Mobarik Ali Ahmed

Vs

The State of Bombay

Criminal Appeal No. 200 of 1956

(Syed Jafar Imam, B. Jagannath Das, P. Govinda Menon JJ)

06.09.1957

JUDGMENT

JAGANNADHADAS J. -

This is an appeal by special leave. The appellant before us was convicted by the learned Presidency Magistrate. Third Court, Esplanade, Bombay, for the offence of cheating under s. 420 read with s. 34 of the Indian Penal Code on three counts of cheating, viz., the first relating to a sum of Rs. 81,000, the second relating to a sum of Rs. 2,30,000, and the third relating to a sum of Rs. 2,36,900. He was sentenced by the learned Magistrate to two years rigorous imprisonment and a fine of Rs. 1,000 on the first count, to twenty-two months rigorous imprisonment and a fine of Rs. 1,000 on the second count, and two months rigorous imprisonment on the third count. It was directed that the substantive sentences only on the second and third counts are to run concurrently.

The prosecution was initiated on a private complaint filed by one Luis Antonio Correa on June 30, 1952, against four persons of whom the appellant was designated therein as the first accused and one Santram as the fourth accused and two other persons, A.A. Rowji and S.A. Rowji, as second and third accused respectively. Bailable warrants were issued against all the four by the learned Magistrate but it appears that warrants could not be executed against accused 2, 3 and 4. They were reported as absconding. The trial was accordingly separated as against them and proceeded only as against (the first accused) the appellant herein. The convictions and sentences have been confirmed on appeal by the High Court at Bombay.

The complainant is a businessman from Goa and was the director of a firm in Goa which was trading in the name of Colonial Limitada doing business in import and export. At the relevant time there was severe scarcity of rice in Goa. The complainant was accordingly anxious to import rice urgently into Goa. He got into touch with a friend of his by name Rosario Carvalho in Bombay who was doing business as a commission agent. Carvalho in his turn got into touch with one Jasawalla who was also doing business of commission agent at Bombay in the name of Universal Supply Corporation. This Jasawalla was previously in correspondence with the appellant about business in rice. The appellant was at the time in Karachi and was doing business in the name of Atlas Industrial and Trading Corporation and also in the name of Ifthiar Ahmed & Co. The telegraphic address of the complainant was Colodingco and that of the appellant was Ifthy. As a result of exchange of telegrams, letters and telephone messages between Jasawalla and the appellant on one side, Jasawalla and the complainant on the other, followed up by direct contacts between the appellant and the complainant through telephone, telegrams and letters, a contract was brought about for purchase, by the complainant from the appellant, of 1,200 tons of rice at the rate of Pounds 51 per ton, to be shipped from Karachi to Goa. The contract appears originally to have been

for payment of the price in sterling at Karachi. But it is the prosecution case (which has been accepted by both the courts below) that a subsequent arrangement was arrived at between the parties by which the payment was to be made in Bombay in Indian currency, in view of the difficulties experienced in opening a letter of credit in a Bank at Karachi through the Portuguese Bank at Goa. It is also the prosecution case, which has been accepted, that the understanding was that 25% of the price was to be paid as advance by the complainant to Jasawalla as the agent of the appellant for this purpose and that on receiving intimation thereof the appellant was to ship the rice and that the balance of the purchase money was to be paid on presentation of the shipping documents. It appears that at a later stage the quantity of rice to be supplied was raised to 2,000 tons and advance to be paid to 50% of the total stipulated price. It is also the prosecution case that the appellant represented at various stages by telephone talks, telegrams, and letters, to Jasawalla as well as to the complainant directly that he had adequate stock of rice and that he had reserved shipping space in certain steamers which were about to leave for Goa and that he was in a position to ship the rice on being satisfied that the requisite advance was paid. It is in evidence that on receiving such assurances, the complainant paid moneys as shown below to Jasawalla and obtained receipts from him, purporting to be the agent of the appellant.

#1.	On July 23, 1951 ...	Rs. 81,0002.
	On August 28, 1951 ...	Rs. 2,30,0003.
	On August 29, 1951 ...	Rs. 2,36,900##

All these amounts are held to have been received by the appellant in due course. It is admitted, however, that no rice was in fact shipped to the complainant and the amounts have not been returned back to the complainant. The defence of the appellant is to the effect that the amounts were not in fact paid to any person who was his agent and not in face received by him at all and that he was unable to supply the rice as the complainant did not comply with the terms of the contract by opening a letter of credit at Karachi or paying him in Pakistani currency. This defence has not been accepted and the appellant has been found guilty as charged by the courts below. He was therefore convicted and sentenced as above stated.

It is necessary to set out somewhat in detail the essential facts held to have been proved by the courts below to appreciate the legal contentions that have been urged before us. As previously stated, the complainant got into touch with his friend Carvalho of Bombay to help him in getting rice for consumption in Goa and Carvalho in turn contacted Jasawalla for the purpose. Before that time, Jasawalla, in the course of his usual business, had received a letter, Ex. O, dated June 5, 1951, from the appellant offering that he would be prepared to do business in rice if a letter of credit is opened or cash payment is made in Karachi. Carvalho came to know of this from Jasawalla and informed the complainant. Jasawalla also wrote a letter to the complainant. The complainant sent a telegram showing his willingness to open credit, if 1,200 tons of rice could be shipped to Goa. Jasawalla wrote a letter, Ex. P, dated June 6, 1951, to the appellant quoting the telegram of the complainant and asking for an offer. The appellant by his letter dated June 10 to Jasawalla, offered to supply as much rice as he wanted and demanded 25% cash payment as advance. After some tripartite correspondence, the appellant by his letter dated June 26, agreed to accept money in Bombay, at the price of Pounds 51 per ton of rice. Jasawalla by telegram dated July 5, 1951, informed the appellant that the Goa party accepted the 25% arrangement. The appellant by a letter dated July 7, accepted the offer but wanted 50% deposit and gave time till the 10th, suggesting that since the rice was scarce the deal must be finished at once. Jasawalla intimated this to the

complainant and asked him to start at once with money and informed him that if there was delay the party at the other end would claim damages. The appellant did not get any information for the next few days. He accordingly sent one Santram (accused 4 in the complaint) to Bombay as his agent for discussing the matter in question and authorising him to fix the deal on the spot. Santram appears to have fixed the bargain for shipping 1,200 tons of rice on the complainant paying an advance sum of Rs. 1,50,000 at Bombay as 25% deposit towards the price of the said 1,200 tons of rice. On receipt of this information the appellant wrote a letter dated July 12, to Jasawalla wherein the confirmed the arrangement arrived at by Santram. Jasawalla was thereupon taken by Santram to accused 2 and 3. They were introduced to him as the agents of the appellant who were to receive the moneys in this transaction on appellant's behalf. At the same time the appellant was also writing letters to Jasawalla which seem to indicate that he was trying to shift his position by asking for 50% as advance deposit. For a few days thereafter the complainant did not turn up at Bombay with the funds and the appellant by his telegram dated July 16, asked Jasawalla why there is no further information about the transaction. By a telegram dated July 17, he informed Jasawalla that S.S. Olinda was sailing in a few days and that it would be too late to ship the rice and that the matter should be hurried up. On July 18, the complainant sent a telegram to Jasawalla informing him that he was coming with funds and that if the rice was not shipped it may be shipped by S.S. Olinda which was about to start on July 21. The appellant also sent a telegram to Jasawalla on July 18, asking why the deal was not coming on and that he had already reserved space by the steamer of the 21st. On July 19 again Jasawalla received a telegram from the appellant informing him definitely that space was reserved in the steamer. The complainant also sent a telegram to Jasawalla on the same day informing him that he was coming and that at least 500 tons must be shipped at once. The complainant arrived at Bombay on July 20. The indent, Ex. A, was prepared in triplicate and signed by the complainant on the same day. The complainant brought cheques and drafts to the tune of Rs. 81,000. It would appear that at this stage the complainant was asking that he should be allowed (for the time being) to deposit only Rs. 50,000 as deposit for a shipment of 500 tons. But appellant insisted that Rs. 1,50,000 should be paid as advance for 1,200 tons. On or about July 21, the appellant sent a letter to Jasawalla with a pro-forma receipt for Rs. 1,50,000 signed by him to be made use of by Jasawalla in whatever manner he thought proper in connection with the transaction then under way. The said receipt was shown to the complainant who was shown also the other correspondence that was received from the appellant. Jasawalla by his letter dated July 22, to the appellant confirmed the shipment of the deal of 1,200 tons of rice and intimated that some portion of the money was immediately ready and some portion would be brought in a day or two, totalling over Rs. 80,000 and that the balance would be paid after hearing about shipment of 1,200 tons. This was agreed to by the appellant. On July 23, Jasawalla telephoned to the appellant that he was going to pay the money to accused 2 as directed by the appellant. In the afternoon of that very day the parties went to the office of accused 2 and there was again a further conversation on the phone with the appellant who, on the phone, conveyed the assurance that payment to accused 2 would be as good as payment to himself. The complainant and Carvalho were hearing both the morning and afternoon talks between the appellant and Jasawalla, on a second line. Thereupon the complainant paid the sum of Rs. 81,000 to Jasawalla who passed a receipt (Ex. B) therefor on behalf of the appellant and the said amount was passed on to accused 2. The fact of this payment was intimated to the appellant by telephone as well as by a telegram. A letter was also written on July 24 to the appellant referring to the telephone calls and telegram and informing him that the amount was paid. He was also asked therein to ship the rice at once promising that the balance will be paid in a week. On July 23 itself the appellant sent a telegram saying that he had received the messages and was trying to book 1,000 tons. According to the prosecution case the appellant having received the sum of Rs. 81,000 as above, changed his front from July 24, 1951. The facts held to have been proved in respect of this

change of front may now be stated.

On July 24, 1951, the appellant sent to Jasawalla a telegram mentioning difficulties created by the Exchange Controller in shipping the goods. When Jasawalla conveyed his protest and insisted upon the shipping of the goods at once, the appellant sent a telegram on July 25, informing him that the difficulties were of a minor character and that the space for shipping was already booked. Jasawalla by his telegram of the same date asked for confirmation of loading of 1,200 tons by S.S. Olinda and requested him that if the full quantity could not be loaded, a portion thereof might be sent immediately. The appellant by his letter dated July 26, acknowledged Jasawalla's letter dated 23rd (informing hims about the payment of Rs. 81,000) and intimated that the rice would be shipped by the next steamer S.S. Umaria sailing for Malaya and that the said steamer can touch Goa if the quantity of rice to be shipped is raised to 2,000 tons. By a letter dated July 26, Jasawalla protested against the new condition. The complainant sent a letter dated July 27, to Jasawalla asking whether the rice was shipped by S.S. Olinda or not. On July 27, the appellant sent a telegram to Jasawalla asking for bank-guarantee (for payment of balance). It does not appear that any question of bank-guarantee was raised in the correspondence between the parties, after Santram (accused 4) fixed up the deal on the footing of payment of advance of Rs. 1,50,000, in cash at Bombay by way of 25% deposit. On receiving this letter raising the question of bank-guarantee, Jasawalla wrote back on the 27th to the appellant about the change of front and charging him with cheating and not fulfilling his part of the contract after receiving the money. By a letter dated July 30 and also a telegram of the same date the appellant replied to Jasawalla wherein he promised to send the rice by S.S. Umaria and also threatened to break off negotiations if the parties had no confidence in him. Jasawalla thereupon asked the appellant by telegram to fix the sailing date of S.S. Umaria and inform him. The appellant wrote back on August 1, admitting receipt of letters from Jasawalla and attempting to pacify him. Jasawalla replied thanking him and asked for a clear date of the sailing of S.S. Umaria. By that time Jasawalla had made enquiries with Mackinons & Mackenzie (shipping agents) and was informed that no shipping space had been reserved by the appellant and found the statement of the appellant in this behalf to be false. Jasawalla sent copies of this correspondence between him and the appellant to the complainant. That correspondence indicated the appellant's position to be that the rice would be shipped by S. S. Umaria only if the load could be increased to 2,000 tons and that the appellant stated that he got the sailing of S.S. Umaria delayed by two days for the purpose. The complainant thereupon informed Jasawalla that he was prepared to accept the new deal for 2,000 tons. Jasawalla by his telegram dated August 2, to the appellant confirmed this new arrangement and by another telegram dated August 3, asked the appellant to hurry up with the shipment. Thereafter the appellant raised a fresh matter. On August 6, the appellant sent a direct telegram to the complainant and asked him to request the Portuguese Pro-Consul at Karachi to obtain exchange-guarantee. Between August 7 and 12, several letters and telegrams passed between the complainant and Jasawalla on the one hand and the appellant on the other. As a result of efforts made in this interval, it appears that the Pro-Consul, Mr. Alphonso, was prepared to give the exchange-guarantee of the State Bank of Pakistan for payment in sterling of the price of rice. The appellant then by his letter dated August 13, informed Jasawalla that the State Bank was not insisting on exchange guarantee but that it would be sufficient if a certificate was issued by the Portuguese authority that the rice was required for replenishing the ration shops in Goa. A similar letter was also written by the appellant on August 14, to the complainant. Thereupon the complainant and Jasawalla approached the concerned authority at Goa, viz., one Mr. Campos, the Trade Agent to the Portuguese Government. Mr. Campos thereupon sent telegrams on August 16, to the State Bank of Pakistan, to the Pro-Consul, Mr. Alphonso, and to the appellant certifying that rice was required for replenishing the ration shops in Goa.

After this there was a further change of tactics by the appellant. By a telegram dated August 20, 1951, the appellant informed the complainant that the papers before the Government were ready and that he had done his best but that payment must be made. In reply the complainant sent a telegram to the appellant on the same date stating that he did not understand the contents of his telegram and promised to send the balance on loading. The complainant also informed Jasawalla about these telegrams exchanged between him and the appellant. This was followed up by some further correspondence between the parties on August 22. The appellant sent telegrams both to the complainant and to Jasawalla demanding 90% deposit as advance and threatened to break off if it was not complied with. Thereupon Jasawalla sent a telegram on the 22nd to the complainant to come to Bombay. He informed the appellant the same day that the complainant was coming down to Bombay to arrange for 50% deposit and asked the appellant to start loading. On the 24th he wrote also a letter to the appellant to the effect that the complainant would pay 50% advance minus the amount already paid and informed him that the complainant would fly to Karachi to supervise the loading. The appellant thereupon sent a telegram dated the 25th informing Jasawalla that everything was ready but hinted about the opening of a letter of credit. Again on August 27, the appellant sent a telegram to Jasawalla that stocks could not be released unless the arrangement was fulfilled, i.e., 90% amount was paid. The complainant came to Bombay with drafts and cheques to the tune of about Rs. 4,75,000 and contacted Jasawalla. He contacted also the appellant on phone. He paid the sum of Rs. 2,30,000 on August 28, 1951, to Jasawalla who passed a receipt, Ex. F, therefor, on behalf of the appellant. On August 29, the complainant paid another sum of Rs. 2,36,900 to Jasawalla who passed a receipt, Ex. G, therefor, on behalf of the appellant. It is the case of the prosecution that both these were also passed on to the second accused and through him to the appellant and that the appellant acknowledged receipt of these amounts in his correspondence and that case has been also accepted. On the 29th itself the appellant sent a telegram to Jasawalla as follows :

> "Part consignment received, rest tomorrow, Pentakota for the 1st certain goods required alongside."

On receiving this telegram Jasawalla informed him by a telegram dated August 31, that he was shocked that no space was reserved, though everything had been done on his side. The appellant sent a reply by telegram dated September 1, 1951, protesting against the language used by Jasawalla in the telegram and informed him that space was reserved but the Company could not wait as the goods could not be shipped. On September 5, the appellant informed Jasawalla by a letter that space was reserved by S.S. Pentakota and that everything was ready for shipment. Meanwhile the complainant feeling very nervous and anxious about the fulfilment of the transaction proceeded in person to Karachi on September 4. According to the complainant he stayed at Karachi for about two weeks. He was shown some godowns containing rice bags suggesting that they belonged to the appellant and were ready for shipment. But he was not afforded any opportunity for verifying that the stock was intended for shipment in respect of his transaction. The complainant went to Karachi on a Visa for three months. But after a stay of less than two weeks he was served with a quit-order from the Pakistan Government on September 18, and was bundled out of Karachi. It is the complainant's impression that this was manoeuvred by the appellant. On his return back, correspondence was again resumed between the appellant and the complainant. By a letter dated September 21, the appellant promised to ship the goods by S.S. Ismalia which would not be sailing in September but would leave on October 3. On September 23, the appellant sent another letter stating that S.S. Ismalia was arriving on October 3 and not on September 26. On October 3, the appellant wrote another letter to the complainant informing him that S.S. Ismalia was not available. The complainant thereafter sent a telegram to the appellant dated September 29, calling upon his to

ship the goods by S.S. Shahjehan if S.S. Ismalia was not available. The complainant by a further letter dated October 1, called upon the appellant to ship the rice at once. By a telegram dated October 2, the appellant informed the complainant that S.S. Shahjehan was arriving the next day and that he would wire the position. By his telegram dated the 3rd, he informed the complainant that the loading had commenced. On October 6, the complainant received another telegram from the appellant that he would not ship per S.S. Shahjehan until demands in his letter dated September 29 are complied with. It is the complainant's case that no such letter was ever received by him. Jasawalla also informed the appellant that no letter dated September 29 was received. By telegram dated October 8, 1951, Jasawalla called upon the appellant to refund the money and cancel the contract. On October 12, the appellant sent a telegram which conveyed a suggestion that he would ship rice by S.S. Shahjehan arriving on October 19, instead of October 9. There were some further telegrams exchanged. Finally the complainant sent a telegram on October 26, calling upon the appellant to ship rice immediately or refund the money. This was followed by further exchange of correspondence which ultimately resulted in a letter by the appellant to the complainant dated November 17, denying all the allegations made against him.

The above facts were held to have been proved by the courts below on the basis of a good deal of correspondence between the parties consisting of telegrams and letters and supported by the oral evidence mainly of three persons, viz., (1) the complainant, (2) Jasawalla, and (3) and ex-employee of the appellant at Karachi by name Sequeria. All this evidence has been accepted by the courts below after full consideration of the various comments and criticisms against acceptability of the same.

In a case of this kind a question may well arise at the outset whether the evidence discloses only a breach of civil liability or a criminal offence. That of course would depend upon whether the complainant in parting with his money to the tune of about Rs. 5 1/2 lakhs acted on the representations of the appellant and in belief of the truth thereof and whether those representations, when made were in fact false to the knowledge of the appellant and whether the appellant had a dishonest intention from the outset. Both the courts below have found these facts specifically against the appellant in categorical terms. These being questions of fact are no longer open to challenge in this Court before us in an appeal on special leave.

Learned counsel for the appellant accordingly raised before us the following contentions :

1. The appellant is a Pakistani national, who, during the entire period of the commission of the offence never stepped into India and was only at Karachi. Hence he committed no offence punishable under the Indian Penal Code and cannot be tried by an Indian Court.

2. The appellant was brought over from England, where he happened to be, by virtue of extradition proceedings in connection with another offence, the trial for which was then pending in the Sessions Court at Bombay and accordingly he could not be validly tried and convicted for a different offence like the present.

3. The various telegrams and letters relied upon by the prosecution were held to have been proved on legally inadmissible material.

4. The charge being under s. 420 read with s. 34 of the Indian Penal Code for alleged conjoint acts of the appellant along with the persons designated as accused 2, 3 and 4,

in the complaint and the said three accused not being before the Court and the appellant not having been in Bombay at the time, the conviction is unsustainable.

We have heard elaborate arguments on all these matters but have felt satisfied that there is no substance in contentions 2, 3 and 4 above. Accordingly we did not call upon the counsel for the State to reply to the same. It is, therefore, unnecessary to deal with them at any length. They will be disposed of in the first instance.

To understand contention 3, it is convenient to take the letters and telegrams separately. The letters which have been relied on for the prosecution fall under the following categories.

1. Letters from the appellant either to Jasawalla or to the complainant.

2. Letters to the appellant from Jasawalla or the complainant.

Most of the letters from the appellant relied upon bear what purport to be his signatures. A few of them are admitted by the appellant. There are also a few letters without signatures. Both the complainant and Jasawalla speak to the signatures on the other letters. The objection of the learned counsel for the appellant is that neither of them has actually seen the appellant write any of the letters nor are they shown to have such intimate acquaintance with his correspondence, as to enable them to speak to the genuineness of these signatures. Learned trial Judge as well as the learned Judges of the High Court have found that there were sufficient number of admitted or proved letters which might well enable Jasawalla and the complainant to identify the signatures of the appellant in the disputed letters. They also laid stress substantially on the contents of the various letters, in the context of the other letters and telegrams to which they purport to be replies and which form the chain of correspondence as indicating the genuineness of the disputed letters. Learned counsel objected to this approach on a question of proof. We are, however, unable to see any objection. The proof of the genuineness of a document is proof of the authorship of the document and is proof of a fact like that of any other fact. The evidence relating thereto may be direct or circumstantial. It may consist of direct evidence of a person who saw the document being written or the signature being affixed. It may be proof of the handwriting of the contents, or of the signature, by one of the modes provided in ss. 45 and 47 of the Indian Evidence Act. It may also be proved by internal evidence afforded by the contents of the document. This last most of proof by the contents may be of considerable value where the disputed document purports to be a link in a chain of correspondence, some links in which are proved to the satisfaction of the court. In such a situation the person who is the recipient of the document, be it either a letter or a telegram, would be in a reasonably good position both with reference to his prior knowledge of the writing or the signature of the alleged sender, limited though it may be, as also his knowledge of the subject matter of the chain of correspondence, to speak to its authorship. In an appropriate case the court may also be in a position to judge whether the document constitutes a genuine link in the chain of correspondence and thus to determine its authorship. We are unable, therefore, to say that the approach adopted by the courts below in arriving at the conclusion that the letters are genuine is open to any serious legal objection. The question, if any, can only be as to the adequacy of the material on which the conclusion as to the genuineness of the letters is arrived at. That however is a matter which we cannot permit to be canvassed before us.

A few of the letters said to have been received from the appellant, as stated above, do not bear his signatures. There were held to have been proved by the circumstantial evidence as pointed out and we see no objection thereto.

The next objection is as regards the letters said to have been sent by Jasawalla and the complainant to the appellant. Jasawalla and the complainant have produced copies of the originals. It has been contended that these copies are inadmissible. But such a contention is obviously untenable. The appellant cannot be expected to produce them, if true, since he disputes them. There is also the evidence of his ex-employee, Sequeria, that the originals were received but taken away by his son. The main contention in respect of these letters is that there is no proof that they were received by the appellant at Karachi. It is contended that evidence given by either Jasawalla or the complainant that the originals were written and posted is not relevant to show that the same have been received. It is urged that the proof of mere posting of a letter is not presumptive evidence of the receipt thereof by the addressee unless there is also proof that the original had not been returned from the Dead Letter Office. Illustration (b) to s. 16 of the Indian Evidence Act, 1872, is relied on for the purpose and it is urged that a combination of the two facts is required to raise such a presumption. We are quite clear that the illustration only means that each one of these facts is relevant. It cannot be read as indicating that without a combination of these facts no presumption can arise. Indeed that section with the illustrations thereto has nothing to do with presumptions but only with relevance. Some cases relating to this have been cited before us. We have considered the same but it is unnecessary to deal with them.

Next taking the question relating to telegrams the main objection is as to the proof of the genuineness of the various telegrams said to have been received from the appellant. In this case since we are largely concerned with the nature and contents of the representations said to have been made by the accused to the complainant or to Jasawalla, it is obvious that what are relevant or important are the telegraphic messages delivered to the complainant or Jasawalla provided the authorship of the original is made out. These messages have been proved by producing the messages actually handed over to either of these persons or the transit copies of the originals recorded at the receiving end. The real objection, however, appears to be that there is no proof as to the appellant having been the author of these messages. It is true that under s. 88 of the Evidence Act there is a presumption only that the message received by the addressee corresponds with the message delivered for transmission at the office of origin. There is no presumption as to the person who delivered such a message for transmission. But here again proof of authorship of the message need not be direct and may be circumstantial as has been explained above in the case of letters. The contents of the messages received, in the context of the chain of correspondence may well furnish proof of the authorship of the messages at the dispatching end. A number of other minor objections have been also raised before us connected with the proof of these telegrams. They have all been fully dealt with by one of the learned Judges of the High Court. Most of these objections are unsubstantial and it is enough to say that we are in general agreement with the conclusions of the High Court in this matter.

As regards both the letters and the telegrams considerable argument was attempted before us as to the mode in which they were let in for proof in the course of the examination of the witnesses. But in the absence of any clear indication on the record that any objection in that behalf was seriously taken, we could not permit any challenge in this behalf.

We may add that as regards the main objection both in respect of letters as well as telegrams, viz., the use of the contents of the disputed documents, for proof thereof there is this that could be said, viz., in view of the fact that quite a large number of the documents are not admitted and only a few have been held to be admitted or indubitably proved it may have been a question open before the Court of appeal whether the internal evidence with reference to such a large mass of correspondence substantial portion of which is disputed was adequate to arrive at a satisfactory conclusion as to the

genuineness of these documents. That question is not open before us. But even if we were inclined to go into this, it was well nigh impossible, having regard to the fact that most of the documents relied upon by the trial court as well as the appellate court have not been printed in the record before us. However, there is no reason to think that the learned Judges who have considered the matter very elaborately have not come to a satisfactory conclusion. They have acted not merely on the internal evidence of the documents but also on the oral evidence of three main witnesses, viz., the complainant, Jasawalla and Sequeria, each set of evidence having been considered as affirmative of the other and in the aggregate as proving the authorship of the disputed documents.

The fourth contention raised by the appellant's counsel relates to the validity of the conviction under s. 420/34 of the Indian Penal Code. Learned counsel argued that persons designated as accused 2, 3 and 4 in the complaint, were all in Bombay and the appellant in Karachi and that therefore no conjoint offence could be committed by them within the meaning of s. 34 of the Indian Penal Code. He relies upon the dictum in Shreekantiah Ramayya Munipalli v. The State of Bombay [[1955] 1 S.C.R. 1177, 1188.] to the effect that it is essential that the accused should join in the "actual doing" of the act and not merely in planning its perpetration. We do not think that that case or the dictum therein relied on, have any bearing on the facts of the present case. It is also necessary to observe that what in fact has been found in this case is the commission of the offence by the appellant himself. Though the trial Magistrate and one of the learned Judges of the High Court referred to the conviction as a conviction under s. 420/34 of the Indian Penal Code, the actual findings support a conviction of the appellant under s. 420 itself. Such a conviction would be valid though the charge is under s. 420 read with s. 34 of the Indian Penal Code. (See Willie (William) Slaney v. The State of Madhya Pradesh [[1955] 2 S.C.R. 1140.], unless prejudice is shown to have occurred.

Thus there is no substance in contentions 3 and 4.

Contention No. 2 arises under the following circumstances. It appears that the appellant was previously undergoing trial in the Court of the Sessions Judge at Bombay for the offences of forgery and fraud and was on bail in connection with that trial. While thus on bail he fled away first to Pakistan and from there to England. The Indian authorities made an application to the Metropolitan Magistrate, Bow Street, under the Fugitive Offenders Act, for his being arrested and surrendered. That application was granted by the Magistrate. Thereupon the appellant moved the Queens Bench Division of the High Court in England for a writ of habeas corpus challenging the validity of his arrest and surrender to the Indian authorities. Judgment of Lord Goddard C.J. dealing with this matter is reported as Re. Government of India and Mubarak Ali Ahmed [[1952] 1 All E.R. 1060.]. The application was dismissed and the order for surrender made under the Fugitive Offenders Act was upheld. It appears that when he was brought back to Bombay and was in jail custody with reference to the resumed sessions trial, the complainant got to know about it and filed his complaint on June 30, 1952. The Presidency Magistrate took it on his file and issued warrant against the accused and had him brought up before his court in due course for trial (presumably after the sessions trial was completed). The objection raised before us is that then appellant having been surrendered by the order of the Metropolitan Magistrate only for the sessions trial which was pending against him in Bombay, he could not be tried for any other offence said to have been committed by him in India. Learned Counsel relies on s. 3(2) of the English Extradition Act, 1870 (33 & 34 Vict. c. 52) which shows that it is contemplated thereby that a fugitive criminal who has been surrendered under the Extradition Act in respect of a particular offence should not be tried for any other offence until he has been restored or has been given an opportunity of returning. This section, however, has no bearing in the present case, since, as already stated, the appellant was surrendered under the Fugitive Offenders Act which contains no analogous provision. Section 8 of

the Fugitive Offenders Act only provides for an optional repatriation of the surrendered person at his request if he is acquitted of the offence for which he is surrendered. Learned counsel urges that the principle underlying s. 3(2) of the English Extradition Act is a general one and that it should be applied by analogy also to a surrender under the Fugitive Offenders Act. We are unable to accede to that contention. It may also be mentioned that even if his arrest in India for the purpose of a trial in respect of a fresh offence is considered not to be justified, this by itself cannot vitiate the conviction following upon his trial. This is now well-settled by a series of cases. (See Parbhu v. Emperor [A.I.R. (1944) P.C. 73.]); Lumbhardar Zutshi v. The King [A.I.R. (1950) P.C. 26.]; and H.N. Rishbud v. The State of Delhi [(1955) 1 S.C.R. 1150, 1163.]. This contention must accordingly be overruled.

We are left, therefore, with the first contention raised by the learned counsel for the appellant which is the only substantial question that has been raised before us requiring careful consideration.

The first contention is raised on the assumption that the appellant is a Pakistani national. At the outset, it may be stated that it is doubtful whether in fact the appellant at the time of the offence could be considered a Pakistani national. The complainant asserted in his complaint, that he came to know the appellant to be an Indian citizen and described him as hailing from Hyderabad (Deccan) and as having absconded to Pakistan and from there to England. In a long written-statement filed after the prosecution closed its case, the appellant himself gave details of his previous history from the year 1928. He stated that he became a Graduate with Honours from the Punjab University in 1928, that he joined the Indian Finance Service and served in various capacities and at various places, that he ultimately resigned from the Government service in 1943 and joined an industrial concern at Hyderabad (Deccan), that he did a lot of business there and that he entered into a large business contract with the Government of Hyderabad, which was revived by the Military Government after the Police Action. He winds up the narration of his previous history with the following significant statement.

> "The contract was satisfactorily fulfilled prior to my migration to Pakistan in July, 1950."

This is a categorical statement of the appellant himself which shows that he continued to be in India till July 1950. If so, it appears prima facie that by virtue of Art. 5 of the Constitution read with Art. 7 thereof, he was a citizen of India on the date of the Constitution and continued to be so at the date of the offence in July-August, 1951, unless he shows that under Art. 9 of the Constitution, he voluntarily acquired the citizenship of a foreign State. Prima facie mere migration to Pakistan is not enough to show that he had lost Indian citizenship. This question has not been considered or dealt with in the courts below, probably because it was not properly raised at the early stages. Being a fundamental objection to jurisdiction this should have been raised at the trial by the appellant (accused), at any rate, soon after the charge was framed. We might well have declined, therefore, to permit the question of jurisdiction in this specific form to be argued before us. But the learned Judges of the High Court have entertained it and dealt with it on the stated assumption that the appellant is a Pakistani national. To overrule the objection at this stage without finally deciding whether the appellant continues to be an Indian citizen (after remanding for additional finding, if need be,) would not be fair or satisfactory. In the circumstances we have felt it desirable to allow arguments to proceed on the same assumption which the High Court has made. We, therefore, proceed to deal with it.

The learned Judges of the High Court decided against the objection of the appellant as to the

jurisdiction of the court to try him for the alleged offence relying on s. 179 of the Code of Criminal Procedure which provides as follows :

> "When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued."

In view of the above provision, the learned Judges say as follows :

> "Even upon the footing that the representations were made, or the deception was practised by the appellant, while he was in Pakistan, the consequence of the deception, namely, the delivery of the property, took place in Bombay."

They held that the appellant could, therefore, be tried in Bombay in respect of the delivery of the money in Bombay. The argument of the learned counsel for the appellant is that s. 179 of the Code of Criminal Procedure proceeds on the assumption that the person to be tried is substantively liable for an offence under the Indian Penal Code and that s. 179 prescribes the place of trial but does not create the liability. He urges that since the appellant is a Pakistan national who was not physically present at Bombay at any stage of the commission of the offence, the Indian Penal Code has no application to him. He is therefore not liable for an offence under the Penal Code and hence is not triable under s. 179 of the Code of Criminal Procedure. It appears from s. 5(1) of the Code of Criminal Procedure that the provisions of the said Code relating to the place of trial assume the existence of substantive liability under the Indian Penal Code or under any other law. Section 5(1) says that "all offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained." Now the point raised by the learned counsel is that to hold a person in the position of appellant substantively liable for the offence charged against him in the circumstances of this case, would be to give extra-territorial operation to the provisions of the Indian Penal Code. He contends that such extra-territorial operation can only be by reason of specific legislation in this behalf and does not arise from any general provisions of the Indian Penal Code.

To deal with this contention, it is necessary to appreciate clearly the basic facts found in this case. The offence of cheating under s. 420 of the Penal Code as defined in s. 415 of the Code has two essential ingredients, viz., (1) deceit, i.e., dishonest or fraudulent misrepresentation to a person, and (2) the inducing of that person thereby to deliver property. In the present case the volume of evidence set out above and the facts found to be true show that the appellant though at Karachi was making, representations to the complainant through letters, telegrams and telephone talks, some times directly to the complainant and some times through Jasawalla, that he had ready stock of rice, that he had reserved shipping space and that on receipt of money he would be in a position to ship the rice forthwith. These representations were made to the complainant at Bombay, notwithstanding that the appellant was making the representations from Karachi. The position is quite clear where the representations were made through the trunk phone. The statement of the appellant at the Karachi-end of the telephone becomes a representation to the complainant only when it reaches cognition of the complainant at the Bombay-end. This indeed has not been disputed. It makes no difference in principle if the representations have in some stages been conveyed by telegrams or by letters to the complainant directly or to some one of the appellant's agents, including Jasawalla in that category. There is also no question that it is as a result of these representations that the complainant parted with his money to the tune of about Rs. 5. 1/2 lakhs on three different dates. It

has been found that the representations were made without being supported by the requisite facts and that this was so to the knowledge of the appellant and that the representations were so made with an initial dishonest intention. On these facts it is clear that all the ingredients necessary for finding the offence of cheating under s. 420 read with s. 415 have occurred at Bombay. In that sense the entire offence was committed by Bombay and not merely the consequence, viz., delivery of money, which was one of the ingredients of the offence. Learned counsel for the appellant has not seriously contested this position. But he urges that even so the appellant who was not corporeally present in India at the relevant time does not fall within the purview of the Indian Penal Code. Now there can be no doubt that prima facie the Indian Penal Code is intended to deal with all unlawful acts and omissions defined to be offences and committed within India and to provide for the punishment thereof the person or persons found guilty therefor. This is implicit in the preamble and s. 2 of the Indian Penal Code. What is, therefore, to be seen is whether there is any reasons to think that a foreigner not corporeally present at the time of the commission of the offence does not fall within the range of persons punishable therefor under the Code. It appears to us that the answer must be in the negative unless there is any recognised legal principle on which such exclusion can be founded or the language of the Code compels such a construction. It is strenuously urged that to consider a foreigner guilty under the Penal Code for an offence committed in India though attributable to him and to punish him therefor in a case where he is not corporeally present in India for the commission of the offence, would be to give extra-territorial operation to the Indian Penal Code and that an interpretation which brings such extra-territorial operation must be avoided. The case of the Privy Council in Macleod v. Attorney-General for New South Wales [(1891) A.C. 455.] is relied upon. But this argument is based on a misconception. The fastening of criminal liability on a foreigner in respect of culpable acts or omissions in India which are juridically attributable to him notwithstanding that he is corporeally present outside India at the time, is not to give any extra-territorial operation to the law; for it is in respect of an offence, whose locality is in India, that the liability is fastened on the person and the punishment is awarded by the law, if his presence in India for the trial can be secured. That this is part of the ordinary jurisdiction of a Municipal Court is well-recognised in the common law of England as appears from Halsbury's Laws of England (Third Edition) Vol. 10, p. 318. Paragraph 580 therein shows that the exercise of criminal jurisdiction at common law is limited to crimes committed within the territorial limits of England and para. 581 states the jurisdiction in respect of acts outside English territory as follows:

> "For the purposes of criminal jurisdiction, an act may be regarded as done within English territory, although the person who did the act may be outside the territory; for instance, a person who, being abroad procures an innocent agent or uses the post office to commit a crime in England is deemed to commit an act in England. If a person, being outside England, initiates an offence, part of the essential elements of which take effect in England, he is amenable to English jurisdiction. It appears that even though the person who has initiated such an offence is a foreigner, he can be tried if he subsequently comes to England."

Thus the exercise of criminal jurisdiction in such cases under the common law is exercise of municipal jurisdiction and much more so in a case like the present, where all the ingredients of the offence occur within the municipal territory.

It would be desirable at this stage to notice certain well-recognised concepts of International Law bearing on such a situation. Wheaton in his book on Elements of International Law (Fourth Edition) at p. 183, dealing with criminal jurisdiction states as follows :

> "By the Common Law of England, which has been adopted, in his respect, in the United States, criminal offences are considered as altogether local, and are justiciable only by the courts of that country where the offence is committed."

At p. 182 thereof it is stated as follows :

> "The judicial power of every independent State, extends (with the qualifications mentioned earlier) to the punishment of all offences against the municipal laws of the State, by whomsoever committed, within the territory."

In Hackworth's Digest of International Law (1941 Edition), Vol. II, at p. 188 there is reference to opinions of certain eminent American Judges. It is enough to quote the following dictum of Holmes J. noticed therein :

> "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power."

In Hyde's International Law (Second Edition), Vol. I, at p. 798, the following quotation from the judgment of the permanent Court of International Justice dated September 7, 1927, in the case relating to S.S. Lotus [Publications, Permanent Court of International Justice, Series A, Nos. 10, 23.] is very instructive :

> "It is certain that the courts of many countries, even of countries which have given their criminal legislation a strictly territorial character, interpret criminal law in the sense that offences, the authors of which at the moment of commission are in the territory of another State, are nevertheless to be regarded as having been committed in the national territory, if one of the constituent elements of the offence, and more especially its effects, have taken place there."

This quotation is also noticed in Openheim's International Law (Eighth Ed.), Vol. I at p. 332 in the foot-note. In noticing the provisions of International Law in this context we are conscious that what we have to deal with in the present case is a question merely of municipal law and not of any International Law. But as is seen above, the principles recognised in International Law in this behalf are virtually based on the recognition of those principles in the municipal law of various countries and is really part of the general jurisprudence relating to criminal responsibility under municipal law. No doubt some of the above dicta have reference to offences actually committed outside the State by foreigners and treated as offences committed within the State by specific legislation. But the principle emerging therefrom is clear that once it is treated as committed within the State the fact that he is a foreigner corporeally present outside at the time of such commission is no objection to the exercise of municipal jurisdiction under the municipal law. This emphasises the principle that exercise of criminal jurisdiction depends on the locality of the offence and not on the nationality of the alleged offender (except in a few specified cases such as ambassadors, Princes etc.).

Learned counsel for the appellant has relied on various passages in the judgment of Cockburn C.J. in the well-known case The Queen v. Keyn (Franconia's case) [(1876) 2 Ex.D. 63.]. Fourteen learned Judges participated in that case and the case appears to have been argued twice. Eight of them including Cockburn C.J. formed the majority. Undoubtedly there are various passages in the judgment of Cockburn C.J. Which prima facie seem capable of being urged in favour of the

appellant's contention. In particular the following passage at p. 235 may be noticed :

> "The question is not whether the death of the deceased, which no doubt took place in a British ship, was the act of the defendant in such ship, but whether the defendant, at the time the act was done, was himself within British jurisdiction."

The learned Chief Justice, however, recognised at p. 237 that there were certain American decisions to the contrary. Now the main debate in that case was whether the sea up to three mile limit from the shore is part of British territory or whether in respect of such three mile limit only limited and defined extra territorial British jurisdiction extended which did not include the particular criminal jurisdiction under consideration. In respect of this question, as a result of the judgment, the Parliament had to enact the Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict., c. 73) which in substance overruled the view of the majority and of the learned Chief Justice on this point. The main principle of criminal jurisdiction, however, relevant for our purposes was enunciated in the minority judgment of Amphlett, J.A., at p. 118, that "it is the locality of the offence that determines the jurisdiction" implying by contrast that it is not the nationality of the offender.

The question, however, that still remains for consideration is whether there is anything in the language of the sections of the Indian Penal Code relating to the general scheme of the Code which compels the construction that the various sections of the Penal Code are not intended to apply to a foreigner who was committed an offence in India while not being corporeally present therein at the time. For this purpose we are not concerned with such of the sections of the Penal Code, if any, which indicate the actual presence of the culprit as a necessary ingredient of the offence. Of course, for such offences a foreigner ex hypothesi not present at the time in India cannot be guilty. The only general sections of the Indian Penal Code which indicate its scheme in this behalf are ss. 2, 3, and 4 and as they stand at present, they are as follows :

> "2. Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India.
>
> 3. Any person liable, be any Indian law, to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any act committed beyond India in the same manner as if such act had been committed within India.
>
> 4. The provisions of this Code apply also to any offence committed by -
>
> (1) any citizen of India in any place without and beyond India;
>
> (2) any person on any ship or aircraft registered India wherever it may be.
>
> Explanation :- In this section the word 'offence' includes every act committed outside India which, if committed in India, would be punishable under this Code."

Section 3 and 4 deal with offences committed beyond the territorial limits of India and s. 2 obviously and by contrast refers to offences committed within India. It appears clear that it is s. 2 that has to be looked to determine the liability and punishment of persons who have committed offences within India. The section asserts categorically that every person shall be liable to punishment under the Code for every act or omission contrary to the provisions of the Code and of

which he shall be guilty within India. This recognises the general principle of criminal jurisdiction over persons with reference to the locality of the offence committed by them, being within India. The use of the phrase "every person" in s. 2 as contrasted with the use of the phrase "any person" s. 3 as well as s. 4(2) of the Code is indicative of the idea that to the extent that the guilty for an offence committed within India can be attributed to a person, every such person without exception is liable for punishment under the Code. Learned counsel for the appellant suggests that the phrase "within India" towards the end of s. 2 must be read with the phrase "every person" at the commencement thereof. But this is far-fetched and untenable. The plain meaning of the phrase "every person" is that it comprehends all persons without limitation and irrespective of nationality, allegiance, rank, status, caste, colour or creed. This section must be understood as comprehending every person without exception barring such as may be specially exempt from criminal proceedings or punishment thereunder by virtue of the Constitution (See Art. 361(2) of the Constitution) or any statutory provisions or some well-recognised principle of international law, such as foreign sovereigns, ambassadors, diplomatic agents and so forth, accepted in the municipal law.

Learned counsel drew our attention to a number of sections in the Penal Code, viz., ss. 108A, 177, 203, 212, 216, 216A and 236. The argument based on reference to these sections is that wherever the legislate in framing the Penal Code wanted to legislate about anything that has reference to something done outside India it has specifically said so and that therefore it may be expected that if it was intended that the Penal Code would refer to a person actually present outside India at the time of the commission of the offence, it would have specifically said so. We are unable to accept this argument. These sections have reference to particular difficulties which arose with reference to what may be called, be related offence being committed in India in the context of the principal offence itself having been committed outside India - that is for instance, abetment, giving false information and harbouring within India in respect of offences outside India. Questions arose in such cases as to whether any criminal liability would arise with reference to the related offence, the principal offence itself not being punishable in India and these sections were intended to rectify the lacunae. On the other hand, a reference to s. 3 of the Code clearly indicates that it is implicit therein that a foreigner who commits an offence within India is guilty and can be punished as such without any limitation as to his corporeal presence in India at the time. For if it were not so, the legal fiction implicit in the phrase "as if such act had been committed within India" in s. 3 would not have been limited to the supposition that such act had been committed within India, but would have extended also to a fiction as to his physical presence at the time in India.

In the argument before us, there has been some debate as to what exactly is the implication of the clause "of which he shall be guilty within India" in s. 2 of the Code. It is unnecessary to come to any definite conclusion in respect thereto. But it is clear that it does not support the contention of the appellant's counsel. We have, therefore, no doubt that on a plain reading of s. 2 of the Penal Code, the Code does apply to a foreigner who has committed an offence within India notwithstanding that he was corporeally present outside.

It has next been urged before us that the exercise of jurisdiction over a foreigner by municipal courts depends on the theory of temporary allegiance to the State by reason of his entry into the State, which carries with it the protection of its laws and therefore his submission thereto. Dicta from some of the decided cases have been cited before us. It is unnecessary to deal with any of those cases. On an examination of those cases it will be found that allegiance, temporary or otherwise, has not been laid down anywhere as a limiting principle in respect of criminal jurisdiction, which is primarily concerned with questions of security of the State and of the citizens of the State.

A number of early cases of the High Courts in India have been brought to our notice as bearing on the question how under consideration. (See Reg. v. Elmstone, Whitwell [(1870) 7 Bom. H.C.R. 89 (Cr. Ca.).]; Reg. v. Pirtai [(1873) 10 Bom. H.C.R. 356.]; Mussummat Kishen Kour v. The Crown [(1878) 13 P.R. 49 (Criminal Judgments).]; and Gokaldas Amarsee v. Emperor [(1934) 35 Cr.L.J. 585.]). As against them may be noticed the case in Emperor v. Chhotalal Babar [(1912) I.L.R. 36 Bom. 524.]. It is unnecessary to consider them at any length. Undoubtedly some of them seem to support the view pressed before us on behalf of the appellant that criminal jurisdiction cannot extend to foreigners outside the State. These, however, are decisions rendered at a time when the competence of the Indian Legislature was considered somewhat limited, under the influence of the decisions like those in Macleod's case [(1891) A.C. 455.] in spite of the decision in Queen v. Burah [(1878) 3 A.C. 889.]. However that may be these concepts are no longer tenable after India become a Dominion by the Indian Independence Act of 1947 and after it become an independence free sovereign republic under the present Constitution. It is enough to the case of Croft v. Dunphy [(1933) A.C. 156.] and to the decision of Spens, C.J., in Governor-General v. Raleigh Investment [A.I.R. (1944) F.C. 51, 60, 61.]. In the latter case Spens, C.J., indicates that there has been considerable change in the concept of the doctrine of extra-territorial legislation, subsequent to Macleod's case [(1891) A.C. 455.] and the criticism of Macleod's case [(1891) A.C. 455.] in certain Canadian decisions and of the Privy Council itself has been adverted to.

Learned counsel invited our attention to a passage from the report of the Indian Law Commissioners quoted at p. 274 of Ratanlal's Law of Crimes (Eighteenth Ed.). It is enough to say that though this quotation may be valuable as a matter of history, it cannot be a legitimate guide for the construction of the section. That construction must be based on the meaning of the words used, to be gathered according to the ordinary rules of interpretation and in consonance with the generally accepted principles of exercise of criminal jurisdiction. It is not necessary and indeed not permissible to construe the Indian Penal Code at the present day in accordance with the notions of criminal jurisdiction prevailing at the time when the Code was enacted. The notions relating to this matter have very considerably changed between then and now during nearly a century that has elapsed. It is legitimate to construe the Code with reference to the modern needs, wherever this is permissible, unless there is anything in the Code or in any particular section to indicate the contrary.

After giving our careful consideration to the questions raised before us, we are clearly of the opinion that even on the assumption that the appellant has ceased to be an Indian citizen and was a Pakistani national at the time of the commission of the offence, he must be held guilty and punished under the Indian Penal Code notwithstanding his not being corporeally present in India at the time.

We have been asked to consider the question of sentence. As has been stated at the outset the substantive sentences of imprisonment are two years under the first count and twenty-two months under the second. The sentences were concurrent on the second and third counts. As a result, the total imprisonment which has been awarded against the appellant would be a period of three years and ten months. We are not prepared to say that the discretion of the trial court in awarding that sentence has been wrongly exercised.

The appeal is accordingly dismissed.

Appeal dismissed.

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