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B. Wood

PAPUA NEW GUINEA

IN THE SUPREME)
)
COURT OF JUSTICE)

CORAM : FROST, C.J.
PRENTICE, DEPUTY C.J.
RAINE, J.

Friday,
28th November, 1975.

PROSECUTOR'S REQUEST NO.4 OF 1974

ORDER OF THE COURT

Questions answered as follows:-

(a) Did I err in law in ruling that I was required to make a finding of fact as to whether the obtaining of the money was dishonest that element of dishonesty being additional to the intent to obtain the property by the false pretence?

Answer : No.

(b) Did I err in law in ruling that s.22 of the Criminal Code of Queensland (Papua, Adopted) was applicable to and could avail the accused in respect of his belief that he was entitled to sign the name of another person on a withdrawal form made out on the bank account of that other person and receive the sum of $125.00 therefrom?

Answer : No.

(c) Did I err in law in ruling that for the Crown to establish that the accused had an intent to defraud for the purpose of s.22 of the Criminal Code of Queensland (Papua, Adopted) it was not sufficient to establish merely that the accused intended to obtain the property by the false pretence?

Answer : No.

(d) Did I err in law in holding that for the Crown to establish that the accused had an intent to defraud for the purposes of s.427 of the Criminal Code of Queensland (Papua, Adopted) it was not sufficient to establish merely that the accused intended to obtain the property by false pretence?

Answer : No.

PAPUA NEW GUINEA

IN THE SUPREME)
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COURT OF JUSTICE)

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RAINE, J.

PROSECUTOR'S REQUEST NO.4 OF 1974

1975
In the Full Court of the Supreme Court of Papua New Guinea.

May 1, 2.

In the Supreme Court of Justice.

Nov 28.

WAIGANI, NATIONAL CAPITAL DISTRICT.

The findings of the trial judge and the questions of law referred to the Supreme Court for decision following the acquittal of the person charged at the trial are set out in the judgment of the Deputy Chief Justice.

The charge which was laid under s.427 of the Criminal Code (s.416 of the 1974 Code) was that the person charged, by falsely pretending to the bank teller that a document purporting to be a Bank of New South Wales Savings Account withdrawal form drawn by a named person, in fact the uncle of the person charged, for the sum of $125.00 was a valid Bank of New South Wales Savings Account withdrawal form, induced the teller to deliver to him that sum of money with intent to defraud.

Frost, C.J.

There are two matters arising out of the form of the charge. First, the trial judge's finding that the obtaining of the money was not dishonest, an element which is repeated as the basis of questions (a) and (d), is appropriate to a different charge, also under s.427, of obtaining money by false pretences. However, for the purpose of this reference I shall assume that it was the inducement which was found by the trial judge to be not dishonest, and that the questions should be understood in that sense.

Secondly, it is an essential element of the charge that the person charged should have induced the teller to deliver the money by means of a representation which was false in fact and which he either knew to be false or did not believe to be true (Criminal Code s.426, now s.415). At the trial the pretence alleged was apparently treated as one that the person charged represented to the teller merely that the

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Frost, C.J.

signature on the withdrawal form was that of the uncle of the person charged, and the trial judge's finding was that a false pretence was made in those terms within that section. But that was not the pretence charged. Although the point was not argued before this Court, nor does it appear before the trial judge, the short answer to the prosecution may well have been that the trial judge's finding that the person charged honestly believed that he was entitled to write his uncle's name on the withdrawal form meant that he believed that the withdrawal form was a valid one. On this view there was no false pretence as charged within the meaning of s.426 (now s.415).

The point of the questions, however, concern the element of intent to defraud. The view of Gibbs, J. in Balcombe v. De Simoni (1) that the element is established if the person charged made a false pretence within the meaning of s.426 (now s.415) with the intention of inducing another to part with property is supported in terms only by the decision of the Full Court of the Supreme Court of Victoria in R. v. O'Sullivan (2). It is contrary to R. v. Williams (3), in which Coleridge, J. said:
"It is not sufficient that the prisoner knowingly stated that which was false, and thereby obtained (the property); you must be satisfied that the prisoner at the time intended to defraud" the complainant. The latter view was also taken in R. v. Carpenter (4) and R. v. Kritz (5).

The facts of Balcombe v. De Simoni (6)(supra) were very different from the present case. There the respondent,by falsely pretending to a Perth householder that he was a student from South Australia selected in a contest for $1,000.00 and an overseas trip to represent the youth of Australia on a goodwill tour, induced her to buy a cookery book which she did not want, and to pay $6.50 for the price of the book. The majority of the Court held that the only possible conclusion from the evidence was that the respondent made false pretences with the intention of inducing the householder to part with her money,

(1) (1971-72) 126 C.L.R.576.
(2) (1925) V.L.R.514 at 518.
(3) (1836) 7 C. & P. 354; 173 E.R.158.
(4) (1911) 22 Cox C.C.618.
(5) (1951) 1 K.B.83.
(6) (1971-72) 126 C.L.R.576.

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that he had the intention of depriving her of her money by deceit and that he therefore had the intention to defraud. Barwick, C.J. who dissented, and with whom Walsh, J. agreed, plainly regarded the case, at the worst, as on the borderline of criminal liability, and held that there being no evidence on which it could be held that the respondent intended to do anything with the money other than provide the book, as was intended by the householder when passing over the money, there was no intent to defraud. Whether there was evidence of that "pervasive dishonesty" as it was termed by Barwick, C.J. at p.584, sufficient to establish an intent to defraud, may well have been the subject of differing views. It is not necessary for the purposes of this case to consider the view of the Chief Justice that, "In relation to an intent to defraud what the parties intended should be done with the property or money obtained can never, in my opinion, be immaterial." Balcombe v. De Simoni (7)(supra). I would however say that I do not find conclusive the two cases put by Gibbs, J. to illustrate his views to the contrary. (8). In the illustration of the alms given the man pretending to be blind, a clear case of intent to defraud, the alms were not in fact used for the relief of a blind man, and in the case of a loan on a false pretence as to the security offered, there is the clearest intention that the lender should act to his injury, and thus of an intent to defraud.

With respect I agree with Barwick, C.J. that the intention to defraud is a separate element of the charge and that whilst the intent may be inferred if no more is known than that the accused obtained money by false pretences, the intention to defraud is not necessarily established by proof of those elements alone. In particular I agree with and would adopt the passage of the Chief Justice's judgment at p.582 which is cited in the judgment of Raine,J., and also the following passage from the judgment of Walsh, J. which I set out in full:-

" In his reasons for judgment the Chief Justice has written that the intent to induce and inducement in fact are necessary elements of that part of the offence which consists in the obtaining of property by a false pretence and that in addition there must be an intent to defraud by the obtaining of the property. The contrary view is that in the description of the offence there is not included,

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(7) (1971-72) 126 C.L.R.576 at 584.
(8) (1971-72) 126 C.L.R.576 at 596.

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apart from the words 'with intent to defraud', any element of intention at all. According to that view all that is necessary in order to establish that a person has obtained property by a 'false pretence' (as defined in s.408 of the Criminal Code) is to show that he obtained it by means of a representation of a matter of fact which representation was false in fact and that he knew that it was false or did not believe it to be true and in this no intention to obtain the property is involved.

I am of opinion that the view of the Chief Justice is correct. If s.416(1) had been enacted without the inclusion therein of the words 'and with intent to defraud', it would not have been proper in my opinion to construe it in such a way that an offence would be committed even if it appeared that the accused, although he made a false statement known by him to be false by which in fact he obtained property from another person, had no intention that that person would be induced by the statement to part with any property. I do not think that s.23 of the Criminal Code would require that it should be so construed. I do not think that the word 'obtains', as used in s.409(1), includes in its meaning a reference to an unintended and unexpected acquisition of property. The same provision refers to a person who 'obtains' something from another person and to a person who 'induces' another person to deliver something. In the first case there is required, in my opinion, an intention that the other person will be induced by the false pretence to part with the property so that the maker of the representation may obtain it, just as in the second case it is plain that there must be an intention that the other person will be induced to deliver the property. " (9). (The sections referred to, viz. ss. 408, 409(1) and 23, are from the Criminal Code of Western Australia, and are in the same terms respectively as ss. 415, 416(1) and 22 of the Criminal Code of Papua New Guinea).

This brings me to the meaning to be attributed to the phrase "with intent to defraud". The Code provides no definition, and I do not consider that this Court should essay one. There must certainly be an element of dishonesty. Suffice it to say that I agree with the submissions of counsel for the person charged that whatever standard test is taken the trial judge's finding of honest belief excludes an intent to defraud. The representation as found by the trial judge was not dishonestly made (R. v. Carpenter (10)(supra) and Reg. v. McEachern (11), a decision of Clarkson, J.). There was no intent to deceive the

(9) (1971-72) 126 C.L.R.576 at pp.589-590.
(10) (1911) 22 Cox C.C.618.
(11) (1967-68) P. & N.G.L.R.48 at p.62.

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bank teller into doing something in the course of his duty which he would not have done but for the withdrawal form, for the person charged believed it to be valid. Welham v. Director of Public Prosecutions (12); Reg. v. Withers (13). So far as the test laid down by Buckley, J. in In re London & Globe Finance Corporation Ltd(14) is concerned, and also the definition of fraud contained in Stephen's 'History of the Criminal Law of England' and cited in Reg. v. Scott(15), there was no intent that the Bank should pay except in reduction of the savings account, and thus not to its injury. Further, taking the element regarded by Gibbs, J. as essential the judge's finding negatived deception. There was no "attempt to obtain some dishonest advantage, or to injure some person", under the test laid down by Griffith C.J. in relation to forgery. White v. The King (16). This test was applied in Bovelt v. Lenehan (17).

Argument was addressed to the Court also on the applicability of the defence of honest claim of right under s.22 of the Criminal Code. On the whole I feel that this defence did not really arise, nor was it appropriate because there was no need to go beyond the element of intent to defraud to determine the question of criminal liability. Subject to this reservation I would agree with my brethren upon the answers to the questions relating to this point.

Assuming that the questions are modified as required by the nature of the charge, I would answer the questions as follows:

(a) On the basis that the trial judge was referring to the intention to defraud, as I consider was the fact, No.

(b) Although the defence was not strictly appropriate on the facts, No.

(c) No.

(d) No.

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(12) (1961) A.C.103.
(13) (1974) Q.B.414 at 420 - per Cairns, L.J.
(14) (1903) 1 Ch.728 at 732-3.
(15) (1974) 3 W.L.R.741 at pp.745-6.
(16) (1906) 4 C.L.R.152 at 162.
(17) (unreported) Judgment No.721 of 30 Nov 72 (Frost, S.P.J.)

PRENTICE, DEPUTY C.J. This reference under s.30(1) of the Supreme Court (Full Court) Act 1968, is designed to elicit an opinion from this Court as to the meaning of the phrase "with intent to defraud" in s.427 of the Criminal Code (Queensland) adopted in New Guinea, and of the phrase "without intention to defraud" in s.22 thereof.

Section 427 so far as relevant to the instant charge, reads as follows:-

> "Any person who by any false pretence, and with intent to defraud, ... induces any other person to deliver to any person ... any ... (money) ... is guilty of a crime ..."

Section 22 is in the following terms:-

> "Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence.
>
> But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud."

The accused in the case, and his uncle TM, had placed moneys on investment with a bank in TM's name. Of the sum deposited, TM provided two hundred dollars and the accused one hundred dollars. During the trial it was stated that the accused had discussed with his uncle the question of his the accused's withdrawing from the account his one hundred dollars investment and another fifty dollars - a proposition to which his uncle agreed. The accused had seemingly had no experience of bank accounts. He wrote TM's name on a withdrawal form and pretending this was TM's signature, presented it to a teller, and obtained payment of one hundred and twenty-five dollars.

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His Honour the trial judge made the following findings:-

(a) That the accused wrote the name TM on a bank withdrawal form drawn on the account of TM;

(b) That the accused presented the said form to a teller, intending the latter to deliver him the amount subscribed on the form - one hundred and twenty-five dollars;

(c) That the accused pretended to the teller that the signature on the form was TM's, knowing at the time that that pretence was false;

(d) That the pretence made by the accused to the teller was a "false pretence" under s.426 of the Criminal Code;

(e) That the accused honestly believed he was entitled to write TM's name on the form and to take the one hundred and twenty-five dollars for his own use;

(f) That TM had given permission to the accused to withdraw such a sum from TM's account;

(g) That the obtaining of the money was not dishonest;

(h) That s.22 of the Code availed the accused in respect of his belief that he was entitled to sign TM's signature on the form; and

(i) That no intent to defraud had been shown.

It is apparent that His Honour found also that the teller was induced by the false pretence to part with the money concerned.

The questions asked of this Court were as follows:-

(a) Did I err in law in ruling that I was required to make a finding of fact as to whether the obtaining of the money

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was dishonest that element of dishonesty being additional to the intent to obtain the property by the false pretence?

(b) Did I err in law in ruling that Section 22 of the Criminal Code of Queensland (Papua, Adopted) was applicable to and could avail the Accused in respect of his belief that he was entitled to sign the name of another person on a withdrawal form made out on the bank account of that other person and receive the sum of $125.00 therefrom?

(c) Did I err in law in ruling that for the Crown to establish that the Accused had an intent to defraud for the purpose of Section 22 of the Criminal Code of Queensland (Papua, Adopted) it was not sufficient to establish merely that the accused intended to obtain the property by the false pretence?

(d) Did I err in law in holding that for the Crown to establish that the Accused had an intent to defraud for the purposes of Section 427 of the Criminal Code of Queensland (Papua, Adopted) it was not sufficient to establish merely that the Accused intended to obtain the property by false pretence?

In urging upon this Court that errors of law had occurred, the Crown Prosecutor submitted that the trial judge should have found himself constrained by (or should at least have followed) the majority judgments of the High Court of Australia in Balcombe v. De Simoni (supra) (18) to hold that the facts found, established an "intent to defraud". (Section 427 of our Code is for practical purposes identical with s.409(1) of the Western Australian Criminal Code under consideration therein by the High Court). It was contended that the demonstration of an intention to obtain property by means of a false pretence, without more, necessarily (or at least in the circumstances of this case), exhibited an "intent to defraud".

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(18) (1971-72) 126 C.L.R. 576

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The resolution of the constituent elements of "an intent to defraud", as can be seen from the many cases cited both to the High Court of Australia in Balcombe's case (supra) (19) and to this Court in this case, and in the deliberations of the House of Lords as appears in Scott v. Commissioner of Police for the Metropolis (20) (a case brought to the attention of the members of the Court since argument concluded), is a vexing question.

In Balcombe v. De Simoni (supra) (21) the victim was induced to buy a cookery book. She got what she agreed to buy. But it was apparently established that she would not have agreed to the purchase but for the fact that she was induced to do so by the false representation of the accused as to the effect that a purchase would have on his personal commercial prospects. The collectivity of judgments is, with respect, somewhat difficult to analyse, and to apply to other factual situations. All the judges seem to have proceeded on the basis that for the offence to have been constituted; dishonesty of purpose as an element additional to the actual "obtaining by false pretence" was required, to establish "with intent to defraud". Thus Gibbs, J. (with whom Menzies, J. agreed) speaks of the necessity to prove "specific intent to defraud" and states that a representation requires to have been "dishonestly made" (at page 592). Again (at page 594) he speaks of "an intent to deprive another person of property by deceit". However he later said "what is essential is that he should have intended to obtain the property by means of a deception". Counsel, with what I believe to be some force, suggested that this should be read with a rider "... which obtaining causes deprivation, loss or detriment". McTiernan, J, the other member of the majority (at page 588) regarded "the crucial characteristic of an intention to defraud" as "not the economic loss which may or may not result to the purchaser but the element of dishonesty". Barwick, C.J. (with whom Walsh, J. agreed, thus forming the minority) stated that "in general ... overall dishonesty of purpose of the accused ... will furnish evidence of his intent to defraud". The minority went on to find that

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(19) (1971-72) 126 C.L.R. 576
(20) (1974) 3 All E.R. 1032
(21) (1971-72) 126 C.L.R. 576

there was no such "pervasive dishonesty" as to exhibit "the statutory intent to defraud".

The majority seems to have been of the opinion that dishonesty of purpose was sufficient to show "intent to defraud" without an intention being shown to use the property gained for purposes different from those intended by the victim. But the minority did not find on the facts of the case, a dishonesty of purpose which was alone sufficient to constitute "an intent to defraud".

It may be that the importation of the word "dishonesty" or of the word "dishonest" has worked for confusion; in that to some, a false pretence may in some circumstances constitute "dishonesty"; while to others "dishonesty" implies a wrongful gain to someone else's detriment.

With respect I have great difficulty in following Barwick, C.J.'s reasoning that the "making of the false pretence", and "obtaining" must each involve an intent. He seems to rely on such a proposition to conclude that the "intent to defraud" appearing later in the Section, provides for something other, namely an intent to do something with the property that the representee did not contemplate or intend. It seems to me that this approach fails to give effect to s.23 of the Code, which, if I may hazard a summation, renders intent immaterial except when expressly delcared an element of the offence.

I find myself agreeing with Barwick, C.J.'s statements that -

(a) "No doubt there are occasions when the nature of the representation, the circumstances in which it was made, and the nature of the property obtained thereby may furnish material upon which an intent to defraud may be found"; and

(b) "it does not necessarily follow in my opinion that obtaining property by a false pretence is an obtaining with intent thereby to defraud ..."

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But with respect I think I should on the facts of that case, have decided it in the manner in which the majority did. Nevertheless, to say in effect with the majority in Balcombe's case (supra) (22), that the obtaining and the false pretence can themselves constitute evidence supporting "an intent to defraud" which latter must be found to enable a conviction; is not to say as the prosecutor here submitted, that the mere showing of "an obtaining by a false pretence" must of itself demonstrate an intent to defraud.

It is my conclusion that more must appear than a mere obtaining by false pretence - because this could result jocosely or unintentionally. I instance as a possibility - a drinker in a hotel states falsely but jokingly, to a fellow-drinker in the hearing of a passing waiter, "the publican is my uncle" and shortly afterwards finds the waiter returning with a free drink for him. Other factual situations were canvassed in the judgments in the High Court case. There must I think, be dishonesty resulting in some form of deprivation of another - to constitute the intent to defraud. Buckley, J's remarks in In re London & Globe Finance Corporation Ltd. (supra) (23) in regard to this ancient legal phrase seem to me in point; even though I recognise that we here are dealing with the phrase in the setting of a Code.

Buckley, J's dicta had for long been regarded as a locus classicus from which meanings for "intent to defraud" might be mined. But they receive some criticism in Balcombe's case (supra) (24), and from Lord Radcliffe in Welham v. Director of Public Prosecutions (supra) (25) when His Lordship found them unacceptable as an authoratative exposition of words contained in a subsequent Statute. The House of Lords through the judgment of Viscount Dilhorne, (with whom all the other Lords concurred) in Scott's case (supra) (26) (at page 1035), has found them inadequate to cover possible "frauds" involved in "conspiring to defraud" cases - the House holding therein that a "deceit" was not necessary to constitute a "fraud".

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(22) (1971-72) 126 C.L.R. 576
(23) (1903) 1 Ch. 728 at 738
(24) (1971-72) 126 C.L.R. 576
(25) (1960) 1 All E.R. 805 at 808 (1961) A.C. 103
(26) (1974) 3 All E.R. 1032

With respect, though I would share Viscount Dilhorne's reluctance to exhibit the temerity necessary to attempt an exhaustive definition of the meaning of (in this case) the phrase "(intent to) defraud"; I would be prepared to adopt His Lordship's "ordinary meaning" of "to defraud" - as "to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled". It is comforting to note that in a passage apparently approved by the House of Lords in Scott's case (supra) (27) (at page 1035), such an eminent criminal jurist as Stephens (History of the Criminal Law of England), while finding difficulty, as everyone does, in defining "fraud" for all purposes; states:-

> "but there is little danger in saying that whenever the words 'fraud' or "intent to defraud' or 'fraudulently' occur in the definition of a crime two elements at least are essential to the commission of the crime: namely, first, deceit or an intention to deceive or in some cases mere secrecy: and, secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy."

I conclude that an obtaining by false pretence does not itself necessarily show an intent to defraud, though no doubt it usually would do so.

The Crown contends in what might be considered a subsidiary argument that Question (b) should be answered "yes". It is submitted inter alia on this aspect, that any mistake made in the formation of an honest claim of right was a mistake as to law (the legality of his action) and therefore not supportable under s.22. I consider this argument to involve a misunderstanding of s.22. The Section which provides for mistake of fact is s.24 of course. As its subject title ("Ignorance of Law - Bona Fide Claim of Right") indicates, s.22 does concern itself with mistake as to law. A claim

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(27) (1974) 3 All E.R. 1032

of right, can to my mind, involve mistakes both as to facts founding a right and as to the legality of the claim of right.

It is my opinion that in view of His Honour the trial judge's findings of fact herein, that there was no dishonesty and no deprivation, that the defendant honestly believed he was entitled to do what he did, that there was no "intent to defraud"; he came to the correct decision. I would answer the questions -

(a) No.
(b) No.
(c) No.
(d) No.

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RAINE, J. The Deputy Chief Justice has set out the facts, and I need only set out my reasons and conclusions. Before doing so I might say that I received a deal of assistance from counsel, who cited very many cases, some quite ancient. Normally this is neither necessary nor desirable where the law is codified, for, after a time, a few leading cases point the way. But not so here, as is exemplified by the division of opinion amongst five learned justices of the High Court in Balcombe v. De Simoni (28)(supra). Their Honours divided three to two as a result, and three to two as to the major matters raised in this request. The case decided by the High Court concerned sections of the Criminal Code in the State of Western Australia exactly similar to the ones in point here, although in the case of one section at least, differently numbered. The difficulties that beset us are pointed up by a recent House of Lords decision, namely Scott v. Commissioner of Police for the Metropolis (29)(supra).

Turning to Balcombe v. De Simoni (30)(supra), with all respect to McTiernan and Gibbs, JJ., and Menzies, J., who merely agreed with Gibbs, J., I prefer the reasons given by Barwick, C.J. and Walsh, J., although, curiously enough, I believe that applying their reasons I would have reached the opposite result.

In Balcombe v. De Simoni (31)(supra), Barwick C.J., said:

" The case is an unusual one for in general the overall dishonesty of purpose of the accused as evidenced by his conduct will furnish evidence of the requisite intent to defraud. "

With respect, I entirely agree. And His Honour went on to say:

"Here, there was no evidence of that pervasive dishonesty which so often runs throughout a case of obtaining money or property by false pretences with intend to defraud."

I agree that there should be this "pervasive" element. In my view the last observations made by Barwick, C.J. in Balcombe v. De Simoni (32) (supra) would, I believe, have been expressed in even stronger terms by His Honour in relation to this case. The facts in this case are clearly distinguishable from those the High Court had to consider.

I believe I have a very clear conception of what Sir Garfield Barwick meant when he uttered those words. Thus I note that earlier

(28) (1971-72) 126 C.L.R.576.
(29) (1974) 3 All E.R. 1032.
(30) (1971-72) 126 C.L.R.576.
(31) (1971-72) 126 C.L.R.576 at 584.
(32) (1971-72) 126 C.L.R.576.

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in His Honour's judgment, at p.582, the Chief Justice said,

"To treat the intended inducement by the false pretence as in itself of necessity proof of an intent to defraud is in effect to dispense with the need for an intent to defraud. In other words the intent to obtain is treated as itself the intent to defraud. No doubt there are occasions when the nature of the representation, the circumstances in which it was made, and the nature of the property obtained thereby may furnish material upon which an intent to defraud may be found. But it does not necessarily follow in my opinion that obtaining property by a false pretence is an obtaining with intent thereby to defraud within the requirement of (the section). " (33) (supra)

This, with respect, is the view I adhere to. It is a question of fact always for the fact-finding tribunal to decide whether the accused fraudulently intended by the inducement to obtain property. But it is not correct to say that once the pretence is shown to be false that it follows that the pretence was made with intent to defraud. In most cases such will be the case. But it is a question of fact.

With respect to Mr. Roberts-Smith, I thus do not agree that the word "obtain" in s.427 should be looked at in the restricted and isolated way he suggests. As I understood him he reads the words as no more than consequential, almost as if all the Crown had to prove was that the offender "got the goods" following the false inducement. I concede, and I need not repeat what Barwick, C.J. said above, that quite often, in fact almost invariably, the answer is easy, the palpably false inducement viewed in the light of the surrounding facts clearly demonstrates the intent to defraud. This is the usual sort of case one meets. But the learned Chief Justice thought Balcombe v. De Simoni (34)(supra) was unusual, and so do I, and the instant case is even more unusual, and the facts are more in favour of the accused here than they were in the case of the man charged in the Western Australian case.

Here the alleged offender, by making out the withdrawal form in the name of his uncle, the actual depositor, obtained money from the bank teller that was partly his and partly his uncle's but the latter sum he had permission to withdraw. There was not what

(33) (1971-72) 126 C.L.R.576 at 582.

(34) (1971-72) 126 C.L.R.576.

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Barwick, C.J. aptly described as "pervasive dishonesty" running through this case, although, as I have indicated, I believe there was a degree of dishonesty running through the Western Australian case. A layman would probably describe what was done there as "a dirty trick". But I would not imagine that such an epithet would or could be applied to the accused's actions in the instant case. And many of the authorities cited seem to me to require facts pointing to dishonesty to be seen in the actions of an alleged offender. Where no mention of this is made in some of the reported cases, or where it is not stressed, it is generally because, as Barwick, C.J. said, "...there are occasions when the nature of the representation, the circumstances in which it was made, and the nature of the property obtained thereby may furnish material upon which an intent to defraud may be found." (35) (supra)

At pp.583,584 of Balcombe v. De Simoni (36)(supra), Barwick, C.J. said:

"Again, in so far as the intent must be to defraud by the obtaining of the property, it would seem that the intent must be to do something to or with that property which the representee in handing it over did not intend, contemplate or understand should be done with it. This does not mean that of necessity economic loss by the representee is intended to be caused. But it does mean in my opinion that there must be an intent to divert or use the property obtained in a dishonest way. " (The underlining is mine).

If the representee is to be regarded, realistically, as the depositor, the accused's uncle, then no problem arises. The situation is not quite so easy if the bank is to be taken as the representee. Had the teller been told the true story by the accused he would no doubt have told him to get another withdrawal form, that he was sorry, but that he would have to ask him to take it away and get his uncle to fill it out and sign it. But in fact the teller obviously thought the form was regular, and that the accused had every right to receive the money, as was indeed the case. I appreciate very keenly that what happened here is a very unsatisfactory way of doing business from a banker's point of view.

I do not see that dishonesty that I regard as necessary being shown to thread its way through the over-all facts of this case.

(35) (1971-72) 126 C.L.R.576 at 582.
(36) (1971-72) 126 C.L.R.576 at 583-4.

.../17

Accordingly I would answer questions (a) and (d) in the negative.

It seems, therefore, in view of my construction of the words "without intent to defraud" in s.427, that questions (b) and (c) must also be answered in the negative.

Solicitor for the Prosecutor:		L.W. Roberts-Smith, Public Prosecutor.
Counsel for the Prosecutor	:	L.W. Roberts-Smith; A. M. Webb.
Solicitor for the Person Charged at the Trial	:	N.H. Pratt, A/Public Solicitor.
Counsel for the Person Charged at the Trial	:	C.F. Wall