

SHIU CHARAN v. THE POLICE

[Appellate Jurisdiction (Hyne, C.J.) September 19th, 1955]

Official Corruption—S. 91 (b) Penal Code—whether constable to whom money given an accomplice—proof that constable in the public service.

The appellant was charged before the Acting Senior Magistrate, Suva, with the offence of Official Corruption contrary to section 91 (b) of the Penal Code and with driving a motor vehicle without a valid driving licence contrary to sections 27 and 85 of the Traffic Ordinance, 1946.

On being discovered driving a motor vehicle without being in possession of a driving licence the appellant gave a constable £5 in money saying, "If you wash out the case I will give you £5." The constable took the £5 saying as he did so that he would report the matter to his superior officer.

The appellant's grounds of appeal were (*inter alia*)—

- (1) that the learned Magistrate failed to direct his mind that the one and only witness for the prosecution was an accomplice;
- (2) that there was no evidence to prove that the one and only witness for the prosecution was a person employed in the public service;

HELD.—1. The constable was not an accomplice since he had no *mens rea*.

2. It must be strictly proved that the person corrupted is in the public service.

Cases referred to:—

Davies v. Director of Public Prosecutions [1954] 1 A.E.R. 507.

[EDITOR'S NOTE.—

In the case of *Mohammed Ali v. The Police* (Criminal Appeal No. 12 of 1954—Fiji) which is not reported in this volume, the Court decided that it would hear further evidence as to whether or not the person alleged to have been bribed was in the public service.]

A. I. N. Deoki, for the appellant.

Justin Lewis, Acting Solicitor-General, for the respondent.

HYNE, C. J.—As to Count 1, the facts are briefly that the accused did give a person who was alleged to be an officer employed in the public service, a sum of money, namely £5, saying first, "If you wash out this case I will give you £5." The person in question took the £5, saying he would report the matter to his senior officer. This he did at the same time handing the money to his superior officer.

As to Ground 1, a recent pronouncement on the subject of what is an accomplice is to be found in *Davies v. Director of Public Prosecutions* (1954) 1 A.E.R. p. 507 in the head note to which it is stated, *inter alia*, that "a person called as witness for the prosecution was to be treated as an accomplice if he was '*particeps criminis*' in respect of the actual

crime charged in the case of a felony." In the present case the constable could not, I agree, be an accomplice, because he did not corruptly receive money, since he handed it over immediately to the senior police officer. The constable on the evidence had no *mens rea*.

This ground of appeal fails. As the police officer was not an accomplice then corroboration of his evidence is not necessary, nor, in the circumstances, was there any necessity for the Magistrate to apply his mind to the question of corroboration.

This question was raised in the case of *Mohammed Ali v. The Police* (Criminal Appeal No. 12 of 1954—Fiji). In that case there was considerable evidence from which it might be inferred that a certain person, a Sergeant, was a person employed in the Public Service. The Court held, however, that something more than inference was required to establish that the person in question was a person employed in the Public Service. It had been argued by Counsel for the appellant in that case that strict proof was required and the learned Solicitor General agreed that strict proof was proper.

It is set out in the charge from which the present appeal results, that Constable Kalivate Cavuilate is a person employed in the public service.

I think it must be concluded from the case of *Mohammed Ali v. The Police* that this must be strictly proved.

In the present case, but to a very much less extent, it may be inferred, as in the case of *Mohammed Ali v. The Police*, that the witness for the prosecution, Constable Cavuilate, was a person employed in the Public Service, but as I have said an inference is not enough. There must be distinct proof since the charge alleges that he was a person employed in the public service. Such evidence is missing. It has been submitted, therefore, that further evidence on this point should be obtained in the same way as the Court directed the taking of further evidence in the case of *Mohammed Ali v. The Police*. In that case it was submitted by the learned Solicitor-General that it was a case where fresh, or further evidence should be obtained under section 353 of the Criminal Procedure Code and no objection was offered by Counsel for the appellant. Nor was it argued that additional evidence could only be allowed in accordance with certain principles.

In the appeal now before this Court objection has been taken, and Counsel for appellant has submitted, that the taking of further evidence should not be allowed. He referred to the 33rd Edition of *Archbold* p. 330, para. 551, and submitted that section 7 of the Criminal Appeal Act, 1907, corresponds in substance to section 353 of the Criminal Procedure Code. I think they are, in substance, the same and the principle enunciated in *Archbold*, namely, that—

"The Court will only act upon this power in very special circumstances such as if it be shown that the proposed witnesses were not available at the trial or that some point which could not have been foreseen arose at the trial on which the evidence would have been material,"

should apply. It is clear from the wording of section 353 that there is a discretion in the Judge as to whether additional evidence shall or or shall not be called.

In *Mohammed Ali v. The Police* the discretion was exercised in such a way that the calling of fresh evidence was allowed but, as appellant's Counsel said, it does not follow that the Court's discretion must be so exercised in this case or every case. On the principles now submitted what the Court has to consider is whether something arose at the trial which could not have been foreseen. I think the answer must be in the negative. As I have said this point was not argued in the case of *Mohammed Ali v. The Police*, and no objection to the calling of fresh evidence was taken. It has, however, now been taken, and I feel bound to hold in view of such objection and in view of the fact that the point could have been foreseen, that I should not allow further evidence to be taken.

It may well be that the constable repeated particulars as to his status and employment after oath taken. There is, however, no record of this.

With considerable reluctance I am bound to allow the appeal. I think there are good grounds for the belief that appellant did bribe the person named in the charge but I feel that I cannot, in view of the principles which I think should be adopted and followed in this case, allow further evidence to be adduced.

Conviction and sentence quashed.