

(2004) 12 BOM CK 0096
In the Bombay High Court
Case No : Criminal Appeal No. 72 of 1994

The State of Maharashtra	Vs	APPELLANT
Dnyndeo Sudam Waghmare		RESPONDENT

Date of Decision : 01-12-2004

Acts Referred:

Evidence Act, 1872 — Section 17, 18, 21
Penal Code, 1860 (IPC) — Section 420, 466, 467, 471

Citation : (2004) 12 BOM CK 0096

Hon'ble Judges : S.S. Parkar, J; S.R. Sathe, J

Bench : Division Bench

Advocate : V.B. Konde-Deshmukh, app, for the Appellant; A.K. Suryavanshi, for the Respondent

Final Decision : Allowed

Judgement

S.S. Parkar, J.—This appeal is filed by the State challenging the order of acquittal recorded by the JMFC, Pandharpur acquitting the respondent-accused of offences of cheating, forgery and use of forged documents with which he was charged in Regular Criminal Case No. 29 of 1988 by the judgment and order dated 13/9/1993.

2. Briefly narrated the facts leading to the present appeal are as follows:

The respondent had joined the services of Zilla Parishad as a Primary Teacher since 25th August 1958. At that time he had given his birth date as 4/11/1934 which was entered into his service record. In the year 1980 Education Officer, Zilla Parishad, Solapur directed the Block Education Officer, Pandharpur to verify the entries of service books of employees as regards birth dates. The school leaving certificates were called from the employees. The respondent-accused produced his school leaving certificate in which his birth date was shown as 10/2/1930. Accordingly the new page in the service book of the respondent-accused was pasted showing his birth date as 10/2/1930. The respondent-accused produced forged birth extract obtained from the office of Tahsildar which

was issued on the basis of entry at Serial No. 92 in the Birth and Death Register pertaining to his younger brother showing the birth date of the accused to be 4/11/1934. The said extract is produced on record at Exhibit 18. The Department had obtained the correct extract of birth from the Birth and Death register maintained in form no. 14 as per which the date of birth of respondent-accused was shown as 1/1/1930. Taking the said birth extract, which is again produced at Exhibit 18 on record, as correct extract the Department retired the respondent-accused on 31/12/1987 on superannuation after completing years on the basis of the birth extract showing his birth date as 1/1/1930. The respondent-accused had filed a civil suit challenging the act of the Department retiring him on 31/12/1987. He, however, withdrew that suit. The department had initiated enquiry against the respondent-accused and found that the respondent had deliberately given wrong birth date by producing forged extract of birth certificate and lodged a complaint on the basis of which prosecution was initiated against the respondent-accused for offences under Sections 420, 466, 467 and 471 of IPC in Regular Criminal Case No. 29 of 1988 in the Court of JMFC, Pandharpur.

3. The trial Court framed charges against the respondent-accused on 15th June 1988 for offences under Sections 420, 466, 467 and 471 of IPC to which the respondent-accused pleaded not guilty and, therefore, the accused was put to trial. On behalf of the prosecution three witnesses had been examined and documentary evidence was produced. The first witness examined on behalf of the prosecution is PW Shrinivas Bhanap, the Block Education Officer of Pandharpur. The second witness examined on behalf of the prosecution is PW 2 Suresh Kolekar, the Record Keeper in the Tahsil Office, Pandharpur and the third witness is none other than the younger brother of the respondent-accused by name Mahadeo Waghmare as PW 3. The defence of the accused was of simple denial. According to him he did not cheat the department but the witnesses had deposed falsely against him because he filed a civil suit against the department.

4. After considering the evidence on record the JMFC, Pandharpur acquitted the respondent-accused on the ground that the clerk who made entry in the service book of the accused maintained by Zilla Parishad, Solapur was not examined to prove that the entry of the wrong date of birth in the service record was made pursuant to the representation made by the accused and the forged birth certificate was produced by him. Secondly, the JMFC has observed that ultimately the accused having retired as per his correct date of birth i.e. 1st January 1930, he had not taken any monetary benefits and, therefore, offence of cheating and use of forged document is not proved. He has also found that the birth certificate mentioning the name of the accused is not proved to have been forged by him. The said order of acquittal is under challenge in this appeal filed by the State.

5. We have gone through the evidence of the prosecution witnesses and perused the documents produced on behalf of the prosecution and have also gone through the reasons of the trial Court and find that the order of acquittal cannot

be sustained on all counts. The trial Court has firstly failed to consider that if ultimately the monetary benefit was not obtained by the accused he could have been convicted for attempt to commit offence of cheating, forgery and use of forged documents. Secondly from the facts of the case it is clear that but for the misrepresentation and use of forged birth certificate the respondent-accused would not have been even employed as a teacher because when he was appointed as teacher in August 1958 he had crossed the age bar of 25 years as he was by that time 28 years and eight months old when the maximum age prescribed for appointment as a teacher in the Zilla Parishad was years. Thus not only the respondent-accused had taken monetary benefits but had also secured employment fraudulently by reliance on forged certificate and therefore there was not only an attempt to commit some of the offences but the said offences have been committed by the accused.

6. So far as the offences under Sections 466 and 467 are concerned undoubtedly the prosecution has not led evidence to prove that the accused had forged the register of birth by inserting his name in the register of birth and death maintained by the concerned office nor it has proved that the extract of birth certificate produced by him had been as a matter of fact forged by himself by inserting his name in the Column No. 5-A where the name of the child is mentioned. As regards the extract of age alleged to have been produced by the accused is concerned the name of the child was left blank even in the decade of 1980s. The extract thereof was produced on 15/2/1993. The case of the prosecution is that taking advantage of the column 5-A left blank in the original register of birth in Form No.14, the birth extract was produced by the accused inserting his name in the column 5-A in the certificate submitted by him to the department though in the register no name was mentioned in the column of the child. Since no evidence is led to show that the name of the accused Dnyandeo was forged by him in Exhibit 18 produced by him even subsequently at the time of verification of the birth dates undertaken by the department in the year 1980, the charge for offence of forgery of not only register of birth but also forgery of valuable security like birth certificate u/s 467 must fail and, therefore, the acquittal of the respondent-accused for those offences cannot be interfered with.

7. So far as the offence of cheating is concerned the requirement of law is that the person deceiving must be proved to fraudulently or dishonestly induce the person so deceived to do or omit to do anything which he would not do or omit to do if he was not so deceived and which act or omission causes or is likely to cause damage, inter alia, to the person or property of the person deceived. In other words to substantiate the offence of cheating what is required to be proved is that the person who is alleged to have cheated must gain monetary benefit because of the act of cheating and cause loss to the person or body of persons cheated. Another charge levelled against the respondent-accused is of using forged document as genuine fraudulently or dishonestly which he knows or has reason to believe to be forged document u/s 471 of the Code.

8. In order to find out whether the prosecution has proved these two charges of cheating and use of forged document against the accused, it would be relevant to scrutinise the evidence of the prosecution witnesses. PW 1 Shrinivas Bhanap, the Block Education Officer of Pandharpur has deposed that accused was teacher in Satpute Vasti at Bhalwani since 25th August 1958. His brother by name Mahadeo was also serving as Teacher in village Bhalwani. He has produced the service book of the accused which is Exhibit 17. Initially the service book which gives the particulars of the accused mentions his birth date to be 4/11/1934. The said page bears the signature of the respondent-accused. It further shows that he had passed P.S.C. examination in the year 1949 and P.T.C. in the year 1957. No doubt in his examination-in-chief itself he has stated that in the service book of the accused the birth date mentioned is 10/2/1930 and it was attested by the accused before the Block Development Officer, Pandharpur. That statement in the deposition is ambiguous and the trial Court has wrongly observed that according to the prosecution case itself his service record shows the birth date as 10/2/1930 forgetting that initially his service record showed his birth date as 4/11/1934 and the new sheet in his service record was inserted after the enquiries were made in the year 1980 and it was changed to 10/2/1930 on the basis of the school leaving certificate produced by the accused himself. On both the sheets signatures of the accused have been obtained. The first sheet, which must have been prepared in the year 1958 when the accused joined the services, mentioned the birth date as 4/11/1934 which was cancelled because a new sheet was prepared in the year 1980 after the enquiry was held about the birth date and the accused had himself produced the school leaving certificate in which his birth date was shown as 10/2/1930. Ultimately it was found that even that date i.e. 10/2/1930 was not correct date of birth of the accused. As per the birth register maintained in Form No.14 the birth date of the accused is 1/1/1930 and, therefore, he was retired on the marked as Exhibit 16/1-A is also signed by the accused as he had signed the earlier cancelled sheet prepared at the time of his entry in the service mentioning his birth date as 4/11/1934. The service book (Exh.17) has got one more sheet in which also the birth date of the accused is shown as 10/2/1930 which is again signed by the accused.

9. The trial Court has acquitted the accused on the ground that the service book must have been prepared by the concerned Clerk of the Zilla Parishad and he not having been examined to prove as to on what basis wrong birth date of the accused was prepared, the offence of cheating or use of forged document is not proved against the accused. In this respect the prosecution is relying on the application addressed by the accused to the Block Development Officer, Pandharpur on 1/7/1986 which is produced as Exhibit 21 through PW 1 Block Education Officer. In that application he took exception to the change in his birth date by changing it from 4/11/1934 to 10/2/1930 and to retire him on the basis of the changed birth date. In the said application he states that when enquiry was held in the year 1980 he had submitted the extract of birth certificate before the Block Development Officer and according to that extract his birth date is

4/11/1934 and, therefore, the change of birth date from 4/11/1934 to 10/2/1930 in the service record was wrongly made and, therefore, it should be corrected. Exhibit 21 is the said application bearing the signature of the accused and is not denied by him at the trial.

10. Besides this, as stated earlier, the accused had also filed a suit being Regular Civil Suit No.492 of 1987 in the Court of Senior Division, Solapur. Certified copy of the plaint in that suit has been produced on record by the prosecution as Exhibit 19. In para 1 of the said plaint he has categorically stated that he was born in village Bhalwani and in the service record his birth date was noted as 4/11/1934 on the basis of the birth certificate as per form no.14 produced by him. He further states in the plaint that at the time of his entry into service he was 23 years 9 months and 20 days old on 25/8/1958 as per his birth date of 4/11/1934. It is further stated in the said paragraph that as per the rules he was employed in that service as the person had to be below 25 years of age and he had not crossed that age limit for his employment as a teacher in the Zilla Parishad.

11. It cannot be disputed that if the birth date of the accused was 1/1/1930, as has been proved now on the basis of the birth register maintained in form no.14, the accused had already crossed the limit of age of 25 years and if this correct date of birth had been produced he would not have been appointed as a teacher in the Zilla Parishad in the year 1958. It was for this reason that the respondent-accused was interested in producing a false birth certificate showing his birth date to be 4/11/1934 and hiding the real birth date which was 1/1/1930. It is important to note that he could have at the time of joining service in support of his birth date produced the school leaving certificate which is normally done and is accepted as proof of birth date in any service and especially in Government departments. Obviously he could have produced this school leaving certificate which showed, though wrongly, his birth date to be 10/2/1930 but according to that date also he was not eligible to be appointed in the service due to bar of age limit. From the evidence of the prosecution it is clear that he produced the false birth extract by taking advantage of the blank left in the Birth Register in Form No.14 in respect of the birth of a male child which took place on 4/11/1934 to the parents of the accused. That entry is produced on record which is at Sr.No.92 without mentioning the name of the child in Column No.5-A meant for the said purpose. The correct extract of that Register has been produced at Exhibit 23 on record which shows that column 5-A meant for the name of the child is left blank in the original register. It appears that entry at Sr.No.92 in the birth register leaving the name of the child blank must be pertaining to the younger brother of the accused by name Mahadeo who has been examined by the prosecution as PW 3. Incidentally he was also employed as a teacher in the same Zilla Parishad. He was working as a teacher in village Bhalwani and retired from service on 1st November 1992 at the age of fifty-eight years. According to him he had three other brothers and one sister. Accused Dnyandeo was the second son of his father while PW 3 Mahadeo was the third son and he was born on 1/12/1934. It

is pertinent to note that while the birth date of this brother was given as 1/12/1934, the birth date of the accused who was direct elder brother of PW 3 had been given as 4/11/1934 meaning thereby that there was difference of hardly 26 days in age between these two brothers born to the same parents. Though this anomaly was obvious and would have come to light any time because two brothers were employed in the same village and by the same Zilla Parishad the accused had dared to produce a certificate or make a representation that he was born on 4/11/1934 just 26 days before the birth of his direct younger brother.

12. No doubt the application of the accused or the birth certificate submitted by the accused in support of his birth date at that time is not produced by the prosecution on record but Exhibit 17 which is the service book of the accused maintained by the Zilla Parishad shows that the accused had signed the service book which had mentioned the date of his birth as 4/11/1934. Having signed that service book by an accused who was employed as teacher, he cannot plead ignorance that he had not represented that his birth date was 4/11/1934 which was mentioned in the service book on which his signature had been obtained. It may be stated that it is not the case of accused that he had not given his birth date as 4/11/1934 at the time of entry in the service. He has also signed the corrected service book in which the date of birth has been shown as 10/2/1930 on the basis of the school leaving certificate produced by him. He has gone to the extent of challenging that change by addressing a letter-cum-application dated 1st July 1986 addressed to the Block Education Officer of Pandharpur and insisted that he should be made to retire on the basis of his birth date as 4/11/1934 as noted earlier on the basis of the birth certificate produced by him. He does not rest there but goes a step further and files a civil suit in the Court of the Civil Judge Senior Division, Solapur bearing No.492 of 1987 in which on oath he affirms and reiterates that he had produced in support of his birth date a birth certificate showing his birth date as 4/11/1934 on the basis of which his service record mentioned his birth date as 4/11/1934 and he was appointed as a teacher as having not crossed the age limit of 25 years for appointment of a teacher.

13. Thus inspite of the fact that the production of false certificate by him or giving of wrong date of birth was discovered by the department and true extract of the original register of birth was obtained, the accused not only made representation but also went to the extent of filing a suit in a court of law insisting that his birth date should not be changed from 4/11/1934 to 10/2/1930 as mentioned in his school leaving certificate. Thus apart from the signature put by the accused on the service record attesting his birth date to be 4/11/1934, which was not the correct date of his birth, he has admitted in his application or representation dated 1/7/1986 (Exh.21) that he had submitted, produced and relied on the birth certificate giving his birth date as 4/11/1934 and has also admitted on oath in the plaint filed in the aforesaid civil suit that at the time of preparation of the service record he had submitted extract of birth certificate mentioning his birth date as 4/11/1934. Though the prosecution has not

produced the original application of the accused nor the birth certificate submitted by him in support of his birth date at the time of entry in service, the accused has subsequently admitted in his application dated 1/7/1986 (Exh.21) and in the plaint in the Civil Suit filed by him in which averment is made on oath, certified copy of which is produced at Exhibit 19 on record, that he had produced birth certificate showing his birth date as 4/11/1934.

14. The trial Court was, therefore, clearly wrong in observing that prosecution has not proved that wrong date of birth was given by the accused in his service book. It cannot be said that this was done innocently by the accused. He must have known that his birth date as recorded in school record was 10/2/1930 and he must also be knowing that the birth date of his younger brother was 1/12/1934 and, therefore, his birth date could not have been 4/11/1934. Undisputedly he was also knowing that the age limit for appointment as a teacher in the Zilla Parishad at that time was 25 years and, therefore, unless he produced a false certificate showing his birth date of the year 1934 or thereabout, he was not eligible for even consideration for appointment as a teacher in Zilla Parishad. The false certificate was produced and relied by the accused knowing that on the basis of his real birth date he was not eligible to apply for the post of a teacher in Zilla Parishad.

15. So far as admission in his application dated 1/7/1986 (Exh.21) and his averment on oath in the plaint made sometime in 1987 admitting that he had produced the birth certificate giving his birth date as 4/11/1934 are concerned, they can be relied on by the prosecution as being admissible under the law of Evidence as embodied in Sections 17, 18 and 21 of the Indian Evidence Act. While Section 17 defines the admission which may be a statement oral or documentary suggesting inference to any fact in issue or relevant fact, u/s 18 admissions by a party to the proceeding are admissible. Section makes the admissions relevant for being proved as against the person who makes them. The admissions made by the accused in the aforesaid two documents are admissible u/s 21 as elucidated by Illustration (a) to the section. The prosecution could have very well relied on those admissions given in the application as well as in the suit since the application was addressed to the Block Education Officer, Zilla Parishad, Solapur and in the suit to which Zilla Parishad, Solapur was a party defendant it was expressly admitted by the accused that he had submitted or produced at the time of entry in service a certificate of birth showing his birth date as 4/11/1934. Both the documents have been brought on record and exhibited in the instant prosecution and, therefore, they, being admissions, can be relied on by the prosecution in the Court against the maker of it i.e. the respondent-accused. In view of the said admission, the prosecution was not bound to lead evidence and produce on record the certificate and the application which was submitted by the accused at the time of his appointment as a teacher in the Zilla Parishad, Solapur. Accordingly both the offences are proved against the respondent-accused. Firstly he had cheated Zilla Parishad by use of forged document showing his name in the blank column to represent that his birth date

was 4/11/1934 and took advantage of being employed as a teacher. But for the production of the said false certificate he would not have been appointed as a teacher as he was not even eligible to be appointed as a teacher because of the age bar. Secondly whosoever might have forged the birth certificate on which reliance was placed by the accused, he having made use of it with requisite mens rea, knowing that it was forged, for appointment as a teacher the provisions of section 471 of the Penal Code for using as genuine a forged document are attracted and, therefore, he is liable to be convicted for the said offence as well.

16. It would not be out of place to mention here that there was some discrepancy with regard to the noting of the birth date of the accused as well as his younger brother Mahadeo in the school record. As per the birth register of the accused his birth date has been given as 1/1/1930 wherein his name has been mentioned. The true extract of the same has been produced by the prosecution at Exh.18 which cannot be doubted because it was an authentic public register in which the name of the accused was shown in column 5-A. As against that his birth date has been shown in the school leaving certificate to be 10/2/1930. Similarly the school leaving certificate of PW Mahadeo, the brother of the accused, shows his birth date to be 1/12/1934 which is also the date mentioned in the service record but the birth register at Sr.No.92 which does not mention the name of the child in column no.5-A appears to be pertaining to Mahadeo, brother of the accused. That entry mentions the birth date as 4/11/1934 which was used by the accused by inserting his name though the register had left the column of the child blank. The authentic true copy of the said register is produced by prosecution on record as Exhibit 23. So here in the case of Mahadeo, brother of the accused also there is discrepancy in the birth register and the date given in the school. It is common knowledge that most of the time in villages in those years the father used to give approximate birth date of the child while getting him admitted in the school and the school authorities in the village were not even insisting for the production of birth certificates. Hence in the school record instead of showing the birth date of accused as 1/1/1930 it must have been noted as 10/2/1930 and in respect of Mahadeo instead of noting as 4/11/1934 it was mentioned as 1/12/1934.

17. It is however pertinent to note that while the younger brother gets the entry in the Zilla Parishad as a teacher on the basis of his school leaving certificate which showed his birth date as 1/12/1934, his elder brother, the accused does not produce the school leaving certificate as he knew in that case he would not be eligible for being appointed as a teacher. He, therefore, produced the forged certificate taking advantage of blank left in the birth register in respect of child born to the parents of these two brothers on 4/11/1934. Surely the accused had a mens rea and he was deliberately using the forged certificate showing his birth date as 4/11/1934 which pertained to his younger brother Mahadeo. Certainly the difference between the ages of two brothers could not have been of 26 days. Mahadeo, the brother of the accused who has been examined as PW 3 on behalf of the prosecution has deposed, inter alia, that difference between his birth date

and birth date of the accused might be two to three years. Actually it was more than four years but then the brother, who was also a teacher and had retired by that time, would not give the exact difference in the age of the two brothers. He has categorically stated even in his cross-examination that the birth date of the accused was not 4/11/1934 and that he himself was born on 1/12/1934.

18. PW 2 Suresh Kolekar who was the record keeper in Tahsil Office, Pandharpur used to maintain record of births and deaths of villages in Tahsil Office at Pandharpur. He had produced two registers of birth and death maintained for village Bhalwani in the years 1930 and 1934. In the register maintained for the year 1930 at Sr.No.2 Dnyanu i.e. the respondent-accused has been shown to have been born to his father Sudama Ranu Nhavi on 1/1/1930. Sr.No.92 in the birth register of the same village for the year 1934 shows that on 4/11/1934 a child was born to Sudama Ranu Waghmare, caste Nhavi but in the said entry column relating to the name of the child is left blank. The true extract of the birth of the accused has been produced by him at Exhibit 18 and true extract of the child born to the parents of the accused and his brother Mahadeo on 4/11/1934 has been produced at Exhibit 23 leaving the column 5-A about the name of the child blank.

19. The aforesaid discussion leaves no doubt that the respondent-accused had committed the offence of cheating punishable u/s 420 of IPC by fraudulently and dishonestly inducing the Zilla Parishad to note his birth date as 4/11/1934 instead of 1/1/1930 and thereby inducing the Zilla Parishad to appoint him as a teacher though he had crossed the age bar for his appointment and thus got the benefit for himself. He has also committed offence u/s 471 of IPC by using the forged birth certificate as genuine which he knew or had reason to believe to be a forged document. In our view from his representation dated 1/7/1986 (Exh.21) and by his subsequent act insisting to give him superannuation on the basis of his forged birth date of 4/11/1934 by filing civil suit (Exh.19) he had further attempted to commit the aforesaid two offences of cheating and using as genuine a forged document. But in the absence of specific charge in respect thereof we do not propose to convict the accused additionally for the offence of attempt to commit the above offences. However, the accused is clearly liable for conviction for offences under Sections 420 and 471 of IPC as charged. The maximum punishment prescribed u/s 420 of IPC is seven years with fine while u/s 471 of the Act read with Section 467 the maximum punishment can be imprisonment for life or for a term which may extend upto ten years with fine. Since the respondent-accused is now stated to be in his seventies we have decided to be lenient so far as substantive sentence is concerned.

20. In the result, this appeal is allowed and the judgment and order dated 13/9/1993 delivered by the JMFC, Pandharpur in Regular Criminal Case No.29 of 1988 is quashed and set aside. The respondent-accused-Dnyndeo Sudam Waghmare is convicted for offence u/s 420 of IPC and sentenced to suffer RI for two years and to pay a fine of Rs.10,000/-in default to undergo imprisonment for

six months. He is also convicted for offence u/s 471 of IPC and sentenced to suffer RI for three years and to pay a fine of Rs.10,000/-in default to undergo imprisonment for six months. Both the substantive sentences shall run concurrently. His acquittal for offences under Sections 466 and 467 of IPC is confirmed. The respondent-accused shall surrender to his bail bond within a period of two weeks from today.