48/91

SUPREME COURT OF VICTORIA

PHILP v ROBESON

Southwell J

10, 11 July 1991

CRIMINAL LAW – BRIBERY – POLICE OFFICER – MONEY NOT OFFERED BY MOTORIST CORRUPTLY – MONEY TAKEN BY POLICE OFFICER CORRUPTLY – WHETHER BRIBERY – WHETHER MUST BE MUTUALITY OF INTENTION: *POLICE REGULATION ACT* 1958, S95.

When R., a police officer, intercepted a speeding motorist and told her she was liable to a fine of $135, the motorist offered R. $50 cash as part payment. R. took the $50 and did not give the motorist a Traffic Infringement Notice. Subsequently R. was charged under s95 of the *Police Regulation Act* 1958 with taking a bribe. At the hearing, the magistrate dismissed the charge on the ground that the prosecution had failed to prove that the offeror intended to induce the police officer to forgo his duty. Upon appeal on a question of law—

HELD: Appeal allowed. Dismissal set aside. Remitted for further determination.
Proof of bribery does not depend upon proof of mutuality of intention. Accordingly, it was not necessary for the prosecution to prove that the giver of the money acted corruptly in the sense that the money was paid as a relevant inducement.
***R v Dillon and Riach* [1982] VicRp 43; (1982) VR 434, applied.**

SOUTHWELL J: [*After setting out the facts, the nature of the charge and the relevant statutory provision, His Honour continued*] … **[6]** (I)t is clear that the magistrate upheld the principal submission of counsel for the respondent, that is, in substance, that a necessary element of the offence under s95 of the *Police Regulation Act* 1958 is that the offeror must act corruptly in the sense that by giving the money he must intend thereby to induce the policeman to forgo his duty. The correctness of that ruling is now in issue, although the question of law is stated in the order of Master Barker (made pursuant to Rule 58.09 on 8 May 1991) in somewhat different terms:

> "Was the Magistrate in error in finding that the charge had not been proved because the payment was not offered as a bribe and so there was no meeting of the minds?"

In this court Mr Johnston, for the applicant, submitted that the magistrate fell into error; that s95 involves two **[7]** discrete intentions; that of the giver of the money, and that of the receiver; that one, or other, or both could be convicted, that is to say, proof of the guilt of the receiver is not dependent upon proof of a guilty intention on the part of the giver. He referred to the definition of bribery in *Russell on Crime* 12th Ed. Vol.1, p381, which is as follows:

> "Bribery is the receiving or offering any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity."

Mr Johnson relied upon a number of authorities. In *R v Millray Window Cleaning Co Ltd* [1962] Crim LR 99 the Court of Appeal considered an appeal by M Co against a conviction for corruptly giving a reward to X, who, however, was found not guilty. It was said that the verdicts were inconsistent. The appeal was dismissed. No satisfactory note of the reasons are given in the report, but the commentator observed, "It is possible for a gift to be given corruptly and received innocently." Mr Johnston submitted that it follows that it is possible for a gift to be given innocently but received corruptly.

In *R v Andrews Weatherfoil Ltd* (1971) 56 Cr App R 31, a case dealing with statutory bribery, the Court of Appeal said at p44:

> "In cases of corruption it is possible to envisage a bribe being corruptly offered and innocently accepted and possible even the other way round."

In *Mills* (1978) 69 Cr App R 154, another statutory bribery case, the defence was that although the giver might be **[8]** corrupt, the receiver need not necessarily be so. The court said at p158:

> "Realising what we say is *obiter*; nevertheless we feel it right to say that in our judgment it is enough that the recipient takes the gift knowing that it is intended as a bribe."

If the observations had stopped there, it might be said that they provided support for the applicant's submission. However, the court continued:

> "By accepting it as a bribe and intending to keep it he enters into a bargain, despite the fact that he may make to himself a mental reservation to the effect that he is not going to carry out his side of the bargain. The bargain remains a corrupt bargain ...."

Taken as a whole, I do not regard those observations as helpful to the applicant. In the present case, the applicant has felt forced to accept as a fact that Mrs Sukiennik was not intending to bribe, but rather was advancing the money as part payment of a fine; a somewhat improbable story that may be, having regard to the fact that the respondent says her words were as quoted above, that is, "Please don't book me, here's $50."

In her evidence in court, as appears above, she tells a different story, but upon this appeal, Mr Johnston did not submit that her evidence must be disregarded. In those circumstances, I do not examine the question whether the court below would have been entitled to act upon the respondent's statement to his colleague as to the words used by Mrs Sukiennik, and so to find that there was indeed a corrupt bargain between them. I merely add that the view might well be taken that the statement of the respondent was an admission of what was said by the giver of the money at the time of the gift, and so was admissible as throwing light on the intention of **[9]** both, in much the same way as the statements of co-conspirators or persons acting in concert are admissible.

If Mrs Sukiennik had been charged as the giver, that statement out of court of the respondent could not have been admissible against her; however, it would have been open to the court to convict the respondent upon the evidence of his admissions, but at the same time, it might have been held that there was insufficient evidence to convict Mrs Sukiennik.

In *Criminal Fraud*, by Lanham, Weinberg, Brown and Ryan, at p209, under the heading *The Problem of Mutuality* the learned authors state:

> "What is the position if D accepts an apparent bribe where the initiator has no corrupt motive? It seems that D will be guilty if he or she believes that the other has a corrupt motive."

The authors then refer to an American authority *Sims v State* 198 SW 883 (1917) (referred to also in *People v Lyons* 122 NE2d 809; 4 Ill2d 396) (1954) from which report I take this reference to *Sims*:

> "The Court referred to the common-law rule that either the bribe-giver or the bribe-taker was indictable for bribery upon his own guilty participation in the transaction, regardless of the intention of the other, and concluded: 'the obvious purpose of the lawmakers in framing this statute was to follow the common-law rule and to make either of the parties to such a transaction guilty who gives or receives money to influence official action regardless of the intention of the other in giving or receiving the money.'"

In *Lyons* the Supreme Court of Illinois said:

> "The guilt of an accused is not measured by the intent of another but by his own intent. In the absence of clear and explicit statutory provisions we cannot ascribe to the legislature an intention to depart from this salutary principle, and to require a mutual criminal intent before either the giver or the accepter can be found guilty."

They are clear statements as to the common-law rule. A similar statement of the principle is seen in the **[10]** South African case of *R v Kok* (1960) (4) SA 638, where at p608, Holmes J agreed with an earlier statement:

> "that in cases of soliciting a gift as an inducement, the person solicited may never form the intention of making the gift, and that it is the state of mind of the person who solicits that must be regarded."

While the present case is not one where the prosecution alleged that the respondent solicited a bribe, that *dictum* seems to me to be consonant with the general principle relating to proof of *mens rea* so simply and clearly expressed in *Lyons*: "The guilt of an accused is not measured by the intent of another but his own intent." The authority in this country which seems closest to the point is *R v Dillon and Riach* [1982] VicRp 43; (1982) VR 434. That was a case where, under s176 of the *Crimes Act* 1958, Dillon and Riach were charged with corruptly giving and receiving, respectively, what may briefly be termed a bribe. Brooking J, in discussing the direction he proposed to give to the jury, said (at p435):

> "The direction if had been minded to give was that Riach acted corruptly if at the time he received the benefit he believed that Dillon intended that it should influence him to show or refrain from showing favour or disfavour in relation to the principal's affairs or business. It will be observed that this formulation is concerned not with the agent's knowledge of the giver's intention but with his belief."

After discussing a number of authorities (including two of those referred to above, *Millray* and *Andrews - Weatherfoil Ltd*) His Honour gave reasons for the proposed ruling in these terms (at p436):

> "In my view, an agent does act corruptly if he receives a benefit in the belief that the giver intends that it shall influence him to show favour in relation to the principal's affairs. If he accepts a benefit which he believes is being given to him because the donor hopes **[11]** for an act of favouritism in return, even though he does not intend to perform that act, he is, by the mere act of receiving the benefit with his belief as to the intention with which it is given, knowingly encouraging the donor in an act of bribery or attempted bribery, knowingly profiting from his position of agent by reason of his supposed ability and willingness, in return for some reward, to show favouritism in his principal's affairs and knowingly putting himself in a position of temptation as regards the impartial discharge of his duties in consequence of the acceptance of a benefit."

I recognise that it might well be argued that the reference to "knowingly encouraging the donor in an act of bribery" seems to import a consideration of the state of mind of the donor, who does not commit an act of bribery unless he has the necessary corrupt intention. However, that it is the belief of the receiver which is the critical fact to be proved, is shown in the passage of Brooking J's ruling immediately following that which is set out above. His Honour referred to the Court of Appeal decision in *R v Wellburn* (1979) 69 Cr App R 254 and then observed (at p436):

> "The Court of Appeal in that case approved a direction that 'corruptly' meant purposely doing an act which the law forbids as tending to corrupt. That description is answered by the receipt by an agent of a benefit which he believes is intended by the donor to influence him to show favour in relation to the principal's affairs."

If Brooking J had thought that proof of Riach's corruption depended in part upon proof of Dillon's corrupt motive, His Honour would doubtless have said so, for example, by referring to "a benefit which he corruptly believes is intended by the donor ..." The correctness of this ruling of Brooking J fell for consideration by the Full Court in *R v Gallagher* [1986] VicRp 25; [1986] VR 219; (1985) 16 A Crim R 215. After a review of the authorities, the Court said at p230:

> **[12]** "It therefore clearly emerges from the decisions and opinions of the Court of Appeal, and from what was said by Cussen J in *R v Scott* [1907] VicLawRp 84; [1907] VLR 471; 13 ALR 143 and Hood J in *R v Stevenson* [1907] VicLawRp 85; [1907] VLR 475; 13 ALR 383; 29 ALT 62, that it is the intention of the person either giving or receiving, as the case may be, at the time of the passing of the consideration which is relevant to whether the behaviour charged was corrupt within the meaning of the section."

The Full Court, at p231, specifically affirmed the ruling of Brooking J. Accordingly, there is powerful authority for the proposition that, unlike the crime of conspiracy, proof of bribery, whether at common law, or under statute, does not depend upon proof of mutuality of intention, or as it is put in the question of law before the court, a "meeting of minds".

Mr Findlay, for the respondent, submitted that the decision of the magistrate was correct; and it was said that even if it were to be held that the ruling on the question of law discussed above

was incorrect, nevertheless upon the facts relevant to other issues, it was open to the magistrate to dismiss the information. I confess that in the end I was not able to understand how this court could uphold the correctness of the magistrate's decision if he were to be held to have erred in the critical finding, that is, that the prosecution must fail for the reason that it had not been proved that Mrs Sukiennik had intended to offer a bribe.

However, on what seems to me to be the critical point, Mr Findlay submitted that a review of the authorities reveals no case, other than entrapment cases, where the offeror or giver acted without a corrupt motive. It was said that the entrapment cases were distinguishable in that, **[13]** while the giver did not have a corrupt motive, nevertheless he intends to induce the receiver to forgo, or at least to agree to forgo, his duty. It was submitted that in all cases there had been corruption on the part of the giver or at least the appearance of corruption. It was said that in this case, Mrs Sukiennik did not offer the money as a bribe, and there was nothing in the evidence to prove, as it must be proved, that the respondent knew it was offered as a bribe.

Mr Findlay expanded upon those principal submissions by referring to what were said to be a number of ways in which a bribe might be offered and received, which I do not regard as necessary now to repeat. He returned to his principal submission that without "a genuine bargain or meeting of the minds", then with the exception of an entrapment, there can be no bribery. I am unable to accept the suggested basis of distinguishing the entrapment cases. The police officer or agent who offers a bribe may not have any intention to induce the receiver to act otherwise than in accordance with his duty. If it were necessary to show that the giver had the corrupt motive usually found in bribery cases, no receiver could be found guilty in an entrapment case. Let it be assumed that X receives money separately from A, B, C and D, in seemingly similar circumstances and with the same guilty mind, on each occasion believing that the giver corruptly intends to induce him to forgo his duty; and let it be assumed that A is proven corruptly to intend the relevant inducement, that no more than suspicion exists as to the corrupt intention of B, and C did not have the **[14]** corrupt intention and D is a police officer involved in entrapment. As it seems to me, it would be quite illogical to find X guilty in respect to A and D, but not guilty in respect to B and C. Yet the upholding of the respondent's submissions in this case would lead to that result.

In the present case, neither counsel contended that differences in the various statutory provisions considered in the cases referred to, were of significance; nor was it said that the terms of s95 of the *Police Regulation Act* 1958 were so different from many of the other statutory provisions as to lead to the conclusion that the elements of the offence are significantly different from those other statutory offences.

It is to be remembered that the word "bribery" in s95 is not defined. It must accordingly be given its ordinary meaning. The precursor to s95 was s67 of the *Police Regulation Act* 1928, and the two sections are in virtually identical terms so far as is presently relevant.

In deciding whether *R v Dillon and Riach* provides guiding authority, the Court must consider whether the offence of "taking a bribe" under s95 has different elements from the offence under s176(1) of the *Crimes Act* 1958 which provides:

> "176.(1) Whosoever being an agent corruptly receives or solicits from any person for himself or for any other person any valuable consideration—
>
> (a) as an inducement or reward for or otherwise on account of doing or forbearing to do or having done or forborne to do any act in relation to his principal's affairs or business; or
>
> **[15]** (b) the receipt or any expectation of which would in any way tend to influence him to show or to forbear to show favour or disfavour to any person in relation to his principal's affairs or business shall be guilty of an indictable offence."

The offence in relation to giving a bribe is created by s176(2), which is in similar terms to s176(1). It was decided in *R v Dillon and Riach* that the receiver is guilty if he believes that the money is paid as a relevant inducement: it is, of course, not in fact paid "as an inducement" unless the giver has the necessary corrupt intention. But that is not to the point; it is received, and corruptly received, as an inducement, if the receiver believes that it is paid as an inducement. It is that guilty belief which injects criminality into the receipt of the money.

I do not see that the different terminology of the sections under consideration require any different reasoning. The common-law rule is, I believe, correctly stated in *Sims*, and *Lyons*, to which reference has been made. For the reasons given, I am of opinion that to make out the offence of bribery under s95 it is not necessary to prove that the giver acted corruptly, in the sense that the money was paid as a relevant inducement.

It follows that the magistrate was in error in holding otherwise, and that the question of law must be answered in the affirmative. The consequences of reaching this conclusion were not discussed before me. It seems to me that the matter should **[16]** be returned to the Magistrates' Court, in order that the magistrate should consider, *inter alia*, whether he is satisfied that the respondent believed that the money was paid as an inducement to the respondent to forgo his duty. The appeal will be allowed. The order dismissing the information is set aside. The matter is referred to the Magistrates' Court at Werribee to be further dealt with according to law. The respondent must pay the costs of the appeal. Upon application I would grant a certificate under the *Appeal Costs Fund Act*.

APPEARANCES: For the applicant Philp: Mr RJ Johnston, counsel. Director of Public Prosecutions. For the rspondent Robeson: Mr DJ Findlay, counsel. John Denton, solicitor.
