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SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

DAY & BRIGGS v RUGALA

Blackburn CJ

19 May 1978 — (1978) 20 ACTR 3; 33 FLR 208

CRIMINAL LAW – OFFENCE TO TAKE A BRIBE 'DIRECTLY OR INDIRECTLY' – DISTINCTION – MEANING OF BRIBE NOT DEFINED IN STATUTE – ONE CHARGE REFERRED TO THE WORD 'DIRECTLY' – OTHER CHARGE DID NOT REFER TO THE WORDS 'DIRECTLY OR INDIRECTLY' – WHETHER CHARGES DEFECTIVE: *POLICE ORDINANCE* 1927, S10.

1. Accepting the contention of counsel for the appellant that the meaning of 'bribe' must be found at common law, each of the informations unequivocally implied that the accused accepted money corruptly, ie, was conscious that the purpose of the payment was to influence his official conduct. The word 'bribe' cannot mean less. For this reason the argument of counsel for the respondent, that s27(2) of the *Court of Petty Sessions ordinance* 1930 established the sufficiency of the informations was upheld.

2. In the present case, the alternative adverbial descriptions of the acts rendered criminal ('directly or indirectly') were contradictory of each other. That in itself was a fact which very strongly suggested that separate offences were created. Accordingly, the information against Riggs was on this score, unobjectionable, since it alleged that he directly took a bribe, but that the information against Day was bad because it did not indicate which of the two offences was alleged.

BLACKBURN CJ:

The *Police Ordinance* 1927 s10 reads as follows:

> A member of the police force who —
> (a) takes any bribe, either directly or indirectly ... shall be guilty of an offence.'

In the case of the appellant Riggs, the relevant words of the information are: 'that on the 9th day of September 1976 at Canberra in the said territory Gordon Phillip Riggs ... being a member of the police force did directly take a bribe, to wit the sum of $200'.

In the case of the appellant Day, the relevant words are: 'that on the 10th day of September 1976 at Canberra in the said territory Peter William Day ... being a member of the police force did take a bribe, to wit the sum of $24'.

In the first place, counsel for the appellants contends that both these informations are bad in that they do not sufficiently disclose the offence alleged against the appellants. There is no definition of the word 'bribe' and it is argued that the common law connotation of that word has to be applied. The essence of the offence of bribery at common law was put very shortly in argument in *R v Whitaker* (1914) 3 KB 1283 at 1290; 10 Cr App R 245 as follows: 'It is an offence at common law to bribe any public officer to act otherwise than in accordance with his duty.' Counsel contended that the information should show the nature of the corrupt purpose for which the bribe was intended. There is no doubt that at common law an indictment for taking a bribe included words which indicated the nature of the corrupt purpose; for example, see the note on *R v Beale* (1797). The argument was that since the statutory offence relied on in these informations is one which uses a term intelligible only in the light of the common law, the information itself must include some words indicating the particular nature of the improper purpose for which the bribe was taken, just as at common law the indictment had to include such words.

In answer to this argument counsel for the respondent relied principally on s27(2) of the *Court of Petty Sessions Ordinance* 1930. The words of this subsection are as follows: 'The description of any offence in the words of the Ordinance, law, order, by-law, regulation, or other instrument creating the offence, or in similar words, shall be sufficient in law.'

Accepting the contention of counsel for the appellant, that the meaning of 'bribe' must be found at common law, each of these informations unequivocally implies that the accused accepted money corruptly, ie, was conscious that the purpose of the payment was to influence his official conduct. The word 'bribe' cannot mean less. For this reason I uphold the argument of counsel for the respondent, that s27(2) of the *Court of Petty Sessions ordinance* 1930 establishes the sufficiency of the informations.

Counsel for the appellants submitted that the information against the appellant Day was bad in that it failed to specify whether the taking of the bribe was 'direct' or 'indirect'. The section creating the offence contains the words 'directly or indirectly'. The first comment to be made in this respect is that the legislature has, on any interpretation of the section, deliberately created a category of indeterminate reference, that of 'indirectly taking a bribe'. The phrase 'takes any bribe' has a discernible meaning; its reference can be determined by applying the common law. In my opinion the phrase 'indirectly takes a bribe' has no such determinate reference. The inescapable conclusion is that the legislature adopted this form of words with the intention that the courts would apply some principle (to be found or invented by the courts) to give meaning to an otherwise indeterminate category. A court must regard with great care a penal provision which, by design, has penumbra of imprecision, the legislative intention being to strike at morally reprehensible conduct but conveniently to refrain from specifying precisely what conduct is to be criminal, Counsel for the respondent contended. The consequence of that contention is that an information for the offence should, strictly speaking, include the words 'directly or indirectly' in every case; their omission would be a technical fault only, as the accused person could not complain of any substantial injustice arising from it.

Counsel for the appellants contended, that the words 'directly or indirectly' refer to two mutually exclusive methods of committing the offence, and therefore to two separate offences. If this contention is correct, an information under the section must specify whether the taking of the bribe is alleged to have been direct or indirect.

There are, as far as I can find, no judicial decisions on the use of the phrase 'directly or indirectly' in s5; perhaps I may say, by the way, that I am unable to see how the phrase in that section adds anything to the meaning which the section would bear without it.

I am clearly of opinion that the Ordinance should be construed as creating two different offences — directly taking a bribe and indirectly taking a bribe. I respectfully adopt the principle stated by Bray CJ in *Romeyko v Samuels* (1972) 2 SASR 529; (1972) 19 FLR 322 at 345 thus:

> 'The true distinction ... is between a statute which penalizes one or more acts, in which case two or more offences are created, and a statute which penalizes one act if it possesses one or more forbidden characteristics. In the latter case there is only one offence, whether the act under consideration in fact possesses one or several of such characteristics.'

In the case before me the alternative adverbial descriptions of the acts rendered criminal ('directly or indirectly') are contradictory of each other. That in itself is a fact which very strongly suggests that separate offences are created. I conclude, therefore, that the information against Riggs is on this score, unobjectionable, since it alleges that he directly took a bribe, but that the information against Day is bad because it does not indicate which of the two offences is alleged.

It was suggested, somewhat faintly, by counsel for the respondent, that I should treat the information against Day as including the word 'indirectly' because that was the form in which it was originally put. At the hearing in the Court of Petty Sessions application was made by counsel for the prosecution to amend the information by deleting the word 'indirectly', and no objection to this course was taken by counsel for the accused. The argument of counsel before me was that that amendment related only to the proceedings in the Court of Petty Sessions and that as the hearing in the Supreme Court is a re-hearing the appeal in the Supreme Court should be conducted on the basis of the information as originally laid. This argument involves yet another of the many procedural difficulties which arise from the fact that these proceedings, nominally an appeal, are in reality a re-trial *ab initio*. It would be absurd not to attribute to the Court of Petty Sessions an inherent power to amend an information by consent, especially since an information need not be in writing at all. As the appeal is against a conviction on the amended information, in my opinion the information as amended is the information before the court.