BABU PRASAD SHARMA

v.

REGINAM

[SUPREME COURT, 1965 (Mills-Owens C.J.), 5th, 19th February]

Appellate Jurisdiction

Criminal law—evidence—inducement to confession—person in authority—Penal Code (Cap. 8) s. 95 (b)—Emergency (Emergency Assizes) Regulations 1953 (Kenya)—Criminal Procedure Code, Part 9 (Kenya).
Criminal law—evidence—admission by conduct.

The appellant was charged with official corruption consisting in substance of offering a £10 bribe to a Driving Licence Examiner. The test had started in the office of the Sub-Accountant to whom the Examiner reported the offer of a bribe in the presence of the appellant. The Sub-Accountant told the appellant that he should not offer money for a licence and that he would get into trouble if the matter was reported to the police. The appellant remained silent for a while and then said that two or three persons had told him that they had got licences by giving money. At the suggestion of the Sub-Accountant the appellant apologised to the Examiner. The prosecution was undertaken on the complaint of a police officer. At the trial the magistrate held that the appellant had made an admission by conduct. It was argued on the appeal that the Examiner was a "person in authority" and what had been said amounted to an implied promise that if the appellant confessed no prosecution would result.

Held : 1. The evidence did not support the allegation that there was an implied promise that if the appellant confessed he would not be prosecuted.

2. In any event neither the Examiner nor the Sub-Accountant fell into the category of a "person in authority".

3. The magistrate was correct in viewing the words and actions of the appellant as an admission by conduct.

Cases referred to : *Muni Deo v. the Police* (Cr. App. No. 65 of 1956 — unreported): *R. v. Christie* [1914] A.C. 545; sub nom. *Public Prosecutions Director v. Christie* 10 Cr. App. R. 141 : *R. v. Mulindwa* (1949) 16 E.A.C.A. 148: *R. v. Keregwa* (1954) 21 E.A.C.A. 262: *Jioji Daudravuni v. R.* (1958-1959) F.L.R. 49: *Cornelius v. R.* (1936) 55 C.L.R. 235.

Appeal from conviction by a Magistrate's Court.

K. C. Ramrakha for the appellant.

B. A. Palmer for the Crown.

The record of evidence indicates that neither the Examiner nor the Sub-Accountant was attached to the police. Otherwise the facts appear sufficiently from the judgment.

A MILLS-OWENS C.J. : [19th February, 1965]—

The appellant appeals against conviction of an offence of official corruption, contrary to section 95 (b) of the Penal Code, consisting in substance of the offer of a bribe to a Driving Licence Examiner.

The appeal centres on the evidence of the Examiner and that of Mr. Singh, a Sub-Accountant, who were the first and second prosecution B witnesses respectively. Counsel for the appellant, Mr. Ramrakha, submits that the evidence on the record discloses that what was said by them to the appellant amounted to an implied promise that if he confessed or admitted the offence no prosecution would result; the Examiner was a 'person in authority', in that in a sense he was the prosecutor; whatever Mr. Singh said was said in the presence of 'the prosecutor' and therefore, if what he said amounted to an induce- C ment, it was in the same category as an inducement offered by 'the prosecutor'; in these circumstances the evidence as to the appellant's remarks and conduct, which were accepted by the learned Magistrate as amounting to 'admissions', was inadmissible; in any event a trial within a trial ought to have been held on the issue of admissibility.

D This is not the ordinary case of a direct conflict of evidence where one side is alleging a specific inducement in so many words, and the other is denying it; it is a case where it is urged that it is to be inferred, on a review of the evidence, that in substance and in fact there was a promise not to prosecute if the appellant admitted offering a bribe. Some account of the evidence must be given. According to the Examiner the appellant offered him £10 to pass him. E This was in the course of the test. He remonstrated with the appellant, asking him rhetorically did he know what a serious thing it was to offer a bribe. After some few other remarks the test was continued. The appellant had failed six times previously. The test had started at the office of the Sub-Accountant and on its completion the Examiner took the appellant before Mr. Singh at the latter's desk, and told Mr. Singh that the appellant had offered him F a bribe; he asked Mr. Singh to tell the appellant what a serious matter it was to bribe public officials. Some conversation ensued between Mr. Singh and the appellant, part of which the Examiner was able to hear. Then the appellant came over to the Examiner and apologised. On returning to Suva the Examiner reported the matter to his superiors. Under cross-examination he said that he heard the appellant tell Mr. Singh that he had heard that G others had offered bribes. The Sub-Accountant, Mr. Singh, corroborated the account of the appellant being brought to him. He said he told the appellant that he should not offer money for a licence and that he would get into trouble if the matter was reported to the Police. The appellant at first remained silent; then, according to Mr. Singh, he said that two or three persons had told him that they H had got licences by giving money. Then, according to the Sub-Accountant, he told the appellant to go and apologise to the Examiner. Later the Sub-Accountant reported the matter to his superiors. The

prosecution was undertaken in the usual way on the complaint of a police officer. In his evidence the appellant denied offering a bribe but agreed that he had told the Examiner that he had been told by two Muslim boys that 'they had brought him £5 — £10.' He further agreed that the Examiner told Mr. Singh in front of him (the appellant) that he 'was offering a bribe'. The examiner had said — 'if reported to the Police, might go to gaol'. Mr. Singh, the appellant said, told him 'not to say all this, he asked me to apologise to (the Examiner). He had no intention of giving a bribe. He agreed that he was not frightened of the Examiner or the Sub-Accountant and said nothing to indicate to the Magistrate that he succumbed to any inducement. When questioned by the Police he had denied the charge and had said he would say what he had to say before the Magistrate.

In the course of the prosecution case, Mr. Ramrakha had made objections to the admissibility of whatever was said by the appellant after he was brought before Mr. Singh, but the objection was never framed in the precise terms in which it is now framed, namely that there was an inducement to make an admission, consisting in an implied promise not to prosecute, held out by a person occupying the position of a 'prosecutor'.

The learned Magistrate in a careful judgment referred to the objection and said that defence counsel was correct in saying that there was no confession or admission to the Sub-Accountant. But there was no indignant denial or disclaimer on the part of the appellant, that is to say when he was brought before Mr. Singh; on the contrary the appellant spoke of two other persons offering bribes. There was an admission by conduct.

I have been referred to a number of authorities. Mr. Ramrakha referred to the case of *Muni Deo v. the Police* (C.A. No. 68/56) where the Crown did not support the conviction because the confession accepted in evidence was obtained by an inducement to the effect that if the money was repaid the appellant would not be prosecuted. I do not find that case of any assistance on this appeal. He referred to paragraph 1106 of *Archbold* (35th Edn.) to the effect that a promise not to prosecute if a confession is made is an inducement rendering the confession inadmissible, provided the promise is made by a person in authority. I accept that. Then he referred to paragraph 1124 (ibid) on the matter of accusations made in the presence of an appellant. This paragraph refers to the leading case of *R. v. Christie* [1914] A.C. 545 dealing with the evidential value of the behaviour of a person accused. As to that I agree with the Magistrate that in the present case there was a clear admission by conduct on the part of the appellant. Far from denying the accusation when brought before Mr. Singh he sought to justify his conduct by referring to cases where, he had been told, others had got licences by bribery; then he apologised to the Examiner. On the question of holding a trial within a trial Mr. Ramrakha referred to *Archbold* at paragraph 1115 and the cases of *R. v. Mulindwa* (1949) 16 E.A.C.A. 148, *R. v. Keregwa* (1954) 21 E.A.C.A. 262, and *Jioji Daudravuni v. R.* (1958-9) Fiji L.R. 49. As to the East African cases it is sufficient to quote the headnote to the 1954 case: "Where the trial court fails to hold a

'trial within a trial' as a result of which the accused is forced to give evidence generally and has thereby been prejudiced, the effect may be that, not only cannot the disputed statement not be looked at, but that the conviction cannot stand" (sic). Such a trial would have been with the aid of assessors — *vide* the Emergency (Emergency Assizes) Regulations, 1953 (Kenya Government Notice No. 931 of 1953 applying Part IX of the Kenya Criminal Procedure Code). In *Jioji D. v. R.* the Magistrate agreed to defer the question of admissibility of a statement until, it appears, after the defence case was heard. The learned Chief Justice, Sir George Lowe, referred to the well established practice of holding a trial within a trial as amounting to a rule of law and held the trial, before a magistrate, to be a nullity. On the present occasion I would only wish to go so far as to say that the defendant is entitled to know the strength of the case against him, and thus to have the ruling of the court on the issue of admissibility before being put on his defence. Where the trial takes place with assessors obviously prejudice may result unless the issues of admissibility and guilt are clearly separated.

Mr. Palmer, Crown Counsel, submits that on the facts of the present case there was no such inducement as alleged; the appellant was merely admonished but as a result tacitly acquiesced in the subject-matter of the admonition and thus made an 'admission by conduct' as the learned Magistrate had held; neither of the prosecution witnesses Nos. 1 and 2 were persons in authority — they were not concerned in the decision to prosecute and their conversations with the appellant were in no sense interrogatory; moreover if there was an inducement it was not an operative inducement — the appellant remained silent at first and then made his remarks about others having given bribes, but he did not purport to confess, certainly not in the terms corresponding to such an inducement as is now alleged. Mr. Palmer referred to the case of *Cornelius v. R.* (1936) 55 C.L.R. 235, 249 where the High Court of Australia held that in simple cases it was unnecessary to hold a trial within a trial. That was a case of trial with a jury, and dependent to some extent on the legislation of the State of Victoria.

In my view, the evidence does not support the allegation that there was a promise by implication that if the appellant confessed he would not be prosecuted, although the appellant may well have taken it that his apology put an end to the matter. Even if such a promise were to be implied, operating as an effective inducement, it would be of no effect as to the question of admissibility unless the Examiner, or the Sub-Accountant, was a person in authority. In my view neither of them fell into that category. The Examiner was a complainant simply in the sense that he was the injured party. His own reputation was at stake and he was justified in bringing the appellant before the Sub-Accountant to bring the matter to the light of day and thus to scotch any possibility of it being said at a later date that he acquiesced in the offer of a bribe. Mr. Singh occupied the position of a witness to the Examiner's integrity in the matter, at the latter's request. There was nothing in the Examiner's conduct and words when bringing the appellant before the Sub-Accountant to imply that if the appellant then confessed that would mean there would be no

prosecution. Nor when the Sub-Accountant told the appellant to go to the Examiner was he inducing a 'confession'; how could the appellant be said to be making a confession by apologising to the injured party who already perforce had first-hand knowledge of the matter?

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In my judgment, the learned Magistrate was perfectly correct in viewing the words and actions of the appellant as an admission by conduct within the principles laid down in *R. v. Christie* (supra). Taking the view of credibility which he did, he quite rightly convicted the appellant.

There is no appeal against the sentence to a fine of £20, to pay costs in the sum of £10, and binding over. B

The appeal against conviction is dismissed.

Appeal dismissed.