



**IN THE COURT OF APPEAL FOR EAST AFRICA**

**AT NAIROBI**

**( Coram: Law Ag P, Mustafa Ag V-P & Musoke JA )**

**CRIMINAL APPEAL NO. 63 OF 1976**

**BETWEEN**

**JOSPHAT MULWA MUKIMA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

**( Appeal from the Judgment of the High Court (Nyarangi J) Dated 16th June 1976 in**

**Criminal Appeal No. 395 of 1975 )**

**JUDGMENT**

This is a second appeal from a conviction by a magistrate on a charge of corruption in office, contrary to section 3(1) of the Prevention of Corruption Act. It was alleged by the prosecution that the appellant, a driving test examiner in the Kenya Police force, demanded and received a bribe, Shs 400 from Denis Owuor, in connection with the holding of a driving test. The appellant had been under suspicion for some time, and a police trap was set. Owuor was supplied with five Shs 100 notes which had been marked and treated with chemicals. Immediately upon Owuor leaving the appellant's office, the police went in and arrested the appellant. The appellant's hands showed signs of the chemical used on the notes, and four of the marked and treated notes were found in his breast pocket. Owuor deposed that, after some bargaining, the appellant demanded Shs 400 as a bribe for the issue of a driving licence, which sum Owuor paid with four of the marked notes. The appellant denied having demanded or received the bribe and claimed that the money was planted on him by the police when he was arrested. The magistrate was left with no doubt that the appellant had in fact demanded and received a bribe; a first appellate court was of the same opinion; there was ample evidence to support these concurrent findings of fact which we normally regard as binding. The points of law relied on by Mr Waweru for the appellant amount to a submission that the appellant did not have a fair trial because, first, of the refusal of the court to order two prosecution witnesses to be recalled for further cross-examination. That we think was a matter within the discretion of the magistrate. The second point is that the magistrate refused to grant a witness summons for a defence witness, applied for at the very end of the case. No indication was given as to the identity of this proposed witness, or of the nature of his evidence. It would have been preferable for the magistrate to have granted a short adjournment to enable this witness to be called. Apparently the witness was required to prove an incidental matter which might have been relevant on the question of the complainant's credibility. In view of the abundant evidence to support the demanding and receiving of a bribe, we do not think the refusal to adjourn so as to enable this witness to be heard has been shown to have been prejudicial to the appellant or to have caused injustice.

Mr Waweru's third ground of complaint is that Owuor, who handed over the bribe, and the police officers who supplied the money for the bribe, were accomplices whose evidence must be corroborated. This submission, which is of substance, stems from section 3(2A) of the Prevention of Corruption Act, which is in the following terms:

For the purposes of sub-section (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 sub-section (1) of this section, he shall be taken to have acted corruptly.

This subsection is an amendment to the Act introduced in 1967, apparently to nullify the judgment of this Court in *Sewa Singh Mandia v The Republic* [1966] EA 315, when we held that the words "corruptly give" in section 3(2) of the Act meant that the giver, to be guilty of an offence, must have had a corrupt motive. The effect of the amendment introduced by subsection (2A) is that the intention or motive of the giver is now irrelevant. The mere giving of a bribe, which leads to the doing of a corrupt act by the receiver, is now to be taken to have been done corruptly, whatever the motive of the giver, even for instance if the giver is an agent of justice acting under the instructions of the police. We can only construe the subsection as we find it, in accordance with its clear and unequivocal words. We accordingly find ourselves in agreement with Mr Waweru to this extent, that Owuor must, according to the letter of the law, be taken to have acted corruptly, so that he is an accomplice in the offence allegedly committed by the appellant, with the consequence that his evidence must in normal circumstances be corroborated before it can be relied on. Owuor's evidence was, of course, amply corroborated by that of the police officers who set and sprung the trap. But Mr Waweru submits that these police officers were also in the position of accomplices. They made possible the giving of the money by Owuor to the appellant by supplying it and making the arrangements for the trap. As the giving of the money is by section 3(2A), "to be taken" as a corrupt act, so in Mr Waweru's submission, is in the supplying of the money, with the consequence that the police officers who set the trap are also accomplices whose evidence is therefore incompetent to serve as corroboration for Owuor's evidence.

This is an ingenious argument. Owuor was supplied with marked money to give to the appellant in the event of the latter soliciting a bribe. The appellant did solicit a bribe; this is we think confirmed by the discovery of four of the five marked notes in his pocket. Had the appellant not solicited the specific sum of Shs 400, Owuor would presumably have handed over all five notes. By "giving" this money, whether in reply to a solicitation or not, Owuor knew it would lead to the commission of an offence, and Owuor must be taken to have acted corruptly. Section 3(2A) so provides in explicit language. To this extent we agree with Mr Waweru's submissions. 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. We do not think that such a drastic provision should be extended so as to affect persons other than the one who actually "gives, promises or offers" a bribe. To do so would make it impossible for a police trap to be set, whatever the circumstances, by extending the deeming of corruption in section 3(2A) to police officers whose intention in setting a trap is not corrupt, but the reverse. If the Legislature had intended persons other than the actual "giver" to be caught by the stringent provisions of that section 3(2A), it would have so provided.

For these reasons we are of the opinion that although Owuor must, in terms of section 3(2A), be taken to have acted corruptly, we do not think that the police officers who made it possible for Owuor so to act by supplying him with the bribe money fall within this "deeming" provision, which applies only to the actual giver of the bribe. We do not consider the evidence of those police officers to be tainted, and we are satisfied as were the courts below that it provides full corroboration in all material particulars of the evidence of Owuor implicating the appellant.

*Appeal dismissed.*

**Dated and Delivered at Nairobi this 13th day of January 1977.**

**E.J.E.LAW**

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**AG. PRESIDENT**

**A.MUSTAFA**

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**AG. VICE PRESIDENT**

**J.S.MUSOKE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the  
original.

**DEPUTY REGISTRAR**