It is a fair inference, therefore, that an approximate date for the sailing of these vessels had hitherto been accepted by the authorities concerned as sufficient; and such inference would be in accordance with the practice of similar steamers sailing out of this Port.

4. On the 28th September the 'Shah Jahan' reached Aden from Jeddah, and telegraphed to her Bombay agents that she would be leaving Aden on the following day. On this same date, the 28th September, the Persian Company advertised two of their steamers as due to sail for Jeddah on the 16th and 18th October respectively. Whether in consequence of this advertisement by the Persian Company or merely because they were anxious to shorten the time of their vessel's lying idle in port, the appellants on the 30th of September announced a change in the sailing date of the ' Shah Jahan.' That date was altered from the 20th of October formerly fixed to the 12th of October.

5. On the 6th October the ' Shah Jahan ' arrives in Bombay in a damaged condition. The appellants go on board the steamer and see for themselves and are also told the particular repairs which would be required. On the nth of October, by

the letter Ex. G, the Commissioner of Police makes enquiry of the appellants as to why they have changed the sailing date of the ' Shah Jahan,' saying that it had been brought to his notice that they had been issuing passage tickets for the 12th, which was other than the date advertised by them in their previous letter. On the following day, the 12th October, by Ex. B. the appellants reply to the Commissioner explaining that in the events which have then happened the steamer will not sail until the 20th of October. In fact she did not sail till the 24th October, the repairs which were found necessary upon her not being completed until the 23rd.

6. Now the appellants have been convicted of cheating upon the footing of a misrepresentation wilfully made by them to their Haji customers, and the misrepresentation charged was that this steamer, the ' Shah Jahan', would sail from Bombay on the 12th of October. It is the case for the prosecution that when that representation was made, it was false to the knowledge of the appellants, and that by such false representation they deceived the Hajis, and fraudulently or dishonestly induced them to part with the money which they paid for their tickets.

7. Mr. Raikes on behalf of the appellants began his address to us by taking an objection in the nature of a demurrer, contending that, even assuming that all the facts are as they were found by the learned Magistrate below, yet in law those facts would not suffice to constitute the offence of cheating. It is not necessary for us to express, and we therefore refrain from expressing, any opinion as to the validity of this contention, because in our view the judgment below is unsustainable on the facts.

8. It is clear that the representation impugned as false was a representation not as to an existing fact but as to a certain future event; and, it is necessary for the prosecution to show, that when on the 30th September, and thereafter to the 12th October, the appellants held out the representation that their steamer would sail on the 12th October, that representation was false to their knowledge. It is but little to the purpose that in fact that representation has turned out to be untrue. The essential point to be considered is what was the knowledge of the appellants at the time when those representations were being made by them. Are they shown

upon the evidence to have known at that time that the steamer 'Shah Jahan' would not leave Bombay on or about the 12th October? We think W. it is clear that the conviction cannot be rested upon any knowledge acquired by the appellants prior to the 6th of October, for the only knowledge alleged to have been obtained by them prior to that date was some hazy and undefined acquaintance with an equally undefined rumour which Capt. Green may be taken to have put about as to the damage which the 'Shah Jahan' had sustained in her voyage to Bombay. We do not doubt the learned Magistrate's estimate of the credibility of the witness Asper, but even upon this witness's evidence there is no clear or certain knowledge which could safely be attributed to the appellants. Moreover, even supposing that the rumours circulated by Capt. Green had reached the ears of the appellants in some definite form, it is not suggested that the appellants had been apprised of their vessel's misfortune by those agents of theirs whose duty it was to keep them informed of such matters ; and in these circumstances the appellants, it seems to us, were clearly under no obligation to accept as Gospel and to act upon 'v' rumours which reached them in this indirect and unverified manner. Indeed as we understood the learned Advocate General's argument, he himself was not prepared to ground the case for the prosecution upon any knowledge which the appellants had derived prior to the 6th of October.

9. It remains, therefore, to see what exactly was the knowledge which upon this evidence must be attributed to the appellants on the 6th of October. Here again we have to rely upon the witness Asper, and upon him alone. That gentleman's account of the material matter is this. He says that when the appellants came aboard the 'Shah Jahan' on the evening of the 6th October he met them there and in his own words : 'I told them to employ some good hands, and I told them that the repairs would take from about fifteen to twenty days'. Now the whole of this conviction on the charge of cheating must depend upon this one isolated passage in the evidence of this particular witness. As we have said, we throw no doubt upon the learned Magistrate's estimate of the witness's claim to credit, but giving him all possible claim to credit, we must yet think that such a statement as this cannot be read as a statement of absolute mathematical precision or cannot be read, as Mr. Raikes put it, as if it were a Section in an Act of Parliament. In the first place, when a witness, however honest, is throwing his mind back to events which

occurred some time ago, and is endeavouring to recount those events, his memory is very apt to betray him on a matter of such subordinate importance as what he himself said with regard to a particular period of time. That is so universally, and we think it is especially so in this country where references to time are almost always the merest approximations. Indeed on the witness's own showing his estimate was a mere approximation, and it may well be that the fifteen or twenty days, which his memory now represents as his statement, may really have been a somewhat different period. If, however, it was a different period, if instead of fifteen or twenty days it was ten or twelve days, then it appears to us that the appellants' defence would be made out. In other words in such a statement as this, which we are now considering, there is always a large margin of honest error, and in the particular case before us even a small error would suffice to render this conviction unmaintainable. We have it on the evidence of Capt. Green who saw the damaged steamer at Aden that, in his opinion, the repairs would ordinarily not occupy more than five or six days. That evidence is corroborated by the artisan whom the appellants with great expedition employed to repair the ' Shah ' for this witness deposes that the repairs were such as would ordinarily have been completed within a period of seven or eight days. According to this witness, he so informed the appellants, as he naturally would inform them; and if he did so, the appellants were not compelled to believe Asper's estimate rather than this witness's. Reckoning the seven or eight days from the 7th of October, when this witness was called in, we have it that the ship would be ready to put to sea by the 14th or 15th October; and we feel sure that if she had sailed by that date, nothing would ever have been heard of this case, although the actual limit, the 12th of October, would have been exceeded. This artisan witness, whose evidence we see no reason for distrusting, deposes that the extra delay was caused by the 'Shah Jahan's ' engineer's action in constantly pointing out to the Government surveyor fresh defects which seemed to him to need repair. There is evidence, however, to show that the engineer's demands in this matter were a little extravagant, and that the ship as a pilgrim ship would have been fit for the ordinary discharge of her duties without all the repairs which in fact she received.

10. On the whole, therefore, we think that in a case of this kind it is not possible in a criminal prosecution to press a matter of one day or two days on this- or that

side of the line, particularly when the representation upon which the conviction rests was itself a mere approximation so far as regards time. We are of opinion, therefore, that the prosecution have not succeeded in showing that the representation that this ship would sail on the 12th of October or thereabouts was to the appellants' knowledge a false representation. It may be that the appellants were unreasonably sanguine, or underrated the difficulties ahead of them, or even realised that their promise as to the 12th October was not unlikely to be broken. But all that is not enough. If the prosecution is to succeed, it must be affirmatively shown that the representation as to time was false to the appellants' then knowledge : and, having regard to the state of the evidence as to the knowledge then in their possession, we cannot think that this has been established. The conviction must, therefore, be reversed and we must direct that the accused be acquitted and discharged and that the fines, if they have been paid by them, should be refunded to them.