IN THE COURT OF APPEAL FOR EAST AFRICA

AT NATROBI

(Coram: Sir James Wicks CJ, Miller & Potter JJ A)

CRIMINAL APPEAL NO 64 OF 1979

BETWEEN

REPUBLIC.....APPELLANT

AND

ZAKARIA SHILISIA AGWEYU.....RESPONDENT

(Appeal against the decision of Cotran J in High Court Criminal Appeal No 647 of 1979 on 12th October 1979)

JUDGMENTOF THE COURT

The respondent was convicted by the Senior Resident Magistrate, Kisumu, on a charge of corruption, contrary to section 3(1) of the Prevention of Corruption Act. His appeal to the High Court was allowed, the conviction being quashed and the sentence set aside. The Republic appeals to this Court, asking that the decision of the High Court be set aside and that of the Senior Resident Magistrate be restored.

The respondent was District Magistrate III at Maseno District Magistrates' Court. Adipo Obama, a man aged about 80 years, filed a civil case (No 9 of 1979) in the Maseno District Magistrates' Court. On 12th June 1979, Adipo and his son, Pitalis Owuor, went to Maseno Court, their intention being to see if the respondent would accept a sum of money to decide the civil suit in Adipo's favour. Nearing the Court Adipo and Pitalis went to the house of a woman, Joyce Atieno Okech. The respondent, who was passing the house, went in. There (according to Adipo and Pitalis) on the civil case being mentioned, the respondent asked for Shs 1000 as a consideration for deciding it in Adipo's favour. In his unsworn statement made at the trial the respondent agreed that the meeting at Joyce's house took place; but he said that the discussion concerned the sale of charcoal, the respondent being licensed to deal in that commodity; that, after a discussion, Pitalis agreed to purchase 40 bags of charcoal at Shs 10 a bag, plus Shs 200 transport charges; and that Pitalis said that he would bring the Shs 600 to the respondent at the Court.

Adipo had engaged an advocate to prosecute the civil case at an agreed fee of Shs 1500, and had paid Shs 900; and the advocate required the balance before he would proceed with the case. On their way home from seeing the respondent, Pitalis became disturbed at the size of the sum demanded by the respondent and went to Kisumu police station where he reported the matter to Chief Inspector Mwangi Waithaka.

Three days later, on 15th June, Adipo and Pitalis went to Kisumu police station. There Adipo was fitted with a transmitting device and given four Shs 100 notes, the numbers of which had been recorded and which were dusted with chemical powder. Adipo and Pitalis then went with a police party to Maseno. At

Maseno market Adipo and Pitalis left the police party. Chief Ins Mwangi and Supt Kimeto went into a maize plantation with a receiving device and Ins James Kipkorir went to the Court compound to join a police woman, Elizabeth, who was already there. Adipo and Pitalis arrived outside the respondent's chambers and Adipo went in. When he was seen to come out Chief Ins Mwangi ran into the building followed by Supt Kimeto. There Cons Elizabeth pointed out the respondent's chambers; they went in, identified themselves to the respondent and told him that they had reason to believe that he had been given some money as a bribe and that he was to produce it. The respondent produced the four Shs 100 notes from his pocket and handed them to Supt Kimeto. On being checked they were found to be the notes handed by the police to Adipo and the respondent was arrested. The file in Civil Case No 9 was found on the respondent's desk; it was the only court file there. That is a summary of the evidence; but we must return to it later to consider certain aspects in greater detail.

In his judgment Cotran J found that the magistrate had misdirected himself on three matters: first, that he had failed to take into consideration major inconsistencies and contradictions in the prosecution case; secondly, that he had erred in the treatment of the supposedly accomplice evidence of Adipo and Pitalis, and their corroboration; and, lastly, that he commented unfavourably on the respondent's silence at the time of his arrest. We must consider these matters.

On the first matter (conflicts in the evidence), there was undeniably the meeting at Joyce's house. There is considerable difference in the evidence, whether the meeting was outside the house or inside, whether Joyce was present during parts of the conversation, whether Joyce was at the back of the house at one time, whether Joyce called the respondent to come to her house or he came uninvited. The magistrate considered these conflicts and we agree that these were what could be expected when witnesses give evidence of an event that they had no particular reason to believe would have to be remembered later. It is very relevant to appreciate that there is no conflict whatsoever on the basic facts of the events at Joyce's house, which were that the respondent met Adipo and Pitalis there on 12th June and that they had a conversation. The other conflict specifically mentioned was that Ins Kipkorir, Adipo and Pitalis said that on 15th June Adipo only went into the respondent's chambers, and Pitalis remained outside, whereas Cons Elizabeth said that Adipo and Pitalis both went into the respondent's chambers and came out together. She said, however, that when she saw Ins Kipkorir take up position she went into the courtroom where she sat and talked to Cpl Mutua; it was a friendly conversation during which Cpl Mutua offered to entertain her with beer. The judge observed that Cons Elizabeth saw the door of the respondent's chambers through a window of the courtroom. With respect, this was said in relation to there being background voices on the tape, one of which Cons Elizabeth identified as being hers; and her explanation was that the courtroom was opposite the respondent's chambers and a few feet from it, there being a window facing the door. Considering the conflict, the magistrate observed in his judgment:

> The evidence of Cons Elizabeth shows that she sidetracked. She accepted the kind invitation of Cpl Mutua, went and sat with him in the courtroom and soon got engrossed with him in "some general talk" that tempted or prompted the corporal to offer beer to this young and otherwise energetic, efficient and impressive lady.

The judge set out this passage in his judgment, but left the matter unresolved. What is the position when the evidence of one prosecution witness, although generally consistent with that of other prosecution witnesses, on one matter is in violent conflict with that of other prosecution witnesses? Such a conflict was considered in *Uganda v Khimchand Kalidas Shah* [1966] EA 30. There part of the evidence of a police officer was at variance with that of other prosecution witnesses. The magistrate considered the evidence, rejected the conflicting evidence, and accepted the evidence of the police officer on other matters and the first court of appeal reversed this finding. The court of appeal allowed a ground of appeal on this point saying:

> On this ground of appeal, we think that the judge was not justified in reversing the finding of the magistrate. The finding was essentially one of credibility, based largely on demeanour. The judge has not, we think, drawn a different inference from the facts, as he was entitled to do, but has rather substituted his own opinion for that of the trial magistrate …

On such matters the decision depends on the circumstances of the particular case. Here the judge did not draw a different inference from the facts. The magistrate had considered the evidence and indicated the relevant aspects (which we have set out above) in his judgment. It seems to us that Cons Elizabeth, having said that she watched the door to the respondent's chambers, and later said that, at that time, she went into the courtroom with Cpl Mutua, was a matter of credibility based on demeanour on which the magistrate's finding should not have been disturbed. In the result we are left with the facts as found by the magistrate, which were that Adipo went into the respondent's chambers where he was alone with the respondent and that Pitalis remained outside.

On the second matter (that the magistrate had erred in the treatment of the accomplice evidence of Adipo and Pitalis and its corroboration) in his judgment Cotran J said:

> It must be remembered that Adipo and Pitalis were not mere passive or mild participants in the crime but accomplices of the highest possible degree.

It was an undisputed fact that Adipo and Pitalis went to Maseno Court on 12th June with the intention of ascertaining whether the respondent would accept a bribe to decide a civil suit in Adipo's favour; and they both agree that on that day Adipo agreed to give the respondent a bribe for that purpose. It is also an undisputed fact that Pitalis changed his mind and persuaded Adipo to do likewise, and reported the matter to the police. The law concerning such conduct is well established and was considered in *R v Hasham Jiwa* (1949) 16 EACA 90. There reference was made to the leading case, *R v Mullins* (1848) 3 Cox CC 526, where it was held that, where a person entered into a transaction and pretended to aid the illegal designs for the purposes of betraying them, his evidence did not require corroboration as an accomplice. In *Hasham Jiwa's* case, following the principle laid down in *Mullins*' case, it was held (at page 93):

> Appellant's counsel has argued that Njoroge, because of his original criminal intent, comes within the second category of witness specified in *Mullins*' case. We disagree, for the reason that Njoroge became a genuine police spy before any offence had been committed by the appellant ...

Indeed we observe that in *R v Mills* (1978) 68 Cr App Rep 154, it was suggested that the principle goes even further and extends to circumstances where the bribe has been accepted. The Court said (at page 159):

> ... if the money is received in order to ... provide evidence for a policeman who is listening and may be taking a recording on tape of the conversation, then the man does not intend to keep the money and it would plainly not be corrupt.

Applying these principles to the case before us, although Adipo originally had a criminal intent, having become a genuine police spy before any offence had been committed, his evidence did not require corroboration.

This would have been the position before the amendment to section 3 of the Prevention of Corruption Act by the addition of a new subsection (2A) which is in the following terms:

> For the purposes of subsection (2) of this section, where a person gives, promises or offers any gift, loan, fee, reward, consideration or advantage to another person, knowing or having reasonable cause to believe that his doing so may lead to the doing of an act by that other person which constitutes an offence under subsection (1) of this section, he shall be taken to have acted corruptly.

The effect of this amendment is that the mere giving of a bribe, which leads to a doing of a corrupt act by the receiver, must be taken to have been done corruptly. Section 3(2A) was considered by this Court in *Josphat Mulwa Mukima v The Republic* [1977] Kenya LR 5, 7, where it was said:

> We do not think, however, that the scope of section 3 (2A) should be extended beyond the strict requirements of its literal construction. That subsection already has the effect that the giver of a

> bribe, whose motive may be innocent (eg a police agent as in this case or a person giving under duress) must nevertheless be taken to have acted corruptly.

In that case it was held that such evidence must, in normal circumstances, be treated as that of an accomplice and must be corroborated before it can be relied on. This case has been referred to on many occasions and as far as we can see the words "in normal circumstances" are overlooked. The effect of these words must be that under certain circumstances (and every case should be considered on its own facts), such evidence can be relied upon without corroboration. It must be remembered that section 3(2A) was enacted after the decision in *Sewa Singh Mandia v The Republic* [1966] EA 315, in which the plea that the appellant's motive was immaterial, provided that he had a corrupt intention, was accepted by the High Court. On rejecting that view this Court said (at page 318) :

> In the instant case, the offeree (the police constable) had shown himself to be already corrupt, and the payment made by the appellant was not made with the intention that it should operate on the mind of the constable to induce him to be corrupt. This being so, the appellants' state of mind which in our view includes motive and intention, seems to us to be an essential and material factor in determining whether, in making the payment, he was acting corruptly or not.

In our opinion it would be wholly unrealistic to apply the provisions of a section meant to correct a previous situation with regard to accused persons and to bring within the Act persons who had a corrupt intention (whatever the alleged motive), to an evidential situation so as to render a person an accomplice when, as was said in *Mills*' case, plainly he was not.

The question of corroboration of the evidence of such an accomplice was considered in the High Court case, *Ombere v The Republic* [1979] Kenya LR 215. The facts of that case were very similar to those before us, except that the magistrate's defence was that the money was given in payment for the repair of bicycles. In that case the Court suggested that:

> Whilst a real accomplice needs corroboration save in exceptional cases, a statutory accomplice simpliciter needs corroboration only in exceptional cases.

With this proposition we are in agreement. Even in a case where there are exceptional circumstances such an accomplice will generally require to be treated as one in the lowest possible degree. This aspect of these cases was considered in relation to police officer who set a trap in *Josphat Mulwa Mukima's* case [1977] Kenya LR 5 where it was said that to extend the operation of section 3(2A) to police officers would make it impossible for a police trap to be set. Equally to extend the "deeming" provisions of section 3(2A) in its application to the giver of a bribe would make it impossible for a police trap to result in a successful prosecution.

Despite the foregoing the magistrate looked for corroboration, as did the judge. The difference between them being that the magistrate found corroboration in (1) the giving, and the receipt by him, of the Shs 400, (2) the contents of the tape, (3) the respondent's silence, and (4) the file in Civil Case No 9 of 1979; and the judge found that none of these matters provided corroboration.

Considering the possible existence of corroboration of Adipo's evidence, in his judgment Cotran J said: "That the [respondent] received Shs 400 from Adipo is not in dispute". With the greatest respect. and we have no alternative but to point it out, that the respondent received Shs 400 from Adipo was not only in dispute, but it went to the very basis of the case for the prosecution and that of the defence. We are mindful that the judge might have made a slip. That this is not so is borne out by another passage in the judgment where the judge said that the giving and taking of the money was a non-issue.

As we have seen, the case for the prosecution was that on 12th June 1970 at Joyce's house the respondent demanded a bribe of Shs 1000 from Adipo, in return for which the respondent would decide Adipo's civil case in his favour. On 15th June Adipo was fitted with a transmitting device and given Shs 400 marked money. Adipo went into the respondent's chambers, Pitalis remaining outside. There, after a conversation relating to Adipo's case, Adipo gave the respondent Shs 400.

The defence case was that, on 12th June 1979 at Joyce's house, the respondent sold charcoal to Pitalis for Shs 600. That on 15th June Pitalis and Adipo together went into the respondent's chambers, Pitalis explained the shortage of money and gave the respondent Shs 400 in part payment for charcoal.

The relevance of who gave the respondent the Shs 400 is clear. If it was established that Adipo gave him the money, Pitalis not being present, the tape showing (and the respondent agreeing) that Adipo spoke about his civil case, the defence is an impossibility, and the Shs 400 must have been given as a bribe. If Pitalis and Adipo went into the respondent's chambers it is possible that Pitalis gave the Shs 400 to the respondent in payment for charcoal and the defence falls to be considered. It is now possible to understand the evidence as stated and accepted by the magistrate in his judgment.

The tape was played once only before the judge and, understandably, he did not think much of it. At the trial the tape was played many times, it was played during the taking of the evidence of every relevant witness. Adipo recognised his voice on it. Inspector Kimeto spoke of sequences, Chief Ins Waithaka spoke of operating the receiver and of sequences. Inspector Kipkorir spoke of Adipo entering the respondent's chambers and explained background noises on the tape, and Cons Elizabeth identified her voice. The relevance of this was that the voices on the tape were identified and so established the sequence.

Having analysed the evidence and found that Cons Elizabeth had "sidetracked", the magistrate accepted that Pitalis remained outside the respondent's chambers. The result was that Adipo and the respondent were the only ones in those chambers; it follows that, there being only two voices on the tape, these must have been those of the respondent and Adipo.

As we have said, Adipo and the respondent were alone in the latter's chambers. The part of the transcript of the tape of two voices were those of Adipo and the respondent and there was this:

> Voice A: About this case I am thinking very much, you see it started during the month of September, this year, upto now it is like that. I am thinking of my cattle, somebody is looking after my cattle, he does not take care properly, he robbed my cattle all of them two, and to rob like that ... "you are the people of this Court in our division and I was not given attach warrant don't you see it is difficult.
>
> Voice B:Yes.
>
> Voice A: So I asked you if you can agree to look into this case to get finished and anything that I get will give you like a man of nowadays.
>
> Voice B:You are Adipo Obama?
>
> Voice A: Hee Adipo Obama, Yes.

Although the magistrate said the tape was not perfect, he accepted it and relied on it. Under these circumstances, the receipt of the Shs 400 by the respondent from Adipo was corroboration of Adipo's evidence. The respondent in his unsworn statement said that Adipo spoke to him at length about his case and, of course, a defendant's own evidence may afford corroboration; see *R v Medcraft* (1932) 23 Cr App Rep 16. The magistrate accepted these matters and in our view there was evidence on which he could properly find that the tape, the receipt of the Shs 400 by the respondent and the file in Civil Case No 9 of 1979 individually was corroboration of Adipo's evidence notwithstanding that he had ceased to be an accomplice, findings which, with respect, should not have been disturbed by the judge.

There remains but one matter which we must consider. In his judgment the magistrate made adverse comment on the respondent's silence when police officers challenged him with the crime. In his judgment the judge observed that the comments were uncalled for and amounted to a serious misdirection. The judge referred to *Hall v R* (1971) 55 Cr App Rep 108, where reliance was placed on a paragraph from *Archbold's Criminal Pleading, Evidence and Practice* and it is unnecessary for us to go further than set

out part of the relevant paragraph (paragraph 1400) from the 39th edition of Archbold:

> There is no rule of law that evidence cannot be given of an accusation of a crime and of the behaviour of the defendant on hearing such accusation where that behaviour amounts to a denial of guilt. But though there is no such rule of law, the evidential value of the behaviour of the accused person where he denies the charge is very small either for or against him ...

In his judgment the magistrate, having made the observations objected to, said: "I am mindful of the fact that no accused person is bound to say anything at any stage." It can be said that in one sense the magistrate repaired the damage (if any, for there is no rule of law); but we must say that it is preferable that comments, which are later sought to be negatived, should not be made at all. In any event it could not amount to corroboration.

As we have said the basis of this case was that Adipo was alone with the respondent when Adipo gave and the respondent received the Shs 400. Under the circumstances of this case, Adipo's evidence did not, as we have held, require corroboration. Nevertheless the magistrate looked for corroboration, the judge did so, and we have also come to the conclusion that there was in fact corroboration. But because throughout a course has been adopted which was equally favourable to the respondent it does not mean that any useful purpose would now be served in ordering a retrial as Mr Oraro, who appears for the respondent, suggests.

After a careful analysis of the evidence the magistrate found corroboration on three matters: first that Adipo gave the respondent the Shs 400, second the tape, and third the presence of the file for Civil Case No 9 of 1979 in the respondent's chambers. As we have indicated, the magistrate's findings were supported by the evidence. On the first that Pitalis did not go into the respondent's chambers where the respondent received Shs 400 from Adipo, made the defence that Pitalis paid the Shs 400 to the respondent in part payment for charcoal impossible of belief. On the second, the playing of the tape to successive witnesses to identify their voices at particular stages, to support evidence that Pitalis did not go into the respondent's chambers, to establish that the two voices on the tape at the crucial stage were those of Adipo and the respondent, and that the conversation related to Adipo's civil case which was before the respondent; and third that Adipo's case file No 9 of 1979 being on the respondent's desk was the one referred to in the conversation recorded on the tape. With respect, these findings of fact being based on an assessment of the credibility of the witnesses and on findings of fact, should not have been disturbed by the judge.

We accordingly allow this appeal and set aside the judgment of the High Court. The appeal against the decision of the Senior Resident Magistrate is dismissed, and the conviction and sentence of fifteen months' imprisonment restored.

Appeal allowed.

Dated and delivered at Nairobi this 23rd January 1980.

S.J WICKS

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CHIEF JUSTICE

C.H.E MILLER

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR