THE STATE

v

SERUVEVELI AISAKE

[HIGH COURT, 1993 (Fatiaki J), 8 April]

Appellate Jurisdiction

Crime-procedure-submission of no case to answer-principles governing-Criminal Procedure Code (Cap. 21) Section 211.

Crime-offences-official corruption-ingredients establishing-Penal Code (Cap. 17) Section 106 (a).

The DPP appealed against the Respondent's acquittal in the Magistraes Court. The High Court examined the nature of the offence of official corruption emphasising that it is insufficient merely to prove that a favour has been shown. In the absence of evidence of a reward for the favour the submission of no case was upheld.

Cases cited:

Attorney-General v. Shamba Ali Kajembe [1958] EA 505
Gopal Krishna Gounder v. R 12 FLR 141
Moidin v R. (Cr. App. 41 of 1976)
R. v Millray Window Cleaning Co. (1962) Crim L 99
State v Humphrey Chang (Cr. Case No. 8 of 1991)
Temo Roy Sekope Stuart v The State (Cr. App. 20 of 1989)
Wellburn and Others (1979) 69 Cr. App. R. 254

Appeal against acquittal in the Magistrates Court.

S. Hettige for the Appellant
Ms. G. Phillips for the Respondent

Fatiaki J:

On the 31st of March this Court after a full days hearing of the above appeal ruled that the appeal was dismissed with reasons to be given later. This I now proceed to do.

On the 2nd of October 1992 the respondent was acquitted by the Suva Magistrates Court of the following offence (as amended):

"STATEMENT OF OFFENCE

Official Corruption : Contrary to Section 106 (a) of the Penal Code Cap. 17.

PARTICULARS OF OFFENCE

A SERUVEVELI AISAKE on the 16th day of January, 1990 at Suva in the Central Division, being employed in the Public Service as a Customs Officer being charged with the performance of the duty of clearing goods for duty purposes in the Customs Dept. corruptly received property namely four pairs of soccer shoes and three pairs of jogging shoes from Yogesh Kaba s/o Moti Ram Kaba on account of assisting the said Yogesh Kaba s/o Moti Ram Kaba in clearing a consignment of jogging shoes which the said Seruveveli Aisake B did in the discharge of his duties".

The acquittal arose as a result of the learned trial magistrate upholding a submission of no case to answer made by learned counsel for the respondent (who was also defence counsel at the trial) at the close of the prosecution's case.

C

The petition of Director Public Prosecutions raises no less than 6 grounds of appeal against the acquittal of the respondent. However these may be conveniently summarised as being firstly, that the learned trial magistrate applied the wrong test in considering the submission of no case to answer and secondly, that the trial magistrate so interfered with the examination of the witnesses as D to cause a miscarriage of justice.

Learned State Counsel in advancing the first ground argued inter alia that the learned trial magistrate had improperly considered the contradictions in the evidence of the principal prosecution witness and the reliability or otherwise of the prosecution witnesses and their evidence led in support of the charge. These E questions about the quality of the evidence and reliability of the witnesses it was submitted are inappropriate considerations in a ruling on a submission of no case to answer.

Counsel referred to the decision of this Court in Temo Roy Sekope Stuart v The State (Cr. App. No. 20 of 1989) and Section 211 of the Criminal Procedure Code (Cap. 21) and formulated what he considered was the appropriate test or F question which the Court ought to ask itself in considering a submission of no case to answer namely:

> "Has the prosecution made out a prima facie case against the accused?"

G In Temo Roy Sekope Stuart's case this Court described the appropriate statutory question which a magistrate is required to ask himself as being:

> "Has the prosecution made out a case against the accused sufficient to require him to make a defence?"

The judgment then continues at p.3:

> "Existing case law has firmly established that the test at the no case to answer stage is objective in so far as it relates to the evidence produced by the prosecution in support of the charge and in regard to its sufficiency to convict as it would appear to a reasonable tribunal trying the case.
>
> However, in my view it is somewhat artificial to require a tribunal which decided both questions of law and of facts to engage in the mental gymnastics required by the existing decisions of the Courts by suspending any form of final adjudication on the obvious unreliability (if any) of the prosecution's evidence and merely consider whether there is sufficient evidence for a hypothetical magistrate if he believed the evidence, to convict."

Reference was also made by this Court to the decision of the Fiji Court of Appeal in Moidin v R. (Cr. App. No. 41 of 1976) in which the Fiji Court of Appeal expressly approved the English Practice Note formulated by the Lord Chief Justice for the benefit of Justices of the Peace in England and which is reported at [1962] 1 All E.R. 448.

The Practice Note reads so far as relevant for present purposes:

> "A submission that there is no case to answer may properly be made and upheld:
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> (a) Where there has been no evidence to prove an essential element in the alleged offence;
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> (b) When the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it."

The learned trial magistrate in his 8 page ruling on the submission of no case to answer very fully considered the evidence of the principal prosecution witness (P.W.2) and said at p.5 (p.35 of the record):

> "In my view the evidence of this witness is not worth anything and I am somewhat sure no Court will be able to act on this evidence."

Needless to say Section 211 of the C.P.C. requires the trial magistrate not only to be satisfied that a case is made out but also that the case is of such a nature and quality "sufficiently to require the accused to make a defence."

In State v Humphrey Chang (Cr. Case No. 8 of 1991) Jesuratnam J. in dismissing a charge of Official Corruption and upholding a submission of no case to answer

in the trial in the High Court, said at p.2 of his ruling:

> "An examination of S. 106(a) reveals that there are two parts or elements in the definition of the offence. The first part deals with the obtaining of property or benefit from some person and the second part sets out the quid pro quo or consideration on account of which the property or benefit is obtained. When these two elements are proved the corrupt act is made out."

From the foregoing it is clear that before an accused can be called upon to make a defence to a charge of Official Corruption it is incumbent on the prosecution to produce credible evidence to show not only that the accused received some property or benefit but also that the benefit or property was received on account of or in consideration for something done by the accused in the discharge of his duties.

In this latter regard it may be noted that after denying any discussions with the accused about the release of his goods PW2 in a complete turn-around claimed that he did have discussions with the accused regarding the release of the goods.

The nature and detailed contents of their discussion however are nowhere disclosed in PW2's entire evidence as it should have been and, more importantly, nowhere in the evidence of PW2 does he state that he told the accused what the contents of the boxes were or that they contained jogging shoes and not soccer shoes.

In Wellburn and Others (1979) 69 Cr. App. R. 254 Lawton L.J. approved the following direction of the trial judge when he said:

> "Corruptly is a simple English adverb and I am not going to explain it to you except to say that it does not mean dishonestly. It is a different word. It means purposefully doing an act which the law forbids as tending to corrupt."

In Gopal Krishna Gounder v. R 12 FLR 141 in which the appellant was charged under the predecessor to Section 106 (a) the Fiji Court of Appeal referred with approval to a passage of the judgment of the East African Court of Appeal in Attorney-General v. Shamba Ali Kajembe [1958] EA 505 in which the East African Court of Appeal said:

> "In our view, subsection (1) means exactly what it says and 'corruptly' means that the corrupt purpose or motive must be in the mind of the person who solicits receives, or obtains or agrees, ... irrespective of whether the other party to conversation, communication or transaction has a corrupt motive or not."

In my view it is not enough merely to prove that a favour had been shown by a civil servant in the discharge of his duties or that a benefit or property had been received by the civil servant but additionally it must be shown that the two elements are so linked in time and circumstances as to give rise to an irresistible inference that the transaction was a corrupt one. A

In R. v Millray Window Cleaning Co. which is briefly reported in (1962) Crim Law Review 99 the respondent company was convicted of Official Corruption but the alleged receiver was acquitted. Upon the respondent company's appeal against its conviction the Court of Appeal dismissed the appeal and held inter alia in relation to the alleged receiver: B

> "It was necessary for the prosecution to prove not only that he had given the favours but also that he had accepted the car as a reward. The explanation given by X (the receiver) unlikely though it might have been, was that he did not think he was getting anything in the shape of a consideration by getting the car; that he believed it was a car which the company had on its hands and that he was "doing them a favour" by taking the car." C

In this regard the learned trial magistrate said in his ruling at p.7 : D

> "Taking the Prosecution case at its best there is no evidence to show that the Accused knew that the goods were not soccer shoes. The entry and the declaration supported by an invoice all go to show that the consignment was soccer shoes. Accused had marked the code accordingly and PW2 paid the duty at 7½% which was the correct duty. It must be remembered that PW1 Dean, Senior Controller of Customs said Accused had not done anything wrong on the face of the documents. Accused would not even have suspected. Even in the entire evidence of PW2 he did not say he told accused the goods were not soccer shoes. In mere circumstances how could any one infer accused knew the goods were not soccer shoes ... E F
>
> Therefore I must find that no Court on the evidence could find accused had done a favour to PW2. If so the charge must fail and there can be no convictions."

Further the learned trial magistrate accepted the explanation given by the Accused in his police interview when he said: G

> "He had nothing to hide. He has said that he asked PW2 for soccer shoes for his Rugby Club and PW2 gave his shoes for the Club. I see no reason to reject his statement as false. Since the explanation was given it was for the investigation to verify

> the statement ... If that was not done then the statement of Accused must be accepted as true. In any event I cannot doubt his statement without reason."

A

Needless to say it does not in my view necessarily follow that every payment made or benefit conferred on a civil servant outside office hours is unlawful per se. It is only unlawful if there is a link between the payment and him doing something in pursuance of his public duty. The reward must relate to something done or omitted to be done in respect of a matter in which his employer is concerned. In other words the offence of Official Corruption lies not in showing favour to someone but rather in accepting a reward for doing so.

B

In this case the prosecution evidence taken at its highest establishes both elements but in the absence of any evidence that the accused knew or must have known that the contents of the boxes were not what the documentation presented described them to be, the evidence in my view fails to establish that vital link between the two elements necessary to sustain a prima facie case of Official Corruption.

C

In view of the conclusion I have reached on this principal ground of appeal it is not necessary for me to deal in any detail with the remaining ground.

D

Suffice it to say that the ground as argued was based on instances of questioning of prosecution witnesses by the trial magistrate which were not accurately recorded in the Court record or a complete failure on the magistrate's part to record the witnesses answers at all.

Such serious allegations by their very nature ought to have been grounded in an application supported by an affidavit. It was not and cannot be seriously considered by this Court. In this regard Counsel's attention is drawn to the Chief Justice's Practice Direction No. 2 of 1982 dated the 11th of March 1982 and entitled "Supplementation of Record of Proceeding in the Magistrate Court for purpose of Appeal to the Supreme Court".

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For the above reasons the appeal of the Director of Public Prosecutions was accordingly dismissed.

(Appeal dismissed)

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