IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

407

CRIMINAL APPEAL NO. 24 OF 1991
(Criminal Case No. 8 of 1991)

BETWEEN:

THE STATE — Appellant

and

HUMPHERY KAMSOON CHANG — Respondent

Mr I. Mataitoga (DPP) for the Appellant
Mr Q. Bale for the Respondent

Date of Hearing: 11th November, 1992
Delivery of Judgment: 27th November, 1992.

JUDGMENT OF THE COURT

The Respondent was tried before the Suva High Court (Jesuratnam J.) on an information containing the following two counts -

FIRST COUNT

Statement of Offence

CORRUPTION: Contrary to Section 106(a) of the Penal Code, Cap. 17.

408

Particulars of Offence

HUMPHERY KAMSOON CHANG on or about the 17th day of October 1989 at Suva in the Central Division, being a person employed in the public service and being charged with performance of such duties by virtue of that employment, corruptly obtained the sum of $85,213.26 for the benefit of WING LEE MOTORS LIMITED, a limited liability company in which he is a director.

SECOND COUNT

Statement of Offence

ABUSE OF OFFICE: Contrary to Section 111 of the Penal Code, Cap. 17.

Particulars of Offence

HUMPHERY KAMSOON CHANG on or about the 4th day of October 1989, at Suva in the Central Division, being a person employed in the public service, authorised the issuance of a Fiji Government Local Purchase Order No. 050475, to DAN PAUL INDUSTRIAL SUPPLIERS, for the supply of Hino spare parts in the sum of $85,213.26, such an authorisation being an abuse of the authority vested in his office, thus prejudicing the interest of Niranjan Autoport Limited.

On the 1st of November, 1991 the Respondent was convicted on the 2nd Count and sentenced to 12 months's imprisonment suspended for 2 years.

There is no appeal against the conviction or sentence.

At the conclusion of the prosecution's case the Defence had submitted that there was no case to answer in respect of both Counts. The trial Judge upheld the submission in respect of Count 1 and acquitted the Respondent on that Count. He, however, ruled that the Respondent has a case to answer in respect of Count 2. The Respondent made an unsworn statement but elected not to call any witness. The trial Judge subsequently convicted and sentenced the Respondent as already stated.

The reasons for the acquittal on Court 1 appear in the following passages from the learned Judge's ruling on submission of no case -

> *' It seems to me that the charge in the first count is unsatisfactory. It is vague. It is incomplete. An examination of S.106(a) reveals that there are to 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. It is in this context that the word "corruptly" has been interpreted in England in cases such as Cooper v. Slade (1857 6 H.L. cas 746) and Smith (44 Cr. App. R.55). If these two elements are proved it is quite unnecessary to go further and prove that the act was done corruptly. "Corruptly" would then mean purposely or deliberately. There is no need to prove dishonesty because such would be the effect of the proof of the two elements themselves without more. But in this case the charge on Count 1 does not set out the consideration or on what account the accused obtained the sum of money. It seems to me that Section 106(a) envisages a bribe situation. It is derived from the Public Bodies Corruption Practices Act of England.*

409

In this case it appears from the prosecution evidence if the prosecution allegation is true that what the accused did was to resort to a subterfuge or a plan to make some money for himself on the sideline, so to say. Such an act is not caught up by Section 106(a). The facts in this case cannot be accommodated within the scope of the section. If there is no particular section in the Penal Code which covers the point in this case it does not mean that the prosecution can resort to this section merely because it contains the word "corruptly". This section contemplates a different situation of bribery or illegal gratification.

A count under Section 106(a) should also specify the duty with the performance of which the officer is charged. This section unlike sections 107, 108, 111 does not confine itself to a person employed in the public service. It goes on to refer to his specific duty as sections 109 and 110 do. The charge is therefore defective in this respect too. Indeed Section 106(a) is identical to Section 87 of the Criminal Code of Queensland except that in the latter code Corporation officials too are included. Carter in his "Criminal Law of Queensland" (Sixth edition) sets out in his forms of proceedings the particulars that have to be stated in indictments and informations laid under that section.

There is no such offence known to the law as "corruptly obtaining property or benefit". That clause is incomplete. It assumes meaning and shape only if and when the consideration on account of which it is done or omitted to be done is added. Otherwise it is meaningless.

In this case the defence did not raise any preliminary objection at the commencement of the trial that the charge in Count 1 did not disclose an offence or that the particulars were not sufficient. Even if the defence had not been prejudiced by the absence of such particulars it is clear to me that the prosecution evidence which was led did not provide any material on the basis of which it could be said that the accused obtained the sum on account of some quid pro quo which he did or omitted to do.

It seems to me that all the evidence led on the first count really relates to the allegations in the second count that the accused did an act in abuse of the authority of his office for the purpose of gain. It would appear that the prosecution was not satisfied with a felony which carries three years' imprisonment but was aspiring for a felony which carries seven years.

It is significant that the Police, who were in possession of all the evidential material, interviewed the accused under caution not in relation to corruption but in relation to abuse of office and mismanagement of funds. Even an amendment of the charge will be of no avail at this stage because the facts revealed by the evidence do not disclose any offence under Section 106(a). '

It is against the acquittal of the Respondent on Count 1 that the State has now appealed to this Count on the following grounds -

" *(i)* *that the learned trial Judge erred in law in finding that the information on Count 1 was so defective that it could not be amended;*

(ii) *that the learned trial Judge erred in law in ruling that Section 106(a) of the Penal Code was limited to bribery;*

(iii) *that the learned trial Judge erred in law in finding that the evidence did not disclose evidence of Corruption under Section 106(a);*

(iv) *that the learned trial Judge erred in law in failing to allow the assessors to decide whether the Respondent was guilty or otherwise of the offence of Corruption."*

The first ground of appeal challenges the Judge's ruling in that he erred in law in holding that the information on Count 1 was defective. The use of the words in the first ground of appeal that it *"was so defective that it could not be amended"* are not the Judge's words for he never said that anywhere. What the Judge said was -

> *"Even an amendment of the charge will be of no avail at this stage because the facts revealed by the evidence do not disclose any offence under Section 106(a)."* (p.4 of Record)

We are at this stage concerned with deciding whether the Judge was correct in holding that the charge was defective and not with the nature of evidence adduced.

As we see it the trial Judge found Count 1 to be defective for 2 basic reasons namely -

(1) Failure to set out or state in the charge the consideration or on what account the accused obtained the sum of money in question and

410

(2) Failure to specify the duty with which the accused was entrusted.

In the circumstances it becomes necessary to examine the provisions of Section 106(a) of the Penal Code, Cap 17 under which Count 1 was laid. The whole of this Section reads as follows:

> *"106. Any person who-*
>
> *(a) being employed in the public service, and being charged with the performance of any duty by virtue of such employment, corruptly asks for, solicits, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office; or*
>
> *(b) corruptly gives, confers or procures, or promises or offers to give or confer, or to procure, or attempt to procure, to, upon, or for any person employed in the public service, or to, upon, or for any other person, any property or benefit of any kind on account of any such act or omission on the part of the person so employed,*
>
> *is guilty of a felony and is liable to imprisonment for seven years."*

It is Mr Mataitoga's contention that the particulars of offence in Count 1 are properly framed although in answer to a question from the Court he did concede that the use of the word "such" before 'duties' did imply that the duties were previously mentioned or described. He said it is grammatically wrong and should be treated as a mere surplusage. He argued that the charge was neither vague nor incomplete and that it was laid in conformity with provisions of Sections 119 and 122(1)(b) of the Criminal Procedure Code Cap 21. Section 119 of the C.P.C. reads as follows:

> " 119. *Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."*

In his written submission Mr Mataitoga had further contended that *"Section 122(1)(b) of the Criminal Procedure Code permits the laying of information in exactly the same way as we have done. We were not required to specify in the particulars of offence, all the essential particulars --"* In fact there is no subsection (1)(b) in Section 122.

Section 122 of the C.P.C. contains the "Rules for the framing of charges and informations". Nowhere do they say that it is not essential to specify all the essential particulars in the particulars of offence. But Section 122(a)(ii) does say that the *"the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence----"* (our underlining).

We, therefore, proceed on the basis that in framing the charge it is essential to specify in the particulars of offence the essential particulars or ingredients of the offence. Unless this is done a charge will not comply with the requirements contained in Section 119 of the C.P.C. (already quoted) especially with regard to the need to give *"such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".*

Mr Mataitoga argued that even if it is necessary to specify

411

all the essential elements then the charge cannot still be faulted. He drew our attention to the East African Court of Appeal case of *The Attorney-General v. Shamba Ali Kajembe* [1958] EA 505 wherein the ingredients of a corruption charge under S.91 of the Tanganyika Penal Code (identical to our Section 106(a) of the Penal Code) were analysed and found to have 7 elements which required proof to support a conviction. These were -

> *"(1) that the accused is a person employed in the public service;*
> *(2) that he is charged with the performance of a duty by virtue of such employment;*
> *(3) that he corruptly solicits, receives or obtains or agrees or attempts to receive or obtain;*
> *(4) any property or benefit of any kind;*
> *(5) for himself or any other person;*
> *(6) on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him;*
> *(7) in the discharge of the duties of his office."*

It was also stated in that case that words quoted under (6) above namely

> *"on account of anything already done or omitted to be done or to be afterwards done or omitted to be done by him"*

require that the act or omission must be something effected or to be effected by the accused and imply that the general object must be understood by both parties. To that extent there must be mutuality. But the precise means to be employed to attain the object need not be stipulated, nor need there be any express agreement----(p.511).

We are of the opinion that Kajembe Case cited by Mr Mataitoga rather supports the Judge's view in the instant case.

We refer in particular to the words *"there must be mutuality"* used in Kajembe Case and compare them to trial Judge's use of the expression 'quid pro quo'. We are of the opinion that consideration on the part of the Respondent was an essential ingredient of the offence. We, therefore, agree with Mr Bale who supported the Judge's ruling, that the omission of a basic and fundamental ingredient of the offence from the particulars of offence cannot be cured by the general words of Section 119 of the Criminal Procedure Code. As to the need to include the essential ingredients of the offence of official corruption in the particulars of offence see *Gopal Krishna Gounder v. Reginam* 12 FIJI LAW REPORTS (1966) 141.

As far as the 2nd reason given by the Judge for holding Count 1 to be defective, namely the failure to specify the duty with which the Respondent was charged, we are of the view that this omission on its own does not render the charge defective. Even Mr Bale, the learned Counsel for the Respondent, readily conceded that the 'defect' is covered by Section 119 of the Criminal Procedure Code in that being employed in the Public Service gave sufficient information as to the nature of the Respondent's duties. We do not think that it could be legitimately argued that the Respondent was misled because his duties were not specified.

We, therefore, hold that the information in Count 1 was materially defective in so far as it omitted an essential ingredient of the offence, namely the element of consideration. It ought to have specified that the consideration for the obtaining of money by the Respondent for his company was his

deliberate departure from the procedures which it was his duty to observe.

The classic definition of "corruptly" is that it envisages an act done by a man knowing that he is doing what the legislature has forbidden, and doing so with an evil mind and evil intentions.

Bradford Election Petition No. 2 (1869) 19 L.T. 723 at 727.
Smith (1960) 2 Q.B. 423.

That definition may suggest that the use of "corruptly" in the information could fill the gap. It is, however, only possible to say that because we now know the nature of the case the prosecution set out to prove.

In the end the Judge's failure was in not amending the information (or inviting the prosecution to apply for amendment), but this is not the ground of the appeal.

There is no doubt that the trial Court has wide powers under Section 274 of the C.P.C. to make an amendment to any information at any stage of the trial. But as we said there is no appeal before us against the Judge's failure to make or give an opportunity to the prosecution to seek an amendment. In the circumstances we uphold the Judge's ruling that the information in relation to Count 1 was defective and as we are of the view that the defect was a material one we do not find it necessary to deal with the remaining grounds of appeal.

Appeal against acquittal dismissed.

.....
Sir Moti Tikaram
Vice-President

.....
Sir Peter Quilliam
Judge of Appeal

.....
Justice ~~Arnold~~ Amet
Judge of Appeal