DISHONOURED CHEQUES AND THE OFFENCE OF CHEATING – A SINGAPORE PERSPECTIVE

In this article an effort is made to explain the policy factors that influenced the enactment of the provisions on "cheating" in the Singapore Penal Code. Explanations are also offered as to the manner in which these provisions ought to be interpreted for purposes of ascertaining the offence of "cheating" in cases that involve dishonoured cheques.

1. INTRODUCTION

IN this article, an effort will be made to analyse the developments in the law relating to dishonoured cheques in the context of section 415 of the Penal Code of Singapore. The first part of this article will focus on the cases that have interpreted the two limbs of section 415 in relation to charges of "cheating" under sections 417 and 420 of the Penal Code. A detailed examination of these two limbs will indicate to some degree the characteristics of the three categories of deceptive conduct that have been described as "cheating" in section 415 and their relevance to deceptive conduct involving the use of cheques. The second part of this article will deal with the manner in which these principles have been applied in cases that deal with dishonoured cheques in Singapore and Malaysia. In doing so an attempt will also be made to spotlight the areas of divergence in the policies that influenced the enactment of various sections on cheating and the views expressed by the courts in dealing with cases on dishonoured cheques and the offence of cheating.

2. THE SCOPE OF SECTION 415

In the course of analysing the two limbs in section 415 an effort will also be made to explain the policy factors that influenced the enactment of limb II of section 415 and the *mens rea* that should be attributed to the offences in limb II. Such an explanation may provide some guidance as to the way in which these limbs should be interpreted for purposes of ascertaining what constitutes "cheating" in cases that involve dishonoured cheques.

(1) *Policy factors that influenced the enactment of section 415*

The Penal Code of Singapore lists the offence of cheating as an offence against property.[1] A careful scrutiny of the various limbs of section 415, which defines the offence of cheating, would reveal that the section covers acts that cause damage or harm to a person's body, mind and reputation as well.[2] The section refers to two categories of cheating:

[1] See Chapter XVII, Cap. 224, 1985 (Rev. Ed.); the Penal Code of Singapore is modelled on the Indian Penal Code (Act XIV of 1860). Indian cases are regarded as persuasive authorities in Singapore courts.

[2] Section 415 reads: "Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to cheat."

Under the first category (limb I of section 415): (i) the accused should have deceived some person; (ii) by such deception he should have *induced* that person; (iii) to *deliver* property or *consent* to the *retention* of property by any person; (iv) the inducement, however, should have been either *dishonest* or *fraudulent.*

Under the second category (limb II of section 415): (i) the accused should have *deceived* some person; (ii) by such deception he should have *induced* that person; (iii) to do or omit to do something that causes or is likely to cause damage or harm to that person's body, mind, reputation or property; (iv) the accused should have *intentionally* induced the victim to do or omit to do something that caused the damage or harm mentioned in (iii) above.

Thus, under the second category, where the requirements as to "deception" and "inducement" in (i), (ii) and (iv) are satisfied, even acts that cause damage or harm to a person's body, mind or reputation may be classified as "cheating" — that is, as "property" offences.

Macaulay has indicated that the provisions on cheating were included in the Penal Code in order to provide additional reinforcement to the remedies available in civil law.[3] Where there is an encroachment on property rights the civil law has traditionally provided remedies to the injured party. These civil law remedies, in effect, provide the primary forms of security for property rights. The criminal law has been used in English law to provide a secondary form of security to the property rights recognized in civil law.[4] This is particularly noticeable in the provisions that deal with cheating in the Indian and Singapore Penal Codes. The English policy has been faithfully followed by Macaulay in drafting the Indian Penal Code. This meant that prosecutions for cheating were more likely in instances where damages were substantial and an order for damages in civil law would be inadequate to repair the harm done or the likelihood of obtaining damages was remote. Macaulay admitted in his report that the effects of this penal policy would be felt mainly by the poorer and less privileged members of Indian society.[5] However, he added, given the unfamiliarity of natives with English ways of conducting transactions, an approach similar to that in England had to be adopted in order to promote honesty in transactions that related to property and contract rights.[6]

Therefore, even in situations where there may not be an immediate threat to a property right, acts of deception that may harm a person's body, mind or reputation were also viewed as "cheating" and legally disapproved. No effort was made by those who drafted this provision to link such acts to any form of economic harm. Had this been done such conduct may have had a bearing to acts of cheating through dishonoured cheques, and it may have been possible to identify such acts as offences against "property" *(i.e.*

3 *Notes on the Indian Penal Code* (1837) at pp. 145-148. The *Introductory Report* and the *Notes on the Indian Penal Code* were printed along with the Draft Penal Code dated 14 October 1837 (see *Essays on the Indian Penal Code* (1962) (Indian Law Institute) at p. 35) Although four commissioners were appointed to draft the Penal Code, due to the illness of three of the commissioners, the draft was completed mainly by T.B. Macaulay (the Chairman of the Commission) – see G.C. Rankin: *Background to Indian Law* (1945) at p. 201; see also, E. Stokes: *The English Utilitarians and India* (1959) at pp. 224 and 261.

4 J. Hall: *Theft, Law and Society* (1935) at pp. 63-79.

5 See notes on the Indian Penal Code, *supra.,* n. 3 at pp. 169-170.

6 *Ibid.,* at pp. 157-158; 169-170.

in its wider sense).[7] Such it seemed was the urgency to promote higher degrees of "honesty" in commerce and property transactions amongst different races with diverse religious and customary values in British India.

(2) *The mens rea of offences specified in limbs I and II of section 415*

On a perusal of the two categories of cheating mentioned in section 415, one may notice the different states of mind that have to be proved in categories I and II in order to establish "cheating." In limb I there is a reference to "fraudulent"[8] or "dishonest"[9] inducement. In limb II the reference is to "intentional" inducement. Futhermore, sections 417 and 420 provide for the punishment of offenders convicted of cheating and prescribe different terms of imprisonment for "cheating" as described in section 415. Indian commentators have indicated that section 417 refers to simple cheating, that is, cheating as described in limb II and section 420 to the more serious offence(s) of cheating as explained in limb I.[10] Thus deceiving another and fraudulently or dishonestly inducing such person to deliver property has been viewed as a more serious offence than the offence of cheating under limb II in the Penal Code. This differential treatment of the two categories *(i.e.* the two limbs of section 415) is clearly reflected even in the Criminal Procedure Code. The Criminal Procedure Code treats the offence under section 417 as a non-seizable offence and the offence under section 420 as a seizable offence. [11]

There has to be proof of deception in order to show there was "cheating" under the Code. Gledhill has defined "deception" as "leading another to believe what is not true."[12] The Indian courts have adopted the common law definition of fraud as elucidated in the English case of *Deny* v. *Peek*[13] in explaining the meaning of the term "deception" in section 415.[14] In doing so, the Indian courts have virtually equated the common law concept of "fraud" with "deception" and have left in doubt the exact scope and relevance of the term "fraudulently" in the same section.[15] Under the common law an action for deceit would lie where there is proof of fraud. Fraud is proved where a false representation is made knowingly, or without belief in its truth, or recklessly without caring whether it is true or false.[16] A false representation made without care or due to a honest belief does not amount

7 "Property" includes "tangibles and intangibles, movables and immovables; it means a tangible thing (land or a chattel) itself, or rights in respect of that thing, or rights such as a debt, in relation to which no tangible thing exists": C.R. Vaines: *Personal Property* (1973) (Tyler and Palmer eds.) at p. 3; it has been indicated by Posner that these tangible objects and intangible rights relate to objects or activities that have some economic value. Therefore Posner submits, objects and activities that have an economic value may be classified as "property". See further, R.A. Posner: *Economic Analysis of Law* (1973) at pp. 10-40.

8 Section 25 of the Penal Code of Singapore reads: "A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise."

9 Section 24 reads: "Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing 'dishonestly'." Section 23 states: "'Wrongful gain' is gain by unlawful means of property to which the person gaining is not legally entitled." "'Wrongful loss' is loss by unlawful means of property to which the person losing is legally entitled.

10 R. Ranchoddas and D.K. Thakore: The *Indian Penal Code* (25th ed. 1984), p. 353.

11 Schedule A, Cap. 113 Rep. 1980.

12 A. Gledhill: *Penal Codes of Northern Nigeria and Sudan* (1963), p. 588.

13 (1889) 14 A.C. 337.

14 *Mangeram* v. *Lai Chhatra Mohansingh* I.L.R. (1950) Nag. 908 at p. 913.

15 See also in this regard, H.G. Hanbury and R.H. Maudsley: *Modern Equity* (1981) (Maudsley & Martin eds.), p. 699.

16 *Supra,* n. 13 at p. 374.

to "fraud."[17] Equity, however, extended the common law definition of fraud and viewed unconscientious dealings as falling within the ambit of "fraud."[18] This wider concept of "fraud" was often indentified as "equitable fraud."[19] Fraud in equity cannot be defined and it is not confined to cases of actual misrepresentation or dishonesty.[20] In equity, fraud could also be inferred from all situations in which there is a breach of confidence.[21] However, in such situations of fraud only the remedies that are available in equity can be resorted to and not those in the penal law.[22] Therefore, even if the Indian courts have been correct in equating the common law concept of "fraud" with "deception" in section 415, it would still be inappropriate to use the wider concept of equitable fraud to define the term "fraudulently" in the same section.

Buckley J. in *In re London and Globe Finance Corporation, Limited,*[23] however, offered an explanation of "deceit" that succinctly explains the distinction between "deceit" and "fraud":

> To deceive is, I apprehend, to induce a person to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind: to defraud is by deceit to induce a course of action.[24]

Buckley J. explained "deception" as inducing a state of mind through falsehood and "fraudulent" as inducing a course of action through deceit. Furthermore, the Code has expressly provided in an explanation to section 415 that even a dishonest concealment of facts could amount to deception. There need not be a positive act (such as a representation) for there to be "deception." This is clearly illustrated in illustrations (i) and (j) to section 415.[25] Thus the term "deception" is wider than the common law concept of deceit. There is uncertainty in the common law as to whether lack of disclosure by a party dealing at arms length could amount to deceit or not. As Fleming has pointed out in the context of actions for deceit in tort:

> ...a duty of disclosure is demanded when parties stand in some fiduciary relation to each other...
>
> Beyond that, however, the law has faltered. Even yet it does not seem to insist on a duty of disclosure merely because the parties' position is unequal, as when one is aware of the other's misapprehension regarding material facts of which he has sole knowledge and unique access. No doubt, one important reason for this lack of apparent con-

17 *Ibid,* at p. 375.
18 W. Anson: *Law of Contract* (A.G. Guest ed., 1984) p. 243.
19 *Ibid.,* at pp. 233-234.
20 *Supra.,* n. 15 at p. 699.
21 Supra., n. 18 at p. 234.
22 *Supra.,* n. 15.
23 [1903] 1 Ch. 728.
24 *Ibid.,* at pp. 732-733; Buckley J's views were approved subsequently in R. v. *Wines* [1953] 2 A1I.E.R. 1497.
25 Illustration (i) reads: "A sells and conveys an estate to B. A, knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats." Illustration (j) reads: "A, playing with false dice, or marked cards, wins money from B. A cheats."

> cern is the dominant role that implied warranties have come to play in ensuring consumer protection.[26]

The term "fraudulently" has been used in the Penal Code for the purpose of explaining a state of mind in the accused that is different from "dishonesty." In situations where the accused has induced another through deception to deliver property without the intention of causing wrongful loss or gaining wrongfully (that is, "dishonestly" as defined under the Code) and no loss is caused to the victim *as a result of delivery of the item* to the accused, the conduct of the accused may be viewed as "fraudulent", if the "deception" and "inducement" to deliver caused or was likely to cause injury. Gour has pointed out that three essential ingredients must exist for there to be "dishonesty" in law, namely (a) an intention to gain by unlawful means what one is not entitled to; (b) employment of unlawful means; and (c) the acquisition of property to which one has no right.[27] Sir James Stephen has indicated:

> Whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in a definition of a crime, two elements, at least, are essential to the commission of a crime, namely a) deceit or an intention to deceive, or in some cases, mere secrecy, and b) either actual injury or possible injury, or a risk of possible injury by means of that deceit or secrecy.[28]

Gour too has supported this explanation of the term "fraudulent." However, he has added that the term implied an element of ill-will towards the victim.[29] Although all the illustrations to section 415 refer to incidents that relate to "dishonesty," there is nothing to indicate that the terms "dishonestly" and "fraudulently" were intended to be used in the same sense. The term "fraudulently" includes conduct covered by the term "dishonestly" but has a much wider meaning. It is not confined to the infliction of loss to another or wrongful gain. An accused can thus be "fraudulent" without being "dishonest." The views of Stephen and Gour would be in keeping with Buckley J.'s views as well, that is, where a person induces another through a representation that he knows to be false to follow a course of conduct that could lead to injury, his conduct may be deemed "fraudulent."[30]

The distinction between these two terms is vividly explained in the Burmese case of *King-Emperor* v. *Tha By Aw*.[31] The accused was permitted by law to purchase a certain quota of opium in the area that he normally resided. Yet, he moved to another area, used a false name, deceived the resident officer of that area by saying he was from the same area and obtained the quota of opium that he was permitted by law to possess. The accused contended that though there was deception, no wrongful loss had been caused to the resident officer for he was paid the appropriate amount and though his act was unlawful, there was no gain to him. Irwin C.J., in his dissenting judgment, applied Sir James Stephen's test to determine whether there was fraudulent conduct. His Lordship held that the risk of

[26] J.G. Fleming: *The Law of Torts* (6th ed., 1983), p. 596.

[27] H.S. Gour: *The Penal Law of India* (Vol. 1) (10th ed., 1982). Vol. 1, p. 228.

[28] J. Stephen: *History of the Criminal Law of England* (1883) Vol. 2, pp. 121-122.

[29] H.S. Gour: *The Penal Law of India* (10th ed., 1984), Vol. 4, pp. 3651 and 3652.

[30] See *supra.,* pp. 44; for the view that the term "fraudulent" should not be confined to transactions that involve deprivation of property, see *Seet Soon Guan v. P.P.* [1955] M.L.J. 223 at pp. 225-226.

[31] (1907) 4 L.B.R. 315.

injury to a third party as a result of the deception was remote. His Lordship also held that of a deception that may cause injury to some person who is unknown or who has nothing to do with the person deceived does not fall within the definition of "fraudulent" conduct in section 25.

Hartnoll J., however, indicated that the person at risk may be unknown. He may have no relationship to the person deceived. In fact, his Lordship added, such a person may be merely a member of the public. As there was an immediate risk of injury to others because the accused could sell the opium in the open market, his Lordship held, the conduct of the accused was "fraudulent." Ormond J., on the other hand, held that the conduct of the accused was "dishonest." If the accused had given his true name and address, he would not have been able to obtain the opium at any price. Therefore, his Lordship pointed out, there was wrongful gain as the accused had caused wrongful loss to the government. The accused, however, was convicted of the offence of cheating under section 417 of the Penal Code instead of section 420.

It would seem, therefore, that since most forms of deceptive conduct would involve either "dishonest" or "fraudulent" inducement, those who drafted the Code need not have provided for yet another category of "deceptive" conduct. Mere evidence of deception and an intention to induce a person to do or omit to do an act that would cause or is likely to cause damage or harm to a person's mind, reputation, body or property would suffice to frame a charge of "cheating" against the accused, under the third category of cheating mentioned in section 415. A controversy has arisen as to whether the prosecution has to only establish that the accused had an intention to induce a person to do an act or omit to do an act or whether it also has to establish that the accused intended to cause harm or damage to the victim's reputation, body, mind or property. In *Johnson* v. *McLarty*[32] it was held that in order to convict the accused under the second limb of section 415, there should be proof of an intention to cause damage or harm to one's body, mind, reputation or property. The accused in *McLarty's* case was an employee in a company that did not have the facilities to make fire bars. The accused knew that the complainants would refuse to make any fire bars for his *(ie.* the accused's) employer. The accused, therefore, indicated that a third party wanted the fire bars. As this third party had purchased some fire bars earlier, the complainants became suspicious and they informed the police just before the accused took delivery of the fire bars.

The High Court of the Straits Settlements held that even though the accused had deceived the complainant, he did not act with the intention of causing loss or damage to the complainants. It was contended by the complainant, however, that the accused had engaged in a practice that could injure his business. The accused had placed an order on behalf of an established customer of the complainant. The court held, such injury, even if shown to exist, would be too remote.

However, in the more recent Indian case of *Baboo Khan* v. *State*[33] the High Court of Allahabad referred merely to the accused's intention to induce a person through deception to do an act that would result in harm

[32] (1888) 4 Kyshe 430.
[33] A.I.R. 1961 All. 639.

to a victim's mind and convicted the accused of cheating under the second limb of section 415 of the Indian Penal Code. The court did not indicate that the accused should intend the harm that was caused as well. In *Baboo Khan,* the accused impersonated a famous eye surgeon and peformed an eye operation on the complainant's twelve year old son. The son was blind at the time of the operation. Since the operation was unsuccessful, when a fee was demanded by the accused, the complainant refused to pay.

The accused was charged with cheating and convicted under section 419 of the Code.[34] Section 419 deals with simple cheating by impersonation. The complainant permitted his son to be operated on due to the deception practised on him by the accused. However, no harm was caused to the complainant. Section 415 refers to harm being caused to the person deceived. The court, however, held that the unsuccessful operation had caused mental anguish to the father. The words "harm to that person's mind" in section 415 were held to include injuries to the victim's mental faculties through mental pain. The accused in this case could not be convicted under limb I of section 415 because the father was not induced to deliver any property by the accused.

Limb II of section 415 was designed to promote honesty in transactions that relate to property and the limb encompasses acts of deception that do not induce a person to deliver property. The limb was included in order to provide through the mechanism of the criminal law a secondary form of protection to property rights. Should the view in *McLarty,* therefore, be preferred to that in *Baboo Khan*? Thus, for instance, if the views in *MaLarty* are adopted, advertisements that amount to "puffing" would not be "cheating" even though harm or damage may result to a person who has decided to follow or omit to follow a course of conduct in direct response to the advertisement. For, there may be no intention to cause harm to a person by an advertiser in such circumstances, even though there may have been an intention to induce a person through deception to act in a particular way. On the other hand, one could say that if the goal of limb II is to promote honesty in transactions that relate to property, intentional inducements through deception to engage in acts that could result in harm or damage should be prohibited. However, Macaulay may not have contemplated such a wide interpretation of limb II. He indicated in his report:

> In fact, if all the misrepresentations and exaggerations in which men indulge for the purpose of gaining at the expense of others were made crimes, not a day would pass in which many thousands of buyers and sellers would incur the penalties of the law...
>
> Penal laws clearly ought not to be made for the preventing of deception, if deception could be prevented by means of the civil code.[35]

The more restrictive interpretation in *McLarty* may accomplish some of the objectives that Macaulay had in mind and provide adequate reinforcement to the remedies in civil law in instances where the accused actually intended the harm (even in the context of dishonoured cheques as explained in the second part of this article). Thus where A has deceived C, who is B's wife, and obtained a typewriter that had been loaned to B who has on previous occasions been in the habit of keeping the typewriter well beyond the period

[34] Section 419 reads: "Whoever cheats by personation shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both."

[35] *Supra.,* n. 5 at p. 161.

for which it has been loaned, there would be no cheating under limb II on the interpretation in *McLarty.* A would have had no intention to cause pain of mind. However, on the principles in *Baboo Khan* there would clearly be cheating under limb II. On the above facts, there would be neither "dishonest" nor "fraudulent" conduct under limb I of section 415. A would not have had the intention to gain wrongfully or cause wrongful loss, for B would in effect have been holding the typewriter for a period beyond the date for which it was loaned and there would have been no risk of injury to anyone as a result of C handing over the typewriter to A. There would be no risk of injury to C even though she may have suffered mental anguish soon after becoming aware of the deception because her mental anguish, if it existed, would not be an "injury" in the eyes of the law, for the harm would not have been caused "illegally."[36]

Further as Buckley J. has stated, to defraud *(ie.* to be "fraudulent") means to induce a person to act to his injury by making him believe in what is false. There need not be an intention to cause injury. In *Baboo Khan* the same test was used to show that the accused *intentionally* induced a person through deception to act to his injury. There need be no intention to cause injury. If so, the only difference between "fraudulent inducement" in limb I and "intentional inducement" in limb II in the context of the offence of cheating would be the requirement of proof of delivery (or retention) of property for a charge under limb I. If such an interpretation is adopted there would be no distinction between "fraudulent inducement" and "intentional inducement." Moreover, such an interpretation would be rather harsh on a party who has neither induced another to deliver (or retain) property nor intended to cause injury. As Macaulay has pointed out, penal laws should not enacted to prevent deceptive practices that lead to injury if they can be curtailed through the civil law.[37]

Further, the Code has made most deceptive forms of conduct criminal. The offence of "cheating" under the Penal Code is much wider than the offence of "false pretence" in English Law. A promise as to future conduct that the accused did not intend to keep was not "cheating" under English law until section 15(4) of the Theft Act of 1968[38] was enacted. Illustrations (f) and (g) clearly indicate that such conduct would amount to cheating under the Code.[39] The offence of false pretence requires proof of only: (i) a false pretence (i.*e.* deceit); (ii) obtaining property through deceit; (iii) an intent to defraud.[40] It does not cover situations where the victim is intentionally induced to act or omit to act due to a deception and made to suffer harm or damage to his body mind, reputation or property (limb II to section 415). In order to charge a person with false pretence, it has to be shown that there

[36] Section 44 of the Penal Code states: "The word 'injury' denotes any harm whatever illegally caused to any person, in body, mind, reputation or property."

[37] *Supra.,* n. 5 at p. 161.

[38] C. 60; see also, P. Seago: *Criminal Law* (1985), p. 266.

[39] Illustration (0 provides: "A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him, and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats."

Illustration (g) reads: "A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of pepper which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the pepper, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract."

[40] J.D. Mayne: *Criminal Law of India* (4th ed., 1914) p. 692.

was a tranfer of title to the goods. If there was a mere transfer of possession the accused could be convicted only of larceny.[41] Under the Penal Code, a charge for cheating could be brought under limb I even in instances where there is no transfer of title. Mere delivery of property (without transfer of title) would suffice. Limb II, therefore, has been clearly designed to cover a situation that the civil law may not be able to provide adequate redress. Yet, every form of deception that may ultimately lead to damage or injury to a person's mind, body or reputation should not be classified as criminal conduct related to "cheating". As was pointed out in *McLarty's* case, the accused should have not only intended the act that can be categorised as an "inducement", he should in addition have intended the consequences of the inducement as well. Otherwise, an intolerable burden would be placed on those engaged in commercial activity.

3. An Evaluation of The Decisions on Dishonoured Cheques

A perusal of the leading judgments in Singapore and Malaysia on dishonoured cheques would reveal that the judges rarely sought to interpret the two limbs in section 415 in the context of the policy factors that influenced the formulation of these sections. The courts have basically adopted two approaches to determine whether the offence of cheating has been committed in situations where cheques have been dishonoured.

The older cases such as *Yong Yong Peng* v. *R.*[42] impliedly sought to draw a distinction between cash and credit transactions. The trend culminated in the decision in *Khoo Kay Jin* v. *PP.*[43] in 1964. In *Khoo* the court indicated that if there was delivery of property under a cash transaction and if a cheque that was handed over in the course of such a cash transaction was subsequently dishonoured, there would be cheating under limb I of section 415. It was held, however, that if the facts revealed the existence of a credit transaction and a cheque that was given in furtherance of such credit arrangement was subsequently dishonoured, the remedy would lie in civil law. In such circumstances the court indicated there would be no cheating under section 415 of the Penal Code. In 1969 in the case of *P.P* v. *Chen Kee Nan,*[44] the Malaysian High Court adopted a different approach. No reference was made to the terms "cash" and "credit" transactions in the judgment. The court merely held that if a cheque that was subsequently dishonoured was given against delivery, there would be cheating, and if it was given to discharge an existing liability the remedy would lie in civil law. An analysis of the cases below will reveal to some extent the inappropriateness of the two approaches and the need to formulate new criteria to determine cheating through the use of cheques.

In *Yong Yong Peng* v. *R.,*[45] the accused was charged under section 420 of the Penal Code for having committed the offence of cheating on two occasions. He was carrying on a business with another person who had also been charged with the accused but was acquitted in the District Court.

[41] G.P. Fletcher: *Rethinking Criminal Law* (1978), p. 10; this position has been altered in England by s 15(2) of the Theft Act of 1968, c. 60. Now there can be theft by deception where anyone obtains "ownership, possession or control" of property by fraudulent deception

[42] [1947] M.L.J. 40.

[43] [1964] M.L.J. 22.

[44] [1969] 2 M.L.J. 239.

[45] *Supra.,* n. 42.

The business commenced on July 1, 1940. On March 11, 1941 there was a credit balance of $3.12 in the bank account of the business. Around 10 March, the accused presented a cheque for $150.00 to a broker. The cheque was signed by the accused. The broker purchased 10 bags of flour from the complainant and delivered it to the accused. In the course of purchasing the flour, the broker handed over the accused's cheque to the complainant. The complainant in his evidence indicated that the cheque was given in lieu of cash (further, there was nothing in the judgment to indicate that this cheque was a post-dated cheque). On the facts the court ruled that there was a cash transaction. The cheque was subsequently dishonoured when it was presented for encashment on March 12, 1940.

The second incident of cheating took place on March 11, 1940. The accused presented a cheque signed by him to a different party and ordered 13 dozen tins of "Barlova". The cheque was accepted because the accused had said that he did not have the money since the banks had closed for the day. This cheque too was dishonoured.

The High Court of Singapore held that the presentation of a cheque does not amount to a representation that there was a credit balance in the drawer's account. There would, however, be an implied representation in such circumstances that the cheque will be honoured by the bank. For there to be "deception", there has to be a false representation. How does one prove that the accused had no intention to pay at the time the cheque was presented? Fletcher has pointed out that apart from viewing the state of facts at the time of the accused's conduct, the best evidence of deception would be what the accused did when the debt fell due, even though technically he would have committed the crime at the time the property was received.[46] This was in fact the approach of the court in *Yong*. The facts indicated that the accused closed down the business on the day on which the complainants were notified of the bad cheques and everything of value had been removed. The accused too had disappeared on that day with the goods that were purchased from the complainants. The court inferred from these facts that the accused intended to deceive the complainant at the time the cheque was presented.

In order to determine whether there was a cash or credit transaction the court looked to past practices and the states of mind of the accused and the complainants. As the accused was used to dealing with the complainants and since he knew that their terms were cash on delivery, it was held that the dealings between the parties amounted to cash transactions.

Ten years later, Rigby J. in delivering his judgment in the Malaysian High Court in *D. C. Henry*[47] did not refer to *Yong* or the distinction between cash and credit transactions. In *D.* C *Henry* two charges of cheating were framed against the accused. The accused wanted to purchase some sundry goods at a provision store on April 10,1957. The shopkeeper declined to give him credit. The accused then gave him a post-dated cheque for $50.00 for the goods and indicated that he would be having some money in the bank on April 15, and the cheque could be cashed on that day.

On April 13, 1957, the accused went to the same shop again and purchased $70 worth of goods and gave the complainant a post-dated che-

46 *Supra.,* n. 41 at p. 12.
47 [1958] M.L.J. 224.

que dated April 18, 1957 for that amount. The complainant on this occasion readily accepted the cheque and handed over the goods. On April 10, 1957, the accused's bank account had a credit balance of $7.03. It remained at that figure till April 13. On May 2, the accused's salary of $228.50 was paid to the credit of his account. He drew out by cheque two sums of $100 and $115 respectively.

The two cheques were subsequently dishonoured. The accused was charged for cheating under section 420 of the Penal Code. The court held that there would be "deception" if the circumstances of the accused at the time of handing over the dishonoured cheques were such that it would be *practically impossible* for him to pay for the goods. The accused as a government servant would have known that he depended on a monthly salary and there would not be sufficient funds to meet the cheques that were to mature on April 15 and 18, 1957. The court held, therefore, that the accused had deceived the complainant at the time he handed over the cheques and convicted him of cheating under section 420.

Rigby J. focussed on the issue of whether there was "deception" at the time the cheques were handed over. There was no reference to *Yong* in Rigby J.'s judgment. Although the cheques were post-dated unlike in *Yong,* no attempt was made by Rigby J. to draw a distinction between cash and credit transactions. His Lordship simply looked to the stage at which the deception could have occurred. Although references were made to subsequent events to corroborate the act of deception practised at the time the cheques were handed over, yet the court made its material inferences regarding "deception" from the circumstance as they appeared at the time the accused present the cheques.

Even though the first transaction took place on April 10, yet the cheque could have been cashed only on April 15. The second transaction occurred on April 13, and again the cheque could have been cashed only five days later, that is, on April 18. In other words, five days of credit had been given by the complainant to the accused on both occasions. The transactions may not have been cash transactions. Should Rigby J. have resorted to the cash-credit formula? Even where there is a statement by the accused that the goods are being purchased on credit, the accused's deceptive conduct at the time the cheque is handed over could induce the complainant to delivery the goods as it happened in *D.C. Henry.* Thus it would seem that there is no need to maintain the distinction between cash and credit transactions in order to determine whether the deception induced the delivery. However, the Malaysian High court sitting in Penang in *Khoo*[48] preferred to adopt views that were similar to those expressed in *Yong* and set down additional guidelines to determine "cheating"in the context of cash and credit transactions.

The accused in *Khoo Kay Jin* v. *P.P.*[49] ordered certain goods from the complainant for a sum of $14,000. The goods were delivered to the accused on August 15 1962. On August 18 1962, the complainant accepted from the accused four post-dated cheques dated 20, 22, 27 and 31 August 1962. When the four cheques were presented in October all were dishonoured. Further,

[48] Supra., n. 43.
[49] *Ibid.*

a representative of the bank indicated at the trial that if these cheques had been presented for payment on the due dates they would not have been honoured.

The accused contended that he had entered into a credit transaction with the complainant. The complainant on the other hand argued that it was a cash transaction. The court held that the prosecution had failed to establish that the deception practised by the accused when he presented the cheques induced the complainant to deliver the goods. A post-dated cheque given in payment of goods already received was viewed as a mere promise to pay in the future, and it was held that a broken promise would not constitute a criminal offence. The court held, citing Gour, that a cheque merely represented a promise and was not even a valuable security.[50] If a cheque was not honoured then there was a breach of a promise and as a consequence if there was a loss, the complainant could bring a civil action for damages. Therefore, a cheque that did not induce delivery had no relevance to a charge of cheating. Furthermore, the court also pointed out that the deception that induced the delivery was not mentioned in the charge. The court held that the remedy lay in civil law.

The prosecution then contended that it was the deception of the accused that induced the complainant to accept the cheques. As a result, the complainant had to forego the opportunity that he had to initiate civil proceedings immediately and therefore he suffered losses. The court held that the damage spoken of must be a proximate result of the act complained of and there was nothing to indicate that the complainant had surrendered his right to institute civil proceedings.

Furthermore, the court added, by accepting the cheques of August 18, the complainant did not put himself in a worse position than what he had been in at the time he delivered the goods without receiving payment. The purchase price, after all, became due on August 15.

In *Khoo,* the court may have resorted to the cash-credit formula to restrain individuals who have been cheated from seeking remedies through the criminal law. In *DC. Henry,* despite convicting the accused of the offence of cheating, Rigby J. went on to suggest that the complainant should have resorted to a civil remedy. His Lordship remarked that the police will be virtually compelled to perform the role of debt collectors even though there may be no prospect of collecting the debts. In instances where the accused has a conviction-free record, his Lordship felt, resort should be made to civil remedies. Noble though such efforts to restrain criminal actions may be, yet the court in *Khoo* should have avoided focussing on the credit and cash aspects of transactions relating to dishonoured cheques to achieve that end. In formulating the cash-credit principle, the court may have been influenced by the rules that relate to the offence of false pretence in England. Unlike in English law, the term "deception" in section 415 encompasses a false representation made not only in regard to a present or past fact, but also a future event.[51] Furthermore, the offence of false pretence dealt only with delivery of chattels, money or valuable security and not conduct covered

[50] Ibid., at p. 24.

[51] See *Nadir Ali* v. *State of U.P.* (1960) Crim. L.J. 188 at pp. 195-1%; also see Gour, *supra.,* n. 29 at p. 3647; Mayne, *supra.,* n. 40 at p. 688.

by limb II of section 415.[52] It will be shown below the unsuitability of using the cash-credit formula to determine whether there was "deception" and why the accused should have been convicted of cheating under Limb II of section 415 even though his deception did not induce the delivery of the goods.

In *PP.* v. *Chen Kee Nan,*[53] the Malaysian High Court steered clear of the uncertainty surrounding the terms cash and credit transactions and used different terminology to determine whether there is cheating in instances where cheques are dishonoured. In *Chen,* the accused phoned the complainant and placed an order for 35 sacks of rice at a price of $2,055. He promised to pay cash on delivery. On delivery, the accused offered in lieu of cash a post-dated cheque for $1,460 as part payment. The complainant collected a post-dated cheque for the balance the same day when the accused said he had no cash to offer.

The court held that if the drawer knew that the cheque would not be cashed in the normal course of events at the time he presented the cheque, his conduct would be *prima facie* proof of intent to deceive. On the facts, the court held that there was an intention to deceive at the time the cheques were given against delivery of goods because: (i) all the goods in the accused's shop were removed on the day the cheques were presented to the bank; and (ii) the accused had written nine other cheques around the same period, knowing well, there was no money in his bank account. These nine cheques were subsequently dishonoured.

The court pointed out that in *Khoo,* the cheques were given to discharge an existing liability unlike in the case before it where the cheques in effect were given against delivery. In such situations, the court held, if the cheques are dishonoured the accused should be convicted of cheating on the basis that it was the deception that induced the complainant to deliver the property. On the facts, it was held that the accused handed over the cheque against the delivery of goods and not to discharge an existing liability, and therefore he should be convicted of "cheating". Were the courts in *Khoo* and *Chen* looking for ways and means to curtail litigants from seeking remedies in the criminal courts for breaches of promises? If not for the principles laid down in these cases, it would have been quite convenient to commence a criminal action under the guise of "cheating" in every situation where there was a breach of promise. On the other hand, if the views in *Khoo* and *Chen* are adopted, the scope of section 415 may be unduly restricted and it may be difficult to prosecute a person who has breached a promise and is not in a position to pay damages to the party deceived.

A post-dated cheque may be given to deceive and induce the complainant to either: (i) deliver property; or (ii) offer credit. When a post-dated cheque is given during a cash transaction (under the cash-credit transaction formula in *Khoo)* or "against delivery" (to use the phraseology in *Chen)* the case would clearly fall under (i). If the cheque was given in the course of a credit transaction (as in *Khoo)* or to discharge an existing liability (to use the terminology in *Chen),* the facts could fall under (ii). In a situation where the complainant is induced through deception to offer credit *(i£.* an

[52] *Supra.,* n. 29 at p. 3633.
[53] *Supra.,* n. 44.

act that he would not have otherwise done), damage or harm could result to his "property" as offering credit creates an incorporeal right. Gour has indicated that the term "property" in section 415 has been used in a wide sense and it encompassed anything that could be the subject of ownership.[54] Thus the term "property" in limb II includes everything that is corporeal or incorporeal. Macaulay too has indicated that the provision on cheating in the draft Code was designed to prohibit the acquisition of services and credit through deception.[55] Stokes too has confirmed that the provision on cheating in the Code was drafted with the intention of dealing with situations that involved the advancement of money as a result of false representations for the performance of services. Stokes also added that the law in regard to cheating under the Panel Code covered a wider area of deceptive conduct than the English criminal law.[56] It would seem, therefore, the views in *Khoo* and *Chen* cannot be reconciled with the views of the early authorities on the Indian Penal Code such as Macaulay and Stokes. Furthermore, it would seem the accused in *D. C. Henry* could have been convicted under both limbs, for inducing the complainant in the first instance through deception to deliver the goods and then deceiving him to offer credit. The accused, however, was convicted for having committed the more serious offence under limb I and there was no discussion as to the possibility of convicting him under limb II. A conviction for a second act of cheating may have had a bearing on the sentence imposed on the accused.

4. CONCLUSION

The approaches in *Khoo* or *Chen* may not provide adequate secondary safeguards to property interests protected under the civil law in a modern society such as Singapore. Macaulay has indicated that the law in regard to cheating "should be formed upon a rough calculation of the chances of dishonesty".[57] As a developing nation that has been driven to incessant commercial activity in order to merely survive as an economic and political unit, Singapore affords ample opportunities for dishonesty through the use of cheques and credit cards. The civil law alone may not be effective to curtail the utilization of commercial and credit opportunities for dishonest gain through the use of post-dated cheques. Confining or restricting the remedies for deceitful conduct in regard to future promises to the remedies that are available in the civil law may not provide adequate security to those engaged in credit transactions that create property rights. Had the courts taken cognizance of the policy underlying the provisions on cheating, they may not have focussed on merely devising ways to limit criminal actions to breaches of promise that relate to the delivery of property *(ie.* limb I). Therefore, when post-dated cheques are given, even after the delivery of goods, with the knowledge that they will not be honoured, the courts should view such conduct as "cheating" under limb II of section 415. Such an approach would clearly reinforce the policy of providing secondary security to property interests recognized by the civil law. The artificial distinctions based on cash-credit transactions, payment of cheques against delivery and the discharge of an existing liability should be discarded. If a party has deceived another at the time of delivery of the property, he should be convicted under limb I of section 415. If there was prior delivery and the cheque was presented subsequently as in *Khoo,* the accused may still be con-

54 *Supra.,* n. 29 at pp. 3660-3661.
55 *Supra.,* n. 5 at pp. 161-162.
56 W. Stokes: *The Anglo-Indian Codes* (1887) Vol. 1 at p. 60.
57 *Supra.,* n. 5 at p. 165.

victed of cheating under limb II for including the complainant through deception to offer credit.

What would the implications be in the context of today's business climate where economic recession has made it difficult for several debtors to honour through their banks the post-dated cheques presented during better times? Would the approaches in *Khoo* and *Chen* be preferable? Should intentional acts which induce another *through deception* to offer credit be left to remedies in civil law so that the wheels of commerce would not be unduly hindered? Businessmen without adequate funds in their bank accounts may be reluctant to engage in credit transactions that may lead to prosecutions for cheating on the basis of "deception" in situations where they are unable to pay their creditors due to a slow-down in their own business activities as a result of circumstances beyond their control. Macaulay has stated very clearly that penal laws should not be enacted for the prevention of deception, if such deception could be prevented through civil remedies.[58] Yet he specifically indicated that acts of deception which induce a person to offer credit should be viewed as "cheating"[59]. If the views in *McLarty*[60] are adopted and if it could be shown that the accused intended to deceive in the manner specified in limb II and in addition, also had the intention to cause harm to the complainant's property rights, there would be no impropriety in convicting the accused for deliberately infringing on another's property rights without adequate cause.[61] The commandment "thou shall not steal" can never be the governing policy of a law formulated to provide some reinforcement to existing remedies in the civil law to protect property rights. It is a purpose or need that determines the limits of such a time-hallowed commandment in the formulation of a law to safeguard property interests. Singapore's needs at present call for a wider interpretation of section 415 than in *Khoo* or *Chen* in order to curtail through the criminal law the adoption of deceptive means to take advantage of the credit facilities that are becoming available in an increasingly complex commercial environment. The *caveat emptor* approach adopted in *Khoo* and *Chen* (and in English law until the Theft Act of 1968 was enacted) may no longer be suitable, in the absence of adequate laws to deal with deceptive conduct through the use of cheques and credit cards in a society where credit transactions are on the increase.

J. K. CANAGARAYAR*

58 *Ibid.,* at p. 161.

59 *Supra.,* n. 55.

60 *Supra.*, n. 32.

61 See *supra.,* pp. 46-48, for a discussion of the approaches adopted in *McLarty* and *Baboo Khan* to determine the *mens rea* of the offences of cheating specified in limb II of section 415.

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