which could not have been any part of your known receipts or which could not have been property to

1977 *Present :* **Wimalaratne, J., Weeraratne, J. and Sharvananda, J.**

D. W. WANIGASEKERA, Appellant

and

THE REPUBLIC OF SRI LANKA, Respondent

S. C. 65/75—D.C. Colombo 246/B

Bribery Act, sections 22 and 23A—Person who can be deemed to have acquired property by bribery—Is it incumbent on the prosecution to prove that property was acquired as a result of bribery—Extent of burden of proof cast on defence of rebutting the presumption of bribery—Is section 26A retrospective ?—Imposition of penalty under section 26—When permissible ?

Interpretation of Statutes—Bribery Act—Amending Law No. 38 of 1974 —Retrospective legislation—Applicability of section 26A brought in by Amending Law—Interpretation Ordinance (Cap. 2), section 6 (3).

In a prosecution for bribery under section 23A of the Bribery Act the question was whether the accused was in terms of section 23A(1) a person who, even if he had acquired property in excess of his known income or receipts, can be *deemed to have acquired such property by bribery—*

Held : That the accused was a person who came within the ambit of section 23A(1).

Wimalaratne J.—"As a Director of the Bank of Ceylon during the relevant period he was a member of the governing body of a scheduled institution. Had he accepted a gratification as an inducement or reward for any of the purposes set out in section 22 (a) (i) (ii) or (iii), he would be guilty of the offence of bribery under section 22 (c). In view of his official status, he could also be considered as coming within the ambit of section 20(*b*) read with section 20 (a) (vi) as being a person who had he accepted a gratification as an inducement or reward for his procuring or furthering the securing of any grant, lease or other benefit from the government, would be guilty of the offence of bribery."

In view of the provisions of section 23A(2) that "income does not include income from bribery" it was contended that the 'basic fact', upon the proof of which the presumption created by section 23A arises, must be proved by the prosecution, and that in a prosecution under section 23A the 'basic fact' to be proved was that the accused acquired property and that such property could not have been acquired with his known income or receipts. Since "income does not include income from bribery" the burden was on the prosecution to prove that the property was acquired with income or receipts from "bribery", meaning the acceptance of any gratification in contravention of any of the provisions of Part II of the Act.

Held : (1) That the 'basic fact' to be proved was that the accused acquired property which could not have been acquired with any part of his sources of income or receipts known to the prosecution after investigation

acquired with any part of your known

Section 23A of the Bribery Act reads as follows :—

" (1) Where a person has or had acquired any property on or after March 1, 1954, and such property—

(*a*) being money, cannot be or could not have been—

(i) part of his known income or receipts, or

(ii) money to which any part of his known receipts has or had been converted ; or

(*b*) being property other than money, cannot be or could not have been—

(i) property acquired with any part of his known income, or

(ii) property which is or was part of his known receipts, or

(iii) property to which any part of his known receipts has or had been converted,

then, for the purposes of any prosecution under this section, it shall be deemed, until the contrary is proved by him, that such property is or was property which he has or had acquired by bribery or to which he has or had converted any property acquired by him by bribery.

(2) In subsection (1), "income" does not include income from bribery, and "receipts" do not include receipts from bribery."

Subsections 3 to 6 need not be reproduced at this stage.

The appellant sought to rebut the presumption of bribery by establishing that the acquisition of property and disbursements referred to in the indictment were made possible mainly as a result of the following sources of income and receipts, namely :—

	Rs.
(1) Outstanding balance of cash in hand on 1.4.70	99,545.93
(2) Money borrowed from four specified sources during this period	101,000.00
(3) Income from rents, Director's fees and wife's pension	128,866.00
(4) Income from the business of Wanigasekera and Co.	209,989.00
(5) Loan recovered	3,000.00
Total ..	542,400.93

hereto being properties which could not have been [illegible] known income or

The accused conceded that during the relevant period his living expenses as well as extraordinary expenditure, such as for travel abroad on two occasions, amounted to Rs. 113,170 leaving a balance of Rs. 429.230.98, which he said was his "known income and receipts" during the relevant period and which was quite sufficient to make the acquisitions and disbursements amounting to Rs. 402,564.25.

The learned District Judge has held that—

(1) that the accused did not have a cash balance of Rs. 99,548.98 or any sum whatsoever on 1.4.70 ;

(2) that the amount of Rs. 101,000 claimed by the accused as loans from four specified sources were not loans, but monies received by him for a sinister purpose ;

(3) that the sum of Rs. 128,866 claimed as income from rents, Director's fees and wife's pensions was a genuine claim ;

(4) that the income from Wanigasekera and Co. was only Rs. 33,061 and ;

(5) that the accused received a sum of Rs. 3,000 in repayment of a loan.

The total income and receipts of the accused during the relevant period was therefore only Rs. 164,927. After deducting the sum of Rs. 113,170 which constituted the living and extraordinary expenditure incurred by the accused the balance sum of Rs. 51,757 constituted his "known income and receipts". The District Judge has therefore concluded that the further sum of Rs. 351,407.25 utilised by the accused to make the acquisitions and disbursements "could not or cannot have been part of his income or receipts", and was therefore acquired by him by bribery. He has accordingly convicted the accused and sentenced him to 7 years rigorous imprisonment, to a fine of Rs. 5,000, to an additional fine of Rs. 354,375.51 (under section 26 A of the Act), and to a penalty of Rs. 354,375.51 (under section 26 of the Act). From this conviction and sentence the accused has appealed.

. s section 23 A is a departure from the established principles of criminal jurisprudence relating to the burden of proof, and as it is contained in an Act the object of which is to provide for the prevention and punishment of Bribery, it is necessary to have a clear analysis of the section.

The comprehensive legal submission made by learned counsel on the scope of this section has revealed that the following questions arise for determination :—

(*a*) whether the accused is a person who, even if he acquired property in excess of his known income, can be deemed to have acquired such property by bribery ? ;

(*b*) in view of subsection (2) that " income does not inlcude income from bribery ", whether it is incumbent on the prosecution to prove the fact that property was acquired as a result of bribery ? ; and

(c) the extent of the burden of proof cast upon the defence of rebutting the presumption of bribery.

Not every person who has acquired property which could not have been acquired from his known income or receipts will be deemed to have acquired such property by bribery. A Bench of five judges of this Court has held, in the case of *Attorney-General v. R. M. Karunaratne,* (S.C. 16/74, D.C. Colombo B/75—S.C. Minutes of 17.6.77), that only certain categories of persons will come within the ambit of section 23A. In the course of his judgment Samerawickrema, J. said, " I would give the term 'any person' in section 23 A the restricted meaning of a person whose receipt of gratification or money will render him guilty of bribery under the relevant provisions (of the Bribery Act) ". He categorised those persons as,

(i) 'officials' such as judicial and public officers, members of the House of Representatives and of Local Authorities, and members of scheduled instituions ; they would be caught up under sections 14, 15, 16, 17, 19, 21 and 22 ;

(ii) any person who accepts any gratification or reward for his withdrawing a tender made by him for a contract with the Government under section 18 ;

(iii) any person who accepts a gratification as an inducement or reward for his doing any of the acts set out in section 20 (*a*) (i) to (vii) ; in regard to this third category too, Samerawickrema, J. would give a restricted meaning to include only such persons who have been " in the habit of doing or has done " any act or acts set out in the subsection in respect of the doing of which, had he accepted a gratification or reward, he would be guilty of bribery under section 20 (*b*).

I am in respectful agreement with the reasoning and conclusions of Samerawickrema, J. Applying this test to the present case it is quite clear that the accused is a person who comes within the ambit of section 23A. As a Director of the Bank of Ceylon during the relevant period he was a member of the governing body of a scheduled institution. Had he accepted a gratification as an inducement or reward for any of the purposes set out in section 22 (*a*) (i), (ii) or (iii) he would be guilty of the offence of bribery under section 22 (*c*). In view of his official status he could also be considered as coming within the ambit of section 20 (*b*) read with section 20 (*a*) (vi) as being a person who, had he accepted a gratification as an inducement or reward for his procuring or furthering the securing of any grant, lease or other benefit from the Government would be guilty of the offence of bribery. I would follow the view expressed by H. N. G. Fernando, C.J. in *Gunesekera v. The Queen*, 70 N.L.R. 457, and give the words 'other benefit' in this subsection a wide meaning.

Mr. Pullenayagam's main submission has been that where a presumption arises at common law or is created by statute the basic fact upon the proof of which the presumed fact arises, must be proved by the prosecution. He refers to the definition of a presumption as denoting a conclusion that a fact (conveniently called the 'presumed fact') exists which must be drawn if some other fact (conveniently called the 'basic fact') is proved or admitted. *Cross on Evidence* (3rd Ed.), p 101. It is only on proof of the basic fact that the burden shifts to the defence to rebut the presumed fact; and in criminal proceedings the prosecution is obliged to prove the basic fact beyond reasonable doubt. According to his analysis of section 23A the basic fact that has to be proved is that the accused acquired property and that the property acquired cannot be or could not have been acquired with his known income or receipts. As, according to the same section "income does not include income from bribery" the burden on the prosecution is to prove that the property was acquired with income or receipts from "bribery", meaning the acceptance of any gratification in contravention of any of the provisions of Part II of the Act.

Mr. Sarath Silva, Senior State Counsel, who argued the appeal for the respondent, contended that the words "known income or receipts" have a special meaning in the context of the Bribery Act. The words income and receipts have been given a negative definition, as not including income from bribery and receipts from bribery. Bribery means the acceptance

of any gratification in contravention of Part II of the Act, and therefore "known income or receipts" means income or receipts not being proceeds obtained by a contravention of Part II. Accordingly "known income or receipts" means income or receipts *known to the prosecution after investigation.* He supported his argument by reference to a decision of the Indian Supreme Court where this interpretation has been given to similar words contained in section 5 (3) of the Prevention of Corruption Act, No. 2 of 1947. Section 5 (1) of the Act defines the acts that go to constitute the offence of "criminal misconduct" which a public servant may commit in the discharge of his duty, whilst section 5 (2) specifies the punishment for such offence. Section 5 (3) reads as follows :—

> "(3) In any trial of an offence punishable under sub-section (2) the fact that the accused person or any other person on his behalf is in possesstion, for which the accused person cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the Court shall presume, unless the contrary is proved, that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction therefor shall not be invalid by reason only that it is based solely on such presumption."

In the case of *C. S. D. Swami v. The State* (1969) A.I.R. (S.C.) p. 7, dealing with the argument that the prosecution had not led evidence to show as to what were the known sources of the accused's income, Sinha, J. said :

> "Now, the expression "known sources of income" must have reference to sources known to the prosecution on a thorough investigation of the case. It was not, and it could not be, contended that 'known sources of income' means sources, known to the accused. The prosecution cannot in the very nature of things, be expected to know the affairs of an accused person. Those will be matters 'specially within the knowledge' of the accused, within the meaning of s. 106 of the Evidence Act."

Mr. Pullenayagam, whilst conceding the correctness of the position that "known income or receipts" means income or receipts from sources known to the prosecution after investigation, put forward the argument that when the accused, in reply to a query by the Bribery Commissioner, submitted particulars of his income and receipts, the Bribery Commissioner had an opportunity of verifying the truth of the statements contained

therein ; and if, after investigation he found any item of income or receipts not to be the proceeds of a transaction which it purported to be, then it was for the prosecution to establish that such income or receipts were the proceeds of bribery. He illustrated his submission by reference to the sources of income and receipts according to accused's statement D 22, namely, the cash in hand at the commencement of the relevant period, the loans obtained from specified sources and the income from the accused's business during the relevant period. If the prosecution was not satisfied, after investigation, of the genuineness of those transactions then, in discharging the burden which rested on it of proving the basic fact, it was incumbent on the prosecution to establish not merely that they were not what the purported to be, but also that they were proceeds of transactions tainted with bribery.

An interpretation of the section based on this submission would defeat the very purpose for which the section was included in the Bribery Act. As observed by Samerawickrema, J. " to require proof that such an individual has in fact received a reward would be to defeat the purpose of section 23A which is designed against a person in respect of whom there is no proof of the actual receipt of a gratification, but there is presumptive evidence of bribery". The same view has been taken by the Supreme Court of India in *C. J. Emden v. State of Uttar Pradesh*, A.I.R. 1960 S.C. 548. Section 4(1) of the Indian Prevention of Corruption Act, 1947, runs thus :

> "Where in any trial of an offence punishable under s. 161 or s. 165 of the Indian Penal Code it is proved that an accused person has accepted or obtained or has agreed to accept or attempted to obtain, for himself or for any other person, any gratification (other than legal remuneration) or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained, or agreed to accept or attempted to obtain, that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in the said s. 161, or, as the case may be, without consideration or for a consideration which he knows to be inadequate."

It was contended that the use of the word 'gratification' emphasised that the mere receipt of any money does not justify the raising of a presumption thereunder, and that something more than the mere receipt of money has to be proved. The court, however, observed : "If the word 'gratification' is construed to

mean money paid by way of a bribery then it would be futile or superfluous to prescribe for the raising of the presumption. Technically it may no doubt be suggested that the object which the statutory presumption serves on this construction is that the court may then presume that the money was paid by way of a bribe as a motive or reward as required by section 161 of the Code. In our opinion this could not have been the intention of the Legislature in prescribing the statutory presumption under section 4 (1)." The Court further observed: "It cannot be suggested that the relevant clause in section 4 (1) which deals with the acceptance of any valuable thing should be interpreted to impose upon the prosecution an obligation to prove not only that the valuable thing ha been received by the accused but that it has been received by him without consideration or for a consideration which he knows to be inadequate. The plain meaning of this clause undoubtedly required the presumption to be raised whenever it is shown that the valuable thing has been received by the accused without anything more. If that is the true position in respect of the construction of this part of section 4(1) it would be unreasonable to hold that the word 'gratification' in the same clause imports the necessity to prove not only the payment of money but the incriminating character of the said payment ". The view was affirmed in the subsequent case of *Dhanvantrai v. State of Maharashtra*, A.I.R. 1964 S.C. 575.

I am therefore of the view that the 'basic fact' required to be proved in a prosecution under section 23A of the Bribery Act is that the accused acquired property which cannot or could not have been acquired with any part of his sources of income or receipts known to the prosecution after investigation; the prosecution is not required to prove that the acquisitions were made with income or receipts from bribery.

The third submission made on behalf of the appellant relates to the extent of the burden of proof which rests on an accused person to rebut the presumption. "Whenever reliance is placed on a rebuttable presumption two legal rules are involved. First there is what may be termed the rule of presumption according to which the presumed fact *must* be found to exist until evidence tending to disprove it is adduced, and secondly there is the rule which prescribes the amount of rebutting evidence required". *Cross on Evidence*, p. 104. Mr. Choksy's complaint is that the learned District Judge has not considered at all the rules which prescribe the quantum of evidence required to rebut the presumption. This rule has been set down in numerous cases, of which I may refer to a few. By section 2 of the English Prevention of Corruption Act, 1916, a consideration given to a person in the

employment of a Government Department by the agent of a person holding a contract from a Government Department is to be deemed to be given corruptly unless the contrary is proved. In construing this section in *R v. Carr-Braint* (1943) 2 A.E.R. 156, Humphreys, J. stated the judgment of the court in the following terms :—"In any case where, either by statute or at common law, some matter is presumed 'unless the contrary is proved' the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving a case beyond reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish" (at 158).

The Supreme Court of India has taken the view that a presumption of law cannot be successfully rebutted by merely raising a probability, however reasonable, that the actual fact is the reverse of the fact which is presumed. Something more than a reasonable probability is required for rebutting a presumption of law. The bare word of the accused is not sufficient and it is necessary for him to show that his explanation is so probable that a prudent man ought, in the circumstances, to have accepted it. This view is based on the difference between a presumption arising under section 114 of the Evidence Act and the presumption arising under section 4 of the Prevention of Corruption Act. In the former case it is not obligatory upon the court to draw a presumption as to the existence of one fact from the proof of another fact, whereas in the latter case, the court has no alternative but to draw the presumption. See *State of Madras v. A. Naidyanatha Iyer*, A.I.R. 1958 S.C. 61 ; and also *Dhanavantrai's Case* (above).

In an appeal from the Federal Court of Malayasia *Public Prosecutor v. Yuvaraj*, 1970 A.C. 913, the Privy Council regarded the Indian decisions as imposing too onerous a burden of proof on the accused, and held that where an enactment creating an offence expressly provided that, if other facts were proved, a particular fact, the existence of which was a necessary factual ingredient of the offence should be presumed or deemed to exist unless the contrary is proved "the burden of rebutting such presumption is discharged if the court considers that on the balance of probabilities the gratification was not paid or given and received corruptly as an inducement or reward as mentioned in section 3 or 4 of the Prevention of Corruption Act, 1961, (Malaysia)".

The standard of proof as laid down in *Carr Briant* and *Yuvaraj* (above) appear to be more consonant with our criminal jurisprudence than the standard required under the Indian decisions. Exactly the same view was expressed, although obiter, by Samerawickrema, J. in Karunaratne's case (above) when he said : " What a person (accused) has to prove is that a property was not acquired by bribery or was not property to which he had converted any property acquired by bribery. The ordinary and usual method by which a person may prove this is by showing the source from which he acquired the property and demonstrating that it was not by bribery. As this is a matter in which the onus is on the accused person, it will be sufficient if he establishes it on a balance of probabilities ".

Dealing with the degree of cogency which evidence must reach in order that it may discharge the burden in a civil case, Denning, J. said in *Miller v. Minister of Pensions* (1947) 2 A.E.R. 372 at 374 : "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say : 'we think it more probable than not', the burden is discharged, but if the probabilities are equal, it is not ".

If the tribunal is reasonably satisfied, that is, satisfied to the extent that it can say " we think it more probable than not that the accused acquired the property by proceeds other than income or receipts from bribery " then the accused is entitled to an acquittal.

It has been submitted on behalf of the appellant that the learned Judge's findings that the appellant's known income or receipts was only Rs. 51,757.00 and consequentially that the sum of Rs. 354,375.51 should be deemed to be money acquired by bribery have been reached by refusing to regard several items of income and receipts proved by the accused to have been obtained by him by lawful means and from lawful sources. Learned Counsel complains that the Judge has not only failed to take into consideration several documents produced at the trial which contain contemporaneous entries which support the truth of the accused's explanations, but has also misdirected himself on conclusions of fact reached by him due to failure to consider relevant aspects of the evidence on those points. It is also submitted that the Judge has erred in placing too heavy a burden on the accused in rebutting the presumption of bribery.

The learned Deputy D.P.P. in addressing the Judge at the conclusion of the evidence submitted that " in a matter where the accused has to prove certain matters under section 23A of the

Bribery Act, the accused need not prove whatever he has to prove beyond reasonable doubt, but it will suffice if he makes it appear to be probable and worthy of acceptence by Court". The learned Judge, in dealing with the presumption states in his judgment, "Quite clearly, this is a well defined and unambiguous departure from the established principle of criminal jurisprudence that the burden always lies on the prosecution to prove all the ingredients of the offence charged, and that the burden never shifts to the accused to dispute the charge framed against him. Secondly, until such time as the accused himself proves the contrary the statutory presumption created by this provision continues to operate. I am more than satisfied on the evidence led in this case that the accused had failed to displace this statutory presumption by his explanations which I have held to be false and false to his knowledge. In the result the accused had failed to satisfy Court that such property was not acquired by bribery or is not property to which any property acquired by bribery had been converted."

In this background it is necessary for us to examine the documentary evidence which the appellant alleged has been ignored by the learned Judge, in order to determine whether there is proof on a balance of probability that the items of evidence that have been struck out by the Judge ought not to have been struck out. But in such examination we cannot ignore the Judge's finding on several matters that transpired in evidence which impeached the credibility of the accused. He has, in the course of the judgment, dealt with eleven such matters, of which we may refer to just a few in order to base our own judgment. The consideration for the purchase of the N'Eliya property was paid by the accused to the vendor W. H. de Silva by two drafts of the Mercantile Bank for Rs. 119,000 dated 10.9.71. He said that he had with him the necessary cash to obtain the drafts. He had obtained a loan of Rs. 31,000 from the Maldivian National Trading Corporation, a further loan of Rs. 20,000 from Collettes, and Rs. 50,000 from an overdraft account at the same bank. But it transpired that the "loan" of Rs. 31,000 was received by him well after the date of N'Eliya transaction, and that he had reached the limit of overdraft facilities well before that date, so that he could not have drawn Rs. 50,000 on that account. He then made an attempt to show that he may have deposited cash with the bank, and that he may have brought the cash from home, but his statement of accounts completely discredited him with regard to the availability of so much cash.

The only income from his business of Wanigasekera and Co. for the year ending 31.3.74 was a sum of Rs. 112,500 which according to him was paid to him in May 1973 by Mr. G. M. Topen,

General Manager of the firm of Harrison and Crossfield and which constituted an "advisory fee" for financial advice given by him to that firm in early 1972. The financial advice was with regard to the capital structure of that firm, and the advice was given not in writting, but at a business discussion he had with Topen. The accused admitted that he did not care to ascertain how this figure of Rs. 112,500 was arrived at even when Topen telephoned him on 18.5.73 to give him the glad news that they had decided to pay him that sum in connection with the sale of their Prince Street building to the Central Bank. That building had been sold on 26.3.73 for a consideration of Rs. 4,500,000 and Rs. 112,500 represented 2½% of the sale price. The accused at first denied any knowledge of the sale price of that building, but was later constrained to admit that Topen mentioned a figure of four million rupees or thereabouts. The learned Judge's remarks that "attempts made by the accused in the early part of his evidence in cross examination to pretend not to know the nature of this payment were designed to give an impression to court that his part in the entire transaction was that of a mere general financial adviser", and that " the answers of the accused were given in a pernicious but futile effort to try and conceal or refrain from admitting the true figure as it would then have been clear that what he got was exactly 2½% of the sale price" were, in my view, perfectly justified.

The accused was admittedly the tenant of premises 37, Pedris Road, Colombo, from 1961. But in a document which was a proposal form for obtaining a loan of Rs. 20,000 from Caves Finance and Lands Sales Ltd. he had described himself as the owner of this property and that he had been resident therein since his purchase. The Judge had no doubt this was a deliberate and calculated attempt on the part of the accused to represent himself to be owner, when in fact he was not. Equally false was his assertion that the rent of Rs. 600 per month charged by the landlord had been reduced to Rs. 150 per month after the enactment of the new Rent Law in 1972; several cheques in payment of rent at Rs. 600 per month for the years after 1972 produced by the prosecution conclusively proved the falsity of his assertion. The Judge's belief that the accused claimed to be the owner of the property in order to represent himself to be a man of means and that he claimed to pay a lower rent in order to show that he had larger savings than when he paid Rs. 600 per month, appear to me to be based on cogent evidence coupled with false explanations on the part of the accused.

It is clear, therefore, that the trial Judge had good reason to disbelieve the accused in respect of several items of evidence given by him. There is no law governing the question whether

the evidence of a witness should be believed or should not be believed. For weighing evidence and drawing inferences from such evidence there can be no canon. A trial Judge in assessing the evidence of a witness on relevant issues will no doubt be influenced by the view he has formed of the witness's evidence on other issues. An Appeal Court will be extremely slow to disturb the finding of a trial Judge under such circumstances. But as a complaint has been made that the Judge has not considered several items of documentary evidence it is necessary to see whether that evidence would have helped the accused in his attempt to rebut the presumption of bribery by adducing proof on a balance of probability. The three items struck out by the Judge are in respect of,

(*a*) cash in hand at the commencement of the relevant period ;

(*b*) loans obtained by the accused during the relevant period ; and

(c) income derived from the business known as Wanigasekera and Co.

(*a*) *Cash in hand at the commencement of the relevant period :*

The accused claimed that his opening balance on 1.6.70 was a sum of Rs. 99,545.98. This was the amount he had claimed in D 22 (*b*) which was a statement of accounts setting out his income and expenditure commencing from 1.4.66 and which statement he had sent to the Bribery Commissioner in reply to the Bribery Commissioner's inquiry by his letter D 21. In an affidavit sent along with D 22 (*b*) the accused stated that the transactions referred to in D 21 were financed out of " my income, repayment of loans received by me and monies borrowed by me from banks, finance institutes and reputed business houses with which I have business dealings and connections ". In the course of his evidence it transpired that beside the expenditure disclosed in D 22 (*b*) the accused had incurred further additional expenditure amounting to Rs. 158,550.00 during the period between 1.4.66 and 1.4.70 mainly in the construction of 4 annexes to his house at Mirihana and for additions and improvements to his residing house at Pedris Road. He had also made two trips abroad and advanced a sum of money to a furnishing establishment in Kandy which sum he did not get back. The prosecution contended that had those items of expenditure been reflected in D22 (*b*) there would have been no opening balance on 1.6.70 ; on the contrary there would have been a debit balance of about Rs. 60,000. The accused tried to explain this omission. He said that D 21 only required him to account for the acquisitions referred

to in that letter, which were the identical acquisitions and disbursements detailed in the indictment. He said further that a sum of about 2 lakhs of rupees was available to him to finance the additional expenditure and made up as follows : — the refund of an advance of one lakh of rupees on the retraction of an agreement with the firm of Chettinad to purchase a property, the repayment of a loan of Rs. 60,000 granted to one Saturninus, and the repayment of a loan of Rs. 25,000 given to one Muttiah. Learned counsel's complaint is that the learned Judge has not referred to these transactions which were supported by documentary evidence, and much time was taken by us in examining the documents relating to these transactions.

The loan of Rs. 60,000 to Saturninus was by mortgage bond D1 dated 29.5.67. The bond had been discharged on 3.10.67, the amount of the principal and interests being Rs. 62,098.64. Both these amounts have been reflected in D22 (*b*) and have been taken into account in striking the balance on 1.6.70. The loan of Rs. 25,000 to Muttiah was by bond No. 3479 dated 30.1.68. Refunds amounting of Rs. 19,000 are also clearly reflected in D 22 (*b*) and have been accounted for in striking the cash balance. There could therefore be no complaint about these transactions.

The evidence of the accused was that on 31.3.65 he and one Mrs. Wilson deposited three lakhs of rupees on an agreement for the purchase of a property for six lakhs of rupees situated in Hyde Park Corner and owned by Chettinad Corporation. His contribution was one lakh. That agreement was renewed in October 1965 valid until 31.12.65. The Chettinad Corporation went back on the agreement, whereupon he got back his one lakh of rupees several months later. That one lakh was available with him to incur the additional expenditure not shown in D22 (*b*). The learned Judge has not referred to this transaction in his judgment. The true position appears to be that on the agreement D33 of 31.3.65 only one lakh of rupees was deposited by the joint purchasers on condition that if they failed to complete the purchase on or before 30.6.65, the deposit was to be forfeited. The second agreement D 34 of 1.10.65 recited the fact that the purchasers had failed to complete the purchase in terms of the previous agreement, that it was accordingly cancelled and discharged, and that neither party shall have any claim whatsoever against the other in respect of that agreement. The purchase price was increased to Rs. 775,000 and the deposit to two lakhs, and the purchasers agreed to complete the transaction on or

before 31.12.65. The deposit of two lakhs included Rs. 50,000 paid by Mrs. Wilson on the first agreement. No consideration was paid in the presence of Mr. H. W. J. Muthukumara, the Notary who attested the second agreement. In the event of the purchasers failing to complete the transaction on or before 31.12.65 Rs. 150,000 of the deposit was to be forfeited to the vendor and only Rs. 50,000 was to be refunded to the purchasers. Apart from the bare assertion of the appellant that the "sellers backed out" and that he got a refund of one lakh of rupees, no other evidence, oral or documentary, supports that position. Mr. John Wilson, the Notary who attested the first agreement, did not testify to any payment of deposit or refund by Chettinads. Neither Chettinads nor Mrs. Wilson have been called to give evidence about any refund. What is more, this amount of one lakh should have been shown in D22 (*b*) because according to the evidence of the accused he got back the advance several months after 31.12.65 and D22 (*b*) commences from 1.4.66. There is therefore no proof, on a balance of probability, that the accused had in his hands the further sum of one lakh of rupees during the period 1.4.66 to 31. 3. 70 in order to enable him to meet the additional expenditure incurred in putting up extensions to his residences at Mirihana and Pedris Road during this period. The only cash he had in hand on 1.4.66 was a sum of Rs. 60,000 as shown in D22 (*b*) and which was utilised for expenditure other than the expenditure in making extensions to residences.

In his wealth tax return P 16 for the year of assessment 1971-72 sent on 24.04.72 the accused had disclosed as cash in hand on 31.03.70 the sum of Rs. 75,000. Counsel's complaint is that the trial Judge has not given due weight to this disclosure in a declaration made long before the Bribery Department commenced investigations, particularly as it tends to corroborate D 22 (*b*) with regard to the balance in hand of Rs. 83,165 on 31.03.70. The learned Judge has considered this evidence in his judgment, but has not been impressed with it because of the discrepancy in the capital levy return P 17 where the cash in hand on 31.03.70 was disclosed as only Rs. 500. The explanation of the accused for this discrepency was that P 17 was sent on 29.04.74, long after P 16 was sent; but that was an explanation hardly worth consideration.

Even if the accused's evidence be accepted that he had a cash balance of Rs. 60,000 on 01.04.66, that amount and more would necessarily have been utilised by him to meet the extraordinary expenditure of Rs. 158,550 which he spent during the relevant period, and which has not been shown in D 22 (b). There was accordingly no proof on a balance of probability that any sum

of money was available to him at the commencement of the relevant period which he could have utilised to make the acquisition referred to in the indictment. The Judge's finding that his cash in hand on 01.06.70 was nil is therefore supported by the evidence.

(*b*) *Loans obtained by the accused during the relevant period :*

The accused sought to prove that he had borrowed a sum of Rs. 101,000 as loans from four sources, namely—

	Rs.
(i) Collettes Finance Ltd., Rs. 20,000, of which he repaid Rs. 10,000 leaving a balance of ..	10,000
(ii) Caves Finance and Land Sales Ltd., ..	20,000
(iii) Malship (Ceylon) Ltd., Rs. 10,000 of which he repaid Rs. 5,000 leaving a balance of ..	5,000
(iv) The Maldivian National Trading Corporation ..	66,000

(i) The accused claimed that on 02.09.71 he entered into a hire purchase agreement with Collettes Finance Ltd., and obtained Rs. 20,000 on the security of his car, a 4 Sri Simca Arianne. The Judge has held that this was not a genuine hire purchase transaction, but a bribe in the guise of a loan ; that it was an extraordinary favour and accommodation granted to this Director of the Bank of Ceylon who was admittedly of a friendly disposition towards Collettes which had by then taken the Bank of Ceylon before the District Court of Colombo. The Judges finding is based upon an allegation made by the prosecution that a copy of the Bank"s manual of operations, which had been borrowed by the accused from the Secretary of the bank had not been returned to the bank, but had been made available to Collettes in their pending litigation. There was no evidence in support of this allegation. On the other hand, the accused had signed the necessary hire purchase agreement before he obtained the loan ; what is more, he had repaid Rs. 10,000 of the sum borrowed on 18.09.72 and had given a promissory note for the balance. There was, therefore proof on a balance of probability that the transaction was a loan on a hire purchase agreement.

(ii) The accused claimed that the Rs. 20,000 he obtained from Caves Finance and Land Sales Ltd. on 13. 09. 73 was also on a hire purchase agreement. In this instance too the formalities preceding the grant had been gone through, and the necessary documents had been signed by the accused. The Judge has held that this was not a genuine transaction because Caves had not taken any steps to get back the money lent until after accused had ceased to be a Director; and also because the Board of Directors at a meeting held on 11.5.72, at which the accused participated, had sanctioned overdraft facilities to Caves to the tune of 5 lakhs of rupees. We note that attempts had been made by Caves to recover the sum lent before the accused ceased to be a Director. In this instance, too, there appears to be proof on a balance of probability that the accused obtained this sum as a loan from Caves. We cannot, however, refrain from making the observation that persons in the position of Directors of banks and other Government lending institutions should avoid borrowing money from firms which are the recipients of credit from such Government institutions. However genuine such transactions may be, they leave room for suspicion of corruption and graft, and bring discredit not only to them but also to the institutions concerned.

(iii) The accused claimed to have borrowed Rs. 10,000, from the firm of Malship Ltd., the successor to the shipping business of the Maldivian National Trading Corporation, on 29.08.73. The fact that he gave as security two cheques each for Rs. 5,000 and that one of the cheques was realised constitutes proof on a balance of probability that the transaction was genuine. The learned Judge has disallowed this item for the same reason that he disallowed the loans alleged to have been obtained from the Maldivian National Trading Corporation. But, as will be seen from (iv) below.

those transactions were on a different footing. The Judge ought not to have 'struck out' this item from the 'known income' of the accused.

(iv) The Maldivian National Trading Corporation (M.N. T. C.) was a trading corporation carrying on businesss in Sri Lanka. It was not a money lending institution. It had shipping business and persons who introduced freight for carriage in their ships received a commission. The accused was a person who introduced freight and earned commissions. The accused said in evidence that because of his association with this firm he was in a position to obtain loans, and he did obtain loans amounting to Rs. 66,000. He wanted the Court to believe that what he received was by way of loan, and he produced by calling a witness named Hashim, D 35, a certified extract from the books of accounts of the M.N.T.C. According to that document there was a sum of Rs. 140,541 due from the accused to the firm as at 31.07.73, and this sum included Rs. 66,000, payments made to the accused between 07.07.70 and 30.12.71.

The accused admitted that he had had a close association with a Director of the Corporation who had brought to his notice that the M.N.T.C. had "'problems" with the Customs Department, by which the Judge understood that there had been instances where, customs contraventions constituted by attempts to smuggle goods had come to light in relation to persons associated with their ships. In addition the M.N.T.C. had considerable "dealings" with Exchange Control. The Judge was therefore ready to accept a prosecution contention that this commercial concern was so lavish in showering its bounty on the accused when he was holding the position of a Director of the Bank of Ceylon, appointed as he was by the Minister of Finance under whose administration fell the Departments of Customs and Exchange Control. Accordingly this sum of Rs. 66,000 was not treated as the accused's known income or receipts.

The accused admitted that this firm had not given him credit prior to July 1970. The first shipment on which he earned freight was in November 1971. So that long before he introduced business to the firm the accused was able to obtain credit to the

tune of Rs. 66,000. To earn a freight brokerage of Rs. 66,000 he had to arrange freight to the value of Rs. 6½ million ; but it transpired that during the entire period the freight arranged was only valued at Rs. 15 lakhs, which would have earned him a maximum commission of Rs. 15,000. The exact amount is given in the document D 36 (*a*) as Rs. 14,938.09, and every cent of this had been paid to the accused by cheque. No attempt appears to have been made by the firm to set off this amount from the "loans" due from the accused.

The accused attempted to offer an explanation. He said that besides this freight brokerage he was also paid a 'trade rebate', and that the amount in excess of Rs. 66,000 shown in D 35 constituted the trade rebates he earned. Apart from the accused's bare assertion of the receipt of trade rebates, there is no supporting evidence. Hashim was not questioned about the accused being entitled to any such rebate. Hashim had never been employed by the M.N.T.C. He had joined Malships (Ltd.) in 1973 at a time when the M.N.T.C. had ceased to carry on business and when their shipping business was transferred to Malships (Ltd.). Hashim's ignorance of transactions which the accused is alleged to have had with M.N.T.C. is quite understandable. He merely produced the copy of account D 35 certified by a book-keeper. He could not explain the various entries in that document. If the accused received trade rebates he should have led some reliable evidence in support. On the other hand no trade rebates are mentioned either in D 35 or in any of the tax returns sent by the accused. There was no evidence worthy of consideration that the accused received any trade rebates ; the only receipts were on account of freight brokerage and the total amount of Rs. 14,938.09 earned in that way has been reflected in the income from Wanigasekera and Co. for the year ending 31.02.73.

Is there proof on a balance of probability that the accused received Rs. 66,000 as loans from M.N.T.C. ? Three different documents give three different amounts. According to D 22 (*b*) the 'loan' of Rs. 31,000 was received on 02.09.71 ; but according to D 35 payments adding up to Rs. 31,000 have been received on six occasions between 13.10.71 and 30.12.71. The break up of this 'loan' of Rs. 66,000 is not shown in D 23. These 'loans' have not been disclosed in the wealth tax return for the year ending 31.03.71, although by that date the accused had received Rs. 25,000 by way of loans. Deductions have however, been claimed in respect of loans from the People's Bank and the State Mortgage Bank. In the capital levy return sent much later on 29.04.74 there is, no doubt, a reference to this loan of Rs. 25,000 from the M.N.T.C. but why did the accused not disclose it in the

earlier tax return sent on 24.04.72 ? In the tax return for the year ending 31.03.72 (P 17) a total of "loans payable and other debts" adds up to Rs. 1[illegible],000 but again there is no break up of this amount and P 17 is not at all helpful.

A careful consideration of the evidence, including the documentary evidence not referred to in the judgment of the learned District Judge, does not lead us to the conclusion that the accused received any sum of money as 'loans' from the Maldivian National Trading Corporation. The sum of Rs. 66,000 claimed from that source therefore does not fall under the category of known income or receipts of the accused.

The accused claimed also that he utilised a sum of about Rs. 72,000 for making the disbursements in question from an overdraft account with the Mercantile Bank. The bank account D 5 shows that he operated on this overdraft between 01.04.71 and 21.12.73 by which date he had settled his commitments to that bank. The learned District Judge was therefore right in concluding that in the overall result it would make no difference to the final question as to the availability of money in the hands of the accused for the purpose of these disbursements.

The known income and receipts of the accused from loans obtained during the relevant period would thus be only a sum of Rs. 35,000, namely Rs. 20,000 from Caves, Rs. 10,000 from Collettes and Rs. 5,000 from Malships.

(c) *Income from Wanigasekera & Co.:*

The accused was the sole proprietor of this business. He claimed to have earned an income of Rs. 209,989 for the period of 4 years, from 1.4.70 to 31.3.74. The firm did the business of buying and selling Ceylon produce (during the first two years) and in securing freight on a commission basis. In the first year he claimed to have sold two allotments of cocoa beans, which brought a profit of Rs. 19,500. He claimed also to have received as commission a sum of Rs. 15,000. After deducting expenditure his net profit was Rs. 31,704.30 which is as shown in D 23. The Judge has disallowed the commission of Rs. 15,000 because the accused had elsewhere claimed that same sum as a loan from the M. N. T. C. The Judge has also disallowed the profit from the sale of cocoa beans because the accused was unable, when questioned, to give particulars relating to the transactions. A strong point in favour of the accused was that he had disclosed in P 16, his income tax return for the year 1971/72 an income of Rs. 46,000 from Wanigasekera & Co ; and had in fact been taxed on that basis long before any

disputes arose. It is unlikely that he would have exaggerated his income and made himself liable to a higher income tax. It was not like exaggerating the amount of loans, with a view to claiming enhanced rebate for wealth tax purposes. The accused appears to have had considerable business experience. He was at one time in the committee of management of the Ceylon Chamber of Commerce during which period he had been in the import trade. There was, in my view, proof on a balance of probability that the accused made a profit of Rs. 19,500 on the sale of cocoa bean and also earned commissions. Although in D 23 the accused has claimed a profit of Rs. 31,704.30 for the year ending 31.3.71 I would act upon his income tax return and give him credit in a sum of Rs. 46,000.

For the year ending 31.3.72 the accused claimed a profit of Rs. 21,929.64 from sales, and a sum of Rs. 5,136 from commissions. After deducting expenditure he claimed a net income of Rs 19,594.68. The profit from sales has again been disallowed because the accused was unable to give particulars relating to the transactions. In his income tax return P 17 sent on 19.1.73 the accused had declared his income from this source as Rs. 20,248. I would therefore consider P 17 as constituting proof on a balance of probability, and hold that his known income from this source for the year ending 31.3.71 was Rs. 20,248 even though the accused had claimed a little less than this amount in D 23.

For the year ending 31.3.73 the accused claimed Rs. 62,403.44 on account of freight rebates and commissions; a fee of Rs. 31,077.12 received for the sale of commercial intelligence to a New York firm, Czarni & Co. by name; and brokerage in a sum of Rs. 5,000 on the sale of a property in Jawatte Road. As stated earlier there was no reliable evidence that apart from freight brokerage of 1% the accused received any trade rebates. The Judge has allowed him Rs. 16,381.42 for freight brokerage plus Feecs, and had also allowed the sums claimed as having been received from the New York firm and from the land sale. It was submitted on behalf of the accused that his income from all sources has been assessed at Rs. 100,000 for this year. The notice of assessment D 19 is dated 24.10.74; that would be after the Bribery Commissioner commenced investigations and even after indictment was served on the accused. No significance can therefore be attached to D 19. The known income of the accused from this source for the year ending 31.3.73 has been correctly estimated as Rs. 28,170.23.

For the year ending 31.3.1974 the accused claimed a nett income from Wanigasekera & Co. of Rs. 84,499. This represented the nett profit out of a sum of Rs. 112,500 paid to the accused by Messrs. Harrison & Crossfield Ltd. The position of the accused was that he was known to the then General Manager of Harrison & Crossfield Ltd., Mr. G. M. Topen. This company was British owned. In the process of adjusting its financial structure in accordance with changing circumstances in this country, accused said that Topen had discussions with him in regard to suggestions or advice that the accused could give. After studying the capital and financial structure, of the company, and considering its balance sheets, the accused claimed that he advised Topen that the company's capital investment in immovable property in Colombo was excessive and out of keeping with the company's trading profits. The company owned, *inter alia,* Prince Building, situated in Prince Street, Fort, and substantial stores premises abutting Darley Road. The accused suggested to Topen that the company might consider selling either of these two assets. Subsequently, the company put up Prince Building for sale, and the same was purchased by the Government of Ceylon for the Central Bank for a sum of about Rs. 4 million. Mr. Topen paid the accused Rs. 112,500 for his advisory services.

Mr. Topen has since left the company. The prosecution called evidence in rebuttal to disprove the payment of any advisory fee, or of any fee whatever to the accused. N. Jeyasingham, a Director of Harrison & Crossfield, who functioned as Accountant in 1972 and 1973 said that their company paid a sum of Rs. 225,000 as brokerage on the sale of their Prince Building, and that the brokerage was paid to one S. A. Jayamaha. Payment was made by 6 cheques drawn on their No. 2 suspense account at the Hongkong & Shanghai Bank, which account was operated upon either by Topen himself or by his confidential secretary, one Martenstyne. The printed endorsement "account payee" on each of the six cheques was scored off, and the cheques were drawn as cash cheques. The counterfoils (P 42, P 43, P 33A, P 44, P 45 and P 46) had been written either by Topen or by Martenstyne and indicate payments to A. S. Jayamaha. Their audited books of accounts and documents, show this payment as being made to A. S. Jayamaha on account of brokerage. He denied that any sum was paid as "advisory fee", and said that there was no need whatsoever for them to have sought financial advice from outside sources, when Topen himself was an Accountant of repute, and when they had their own lawyers and auditors. They had also no difficulty in continuing to operate on their overdraft accounts. Jeyasingham also stated that if this payment was made for advice given they would then have charged this payment

to their revenue account, with consequential tax benefits whereas brokerage is only deducted from capital gains, which is taxed at 25%. The evidence of Jeyasingham established that their firm had no dealing with the accused and that no advisory fee was ever paid to any person.

During the cross-examination of Jeyasingham the defence elicited the fact that there were two receipts in the company's files, P 30 and P 31, signed by the accused acknowledging receipt of a sum of Rs. 112,500 "as advisory fees" regarding the sale of their Prince Street property. They are dated 18th and 24th May 1973, the dates when two of the cheques for Rs. 50,000 and Rs. 62,500 were drawn. Mr. Choksy submits that these documents constitute contemporaneous evidence in support of the accused's position, which the trial Judge has overlooked.

The learned Judge held that the accused had pretended in vain to disguise the true nature of this transaction which resulted in his realisation of Rs. 112,500 ; that the accused received this substantial payments for some significant service rendered by him in the matter of the ultimate sale of the Prince Building to the Central Bank on 26.3.73 ; and that the circumstances surrounding it clearly demonstrate that this sum of money can not be regarded as part of the accused's known income or receipts. I may summarise the reasons given by him for his conclusion. In evidence in chief the accused did not testify to his having received this money from this source ; it was only in cross examination, after he had handed over the set of accounts D 23, and when he was questioned on the item relating to "Commissions" that he gave details. All that he did to deserve this payment was that in January or February 1972 he had given "financial advice" on the "capital structure" of Harrison & Crossfield to Topen whom he had occasion to meet at the latter's office. This "financial advice" was never reduced to writing but was "given across the table" at a discussion at which only he and Topen were present. Fifteen months later, on 18.5.73 Topen told him over the telephone that the firm had decided to make this payment for the services rendered in giving financial advice. The two cheques were not drawn in favour of the accused, but the evidence of Jeyasingham and Martenstyne was that all payments on account of "brokerage" had been recorded in their books as being made to Jayamaha. The accused was unable to say specifically as to how the two cheques reached his hands ; on the other hand the prosecution suggested that

there had been some arrangement between Jayamaha and the accused whereby the accused was to receive half the payment and the accused had therefore no alternative but to give the receipts P 30 & P 31 for otherwise Jayamaha would have been liable for income tax on the full amount of Rs. 225,000. The form in which the receipts were given, referring as they are to the "sale" of the Prince Building, contradicts the evidence of the accused that he had nothing to do with the sale of that building to the Central Bank. We could see no other conclusion that the Judge could have reached than the one set out in his judgment, for there was no proof on a balance of probability that this payment was an advisory fee.

The learned Judge was right in concluding that it did not constitute any part of the known income or receipts of the accused. Both Mr. Pullenayagam and Mr. Choksy posed the questions—what is the role played by the accused in the purchase of Prince Building by the Central Bank ? Is there any evidence whatever to suggest that he exercised any influence, and if so on whom ? As stated earlier in this judgment, it was not necessary for the prosecution to prove that this sum of Rs. 112,500 came into the hands of the accused as a result of bribery. The purpose for which this money was paid to the accused was not known to the prosecution. Although the books of Harrison & Crossfield Ltd have noted the payment of Rs. 225,000 to A. S. Jayamaha as "brokerage" on account of the sale of their Prince Building, neither Jeyasingham nor Martenstyne had any personal knowledge as to what this payment represented. It is not necessary to say anything more, except to note the secrecy surrounding the payment. A large sum of money has been paid by cash cheques drawn on a suspense account, under the personal supervision of the General Manager. They were all payments made to Jayamaha. The accused said in his evidence that he had nothing to do with the sale of the Prince Building to the Central Bank, and that he had no association with Jayamaha. There was therefore no proof on a balance of probability that this was payment as "brokerage" either.

In the background of the evidence that the accused, as a Director of the Bank of Ceylon, participated in at least four meetings of the Board of Directors of the bank, at which the question of the purchase of the Prince Building to house certain branches of the Bank of Ceylon was discussed; that the accused had at about the same time given advice to Topen regarding the sale of this building with a view to reorganising the capital structure of the company, that soon thereafter Topen wrote a confidential letter to the Manager of the Bank of Ceylon offering to sell this building for a sum of Rs. 5¼ million; that the Manager of the Bank's Premises Department had valued that same building at only Rs. 3½ million; that shortly thereafter Harrison & Crossfield Ltd. was able to sell the building for Rs. 4½ million to the Central Bank; and that soon thereafter the accused received a handsome payment of Rs. 112,500 taken cumulatively suggest a strong inference that the payment to the accused was by way of a bribe. As I stated earlier, as this sum of money has been proved not to be part of his known income or receipts, the accused is deemed to have acquired it by bribery and the accused has failed to rebut the presumption of bribery.

A submission was made that as the Department of Inland Revenue, by its notice of assessment D 20 for the year of assessment 1973/74, had imposed income tax on the basis of an income of Rs. 100,000 the accused's known income should be taken at that figure. We have acted on the basis of similar notices D 16, for the year 1971/72, and D 18 for the year 1972/73, and given the accused the benefit of those assessments because they are assessments made long before any disputes arose, and consequent on contemporaneous returns submitted by the accused. Nevertheless we were not unmindful of the fact that it is quite easy for a person to include false incomes in his returns with a view to utilising such declaration as a defence to subsequent prosecutions under section 23 A; but as this prosecution appears to be one of the earliest under this section we have given the accused the benefit of the declarations in D 16 and D 18. D 20 is on a different footing. It was an assessment made in the absence of

a return, on 24.10.74 long after the dispute arose, and even after this prosecution had been instituted.

The known sources of income and receipts of the accused during the relevant period are therefore the following :—

	Rs.
Loans obtained from Collettes, Caves & Malships (Ltd.)	35,000.00
Income from rents, Director's fees and wife's pension	128,866.00
Income from Wanigasekera & Co. ..	94,418.00
Loan recovered	3,000.00
	261,284.00
Less living expenses (including trips abroad)	113,170.00
The accused's known income and receipts therefore will be	148,114.00

The total value of the property admittedly acquired by the accused and disbursements admittedly made by him was ..	Rs. 402,564.25
His known income as stated above was ..	Rs. 148,114.00
	Rs. 254,450.25

This balance sum of Rs. 254,450.25 constitutes the value of property acquired by bribery, in terms of section 23A of the Bribery Act. The conviction of the accused appellant is therefore affirmed.

The learned District Judge has imposed the maximum sentence permissible under section 23A (3), namely, a term of seven years rigorous imprisonment, and a fine of Rs. 5,000. In addition he has imposed a penalty under section 26 of the Act, as well as an additional fine under section 26A. I am of the view that section 26A has retrospective operation, for the reasons set out in the judgment of my brother Sharvananda, J. But the District Judge was clearly wrong in imposing a penalty under section 26. It seems to me that whereas the additional fine under section 26A, may be imposed in respect of an offence under section 23A, the penalty contemplated under section 26 cannot also be imposed.

The penalty under that section can be imposed only on offenders who have been found guilty of any offence committed by the acceptance of any gratification in contravention of the provisions of Part II of the Act, other than the provisions of section 23A.

As the fine that a court is obliged to impose upon an offender under section 26A cannot be less than the amount which the court has found to have been acquired by bribery, the maximum punishment imposed on the appellant under section 23A (3) is, in my view excessive. I would therefore set aside the sentence imposed on the accused by the learned District Judge and substitute therefor the following sentences :—

> Rigorous imprisonment for a period of 3 years and a fine of Rs. 1,000, under section 23A (3). An additional fine of Rs. 254,450.25 under section 26A.

The legal issues in this case are important, and the factual issues have been most interesting. On both aspects counsel have been of great assistance to us during the 10 days of argument.

WEERARATNE, J.—I agree.

SHARVANANDA, J.

At the conclusion of the trial, the District Judge convicted the accused and, in terms of section 26A of the Bribery Act, imposed a fine of Rs. 354,375.51 (which amount the Court found to have been acquired by bribery).

The question had been raised in appeal as to the jurisdiction of the District Judge to impose a fine under section 26A of the Bribery Act for an offence which had been committed prior to the enactment of section 26A. For the purpose of appreciating this argument, the following dates have to be borne in mind :—

The property which is deemed to have been acquired by bribery was alleged to have been acquired by the accused-appellant between *1st June, 1970, and the 18th day of March, 1974.* The indictment in this case was presented to the District Court on *12th October, 1974.* Section 26A of the Bribery Act, forming part of the Bribery (Amendment) Law, No. 38 of 1974, came into operation on *24th October, 1974,* and the trial concluded and conviction recorded on *18th June, 1975.*

The Amending Law No. 38 of 1974 amended the original Bribery Act by adding new sections to existing ones and by repealing certain old sections and substituting in place of the repealed provisions certain new provisions. The scheme of the Amending Law maintains a distinction between provisions which are repealed and substitution made thereto and new provisions which are added to the already existing provisions. Sections 4(5), 8(2), 10(4), 19(3), 23A, 25(3), 26A, 30A and section 89A are new sub-sections or sections incorporated in the Amending Law, while the old sections 6(2), 7, 9(1) and section 10(3) have been repealed and new sections have been substituted therefor. Section 78 of the principal enactment has been amended by the repeal of sub-sections (4) and (5) of that section without any substitution being made therefor.

Counsel for the appellant contended that in keeping with the cardinal rule of statutory interpretation that generally statutes are prospective and that they apply only to cases and facts which come into existence after they were enacted, the provision for enhanced fine introduced by the Amending Law, No. 38 of 1974 is not applicable to the punishment of offences committed before its enactment and that hence it was not competent for the District Judge to have imposed in this case an additional fine under Section 26A of the Bribery Act. In support of his submission, he relied on the judgment of the Criminal Justice Commission in *In Re de Mel* (78 N.L.R. 67). On the other hand, State Counsel referred us to the judgment of the English Courts in *The Director of Public Prosecutions v. Lamb,* (1941) 2 A.E.R. 499, *Buckman v. Button,* (1943) 2 A.E.R 82 and *Rex v. Oliver,* (1943) 2 A.E.R. 800, and submitted that the Amending Law providing for enhanced punishment on conviction applies to offences committed before the enactment of the law as well as to offences committed thereafter.

The relevant facts in *In Re de Mel* (78 N.L.R. 67), are as follows :—

The suspects were charged and found guilty on their own plea of offences punishable under section 51(4) of the Exchange

Control Act committed between the 1st day of January, 1970, and the 30th day of June, 1971. At the time when the offences were committed, the relevant provision in section 51(4) relating to the punishment of an offender was as follows :—

" (4) Any person who commits an offence against this Act shall—

(*a*) upon conviction after summary trial before a Magistrate, be liable to imprisonment of either description for a term not exceeding six months or to a fine, or to both such imprisonment and fine ; or

(*b*) on conviction before a District Court, be liable to imprisonment of either description for a term not exceeding two years or to a fine, or to both such imprisonment and fine ; "

By section 13 of the Exchange Control (Amendment) Law, No. 39 of 1973, section 51 was amended, *inter alia*, as follows :—

" (2) by the repeal of sub-section (4) thereof and the substitution therefor of the following sub-section :

(4) Any person who commits an offence under this Act shall—

(*a*) on conviction after summary trial before a Magistrate, be liable to imprisonment of either description for a term not exceeding eighteen months, or to both such imprisonment and fine ;

(*b*) on conviction before a District Court, be liable to imprisonment of either description for a term not exceeding five years, or to both such imprisonment and fine ; "

Controversy arose whether it was the provision introduced by the Amending Law, No. 39 of 1973 or the provision in the original Act which applied in respect of the offences committed

by the suspect. Samerawickrema, J. in the judgment referred to the rules of statutory interpretation against retrospective operation of laws and to section 6(3) of the Interpretation Ordinance and distinguished the English case of *D. P. P. v. Lamb,* (1941) 2 A.E.R. 499, on the following ground :

> "In the statute which was considered in Lamb's case, there was no repeal. There was only provision for the imposition of an alternative penalty. In the Exchange Control (Amendment) Law, the word 'repeal' is expressly used. In the former case, the Interpretation Act was held not to apply. In the present case, *prima facie,* section 6(3) (of the Interpretation Ordinance) would apply. But the chief point of difference is in the language used. The English Statute states : 'Where any person is convicted of an offence..... the maximum fine which may be imposed on him shall be .....' it was held that from the language it was clear that the provisions applied to a conviction for an offence committed before the enactment. Section 51(4) of the Exchange Control (Amendment) Law states :
>
> "Any person who commits an offence under this Act shall on conviction.....be liable to imprisonment...."
>
> The word 'commits', *prima facie,* refers to the present and the future. Under this provision, the conditions for liability are two fold : namely, the committing of an offence on or after the date of enactment and a conviction. Far from being express language indicating that the provision is retrospective, the language used indicates the contrary." (78 N.L.R. 67 at 74 and 75).

In *D. P. P. v. Lamb,* (1941) 2 A.E.R. 499, the facts were as follows :—

> The defendants were charged with certain currency offences committed between September 3, 1939, and May 11, 1940. They pleaded guilty. The information was dated August 17, 1940. The regulations in force at the time of commission of the offences

limited the penalty for each offence to a fine of £ 100 or imprisonment for a term not exceeding three months, or both. On June 11, 1940, the Order-in-Council came into force providing for an enhanced penalty. The terms of this Order were :

> "Where any person is convicted of an offence against those regulations, the maximum fine which may be imposed on him shall be a fine equal to three times the value of the security."

It was contended on behalf of the accused that the Amending Order-in-Council, which came into operation subsequent to the date of the offence, could not affect the punishment for the offence which was complete in every respect before the amendment was made. This contention was rejected by the Court on the ground that the meaning of the Order-in-Council was plain and not in any way ambiguous. Upon a plain meaning, it referred to conviction after the date at which it came into force and it was therefore immaterial that the offence was committed before that time. It was further held that there had been no repeal. The original section imposing a penalty had full force and effect either expressly or impliedly. The amendment had merely imposed an increased penalty. As Tucker, J. stated :

> "It is not a case of regulation creating a new offence. Nor is it for that matter a regulation providing for some different kind of penalty or punishment altogether. It is merely increasing the amount of a monetary fine. In my view, the words are clear, and although I do not altogether like the idea of punishment being increased after the offence had been completed, nonetheless, and if that is the result, I think it is impossible to escape from the consequences of the language which has been used."

In the course of his judgment, Humphreys, J. referred to *Rex v. Jackson*, (1775) 1 Cowp. 297, where Lord Mansfield, C.J. observed that "now it is a general rule that subsequent statutes which add accumulative penalties do not repeal the former statutes".

The case of *Buckman v. Button*, (1943) 2 A.E.R. 82, confirmed the decision in *D. P. P. v. Lamb*, (1941) 2 A.E.R. 499, in so far as it dealt with the position where the penalty is increased after the offence is complete. Lamb's case was followed in *Rex v. Oliver*, (1943) 2 A.E.R. 800, in which, after the commission of the offences charged against the accused, the penalties were increased by an order in the following terms :—

> "Any person guilty of an offence against this regulation shall be liable to 'certain penalties being greater than those previously applicable to such offences'."

It was held that in that context guilty "could mean only found guilty" and hence, on a proper construction of the regulation increasing penalties, a person who had already committed the offences at a time the order was enacted could be made liable to the higher penalties.

Section 23(A) (3) of the Bribery Act, as amended by Act No. 40 of 1958 and Act No. 20 of 1965, provided as follows :—

> "A person who is or had been the owner of any property which is deemed under subsection (1) to be property which he has or had acquired by bribery..... shall be guilty of an offence punishable with rigorous imprisonment for a term of not more than seven years and a fine not exceeding Rs. 5,000."

Section 11 of the Bribery (Amendment) Law, No. 38 of 1974, provided as follows :—

> 11. The following new section is hereby inserted immediately after section 26 and shall have effect as section 26A of the principal enactment :
>
> "Where the District Court convicts any person of an offence under section 23A, it shall, in addition to any other penalty that it is required to impose under this Act, impose a fine of not less than the amount which such Court has found to have been acquired by bribery ..... and not more than three times such amount."

In my view, the language of the Amending Law is plain and can only mean that which it says. Section 6(3) of the Interpretation Ordinance does not apply to the present circumstances as the new section 26A in the scheme of the Amending Law does not repeal any existing written law, but only provides for the imposition of additional penalty. The amending section 26A is clearly retrospective. For the reasons set out in *D. P. P. v. Lamb*, (1941) 2 A.E.R. 499, and referred to with approval by Samerawickreme, J. in *de Mel*, 78 N.L.R. 67, I have no hesitation in holding that the offence with which the accused is charged in the present case attracts 26A of the Bribery Act and that the accused-appellant has, on his conviction in this case, incurred the further penalty imposed on him.

Further, on an examination of the relevant provisions of the Bribery Act, it would appear that section 26A was intended to fill up a lacuna in the scheme of the punitive provisions of the Act and that there was good reason for retrospective operation being given to that section. Offences of the same genre should suffer the same punishment. Sections 19, 20, 21 and 23A deal with offences of accepting a bribe or gratification by various categories of persons and prescribe the punishment of a term not exceeding seven years and a fine of not more than Rs. 5,000 for all such offences. The Legislature further provides, by section 26 of the Act, that any person who is convicted of an offence committed by the acceptance of any gratification in contravention of any provision of Part II of the Act shall, in addition, be liable to pay as penalty a sum which is equal to the amount of the gratification. The object underlying section 26 would seem to be compel the offender to disgorge the proceeds of the bribe which he has accepted. When section 23A was enacted by the Amending Act No. 40 of 1958 making a person who is the owner of a property which is deemed under section 23A (1) to be property which he has acquired by bribery guilty of an offence, the draftsman appears to have overlooked the fact that section 26 was applicable to the offender under section 23A, and that hence a person who is guilty under section 23A (3) will not be liable, apart from the penalty imposed by section 23A, to the additional penalty provided by section 26. The amending section 26A seeks to cure this anomaly. Under section 26A, the offender under section 23A will also have to disgorge the proceeds of the bribe that he has accepted or deemed to have accepted. Thus section 26A fits into the general scheme of punishment.

I agree with the judgment of Wimalaratne, J. and with the sentence imposed by him.

Conviction affirmed.

Sentence varied.

1976 *Present :* **Pathirana, J., Ratwatte, J. and Wanasundera, J.**

J. K. ALPENIS SINGHO, Petitioner

and

K. D. PILOCHCHIYA FERNANDO and ANOTHER, Respondents.

S. C. Application No. 520/75

Paddy Lands Act, No. 1 of 1958, sections 4 (1), 21—Complaint of eviction by tenant cultivator—Requirement that landlord be given an opportunity of being heard at inquiry—Effect of non-compliance with this requirement—Agricultural Lands Law, No. 42 of 1973, section 53 (4).

Writ of Certiorari—Application in 1975 to quash order made under Paddy Lands Act in 1964—Objection on ground of delay in seeking remedy—Petitioner's contention that he was unaware of any proceedings until Order under section 21 of Paddy Lands Act by Magistrate in 1973—Delay excused.

Held: (1) That where in an inquiry held by the Assistant Commissioner of Agrarian Services under the Paddy Lands Act on a complaint of eviction made by a tenant cultivator, there is a finding of eviction against a person who was not present at the inquiry, such a finding could not stand. The landlord of such extent of paddy land and the person evicted must be given an opportunity of being heard in person or through a representative at such inquiry.

(2) That the petitioner who contended that he was unaware of any such proceedings under the Paddy Lands Act until the Magistrate's Court of Gampaha issued notice on him on 31st January, 1973 under section 21(1) of the Paddy Lands Act should not be denied relief by way of *Certiorari* on the ground that his application was belated even though the order of the Assistant Commissioner of Agrarian Services had been that he vacate the said extent of paddy land on or before 10th June, 1964.

APPLICATION for a Writ of Certiorari.

Prins Gunasekera, for the petitioner.

P. Goonesekera, State Counsel, for the respondents.

Cur. adv. vult.

June 22, 1976. PATHIRANA, J.

This is an application dated 22nd July, 1975, by the petitioner who claims to be the owner-cultivator of an extent of paddy land called Devatagahakumbura for a Writ of Certiorari to quash the order of the 2nd respondent, the Assistant Commissioner of Agrarian Services, ordering the petitioner in terms of section 4(1) (*b*) of the Paddy Lands Act to vacate on or before the 10th of June, 1964 the paddy land in question. The main ground on which the petitioner seeks to quash the said order is that he had no notice of the inquiry that was held by the 2nd respondent in respect of the complaint made by the 1st respondent who claimed to be the evicted ande cultivator of the said field, nor was he given any opportunity of being heard before the impugned order was made against him.

According to the 1st respondent who claimed to be the ande cultivator of the field in question, the field was cultivated by him from 1925 till September 1958. In 1925 the owner was one Issan Appu under whom he was the ande cultivator. Issan Appu sold the field to Abeywardene but the 1st respondent continued to deliver the ande share to Issan Appu who managed the field for the new owner Abeywardene. After Abeyawardene's death his heirs sold the field to D. A. Charles Perera but the 1st respondent continued to cultivate the field and he gave the ground

CHANDRAPALA PERERA
v.
THE ATTORNEY-GENERAL

SUPREME COURT
G. P. S. DE SILVA, CJ.,
PERERA, J. AND
BANDARANAYAKE, J.
S.C. APPEAL NO. 169/96
C.A. NO. 157/91
H.C. COLOMBO NO. 8243/84 27
FEBRUARY, 1998

Bribery Act - Sections 19 (b) and 19 (c) of the Act - Acquittal on one count Conviction on the other count on the evidence of same witness - Rejection of evidence by implication - Order required to be made at the conclusion of trial - S. 203 of the Code of Criminal Procedure Act.

The appellant was a labour officer. He was charged that he being a public servant solicited a gratification of Rs. 3,000.00 from the complainant on 17. 1. 83 to assist the complainant to avoid payment of EPF dues and accepted Rs. 1,500.00 out of that sum on 22. 1. 83, offences punishable under sections 19 (b) and 19 (c) of the Bribery Act. On 22. 1. 83 the appellant visited the complainant's work place to collect the gratification where the complainant was present with a decoy Police Officer from the Bribery Department who posed off as the complainant's son and gave the appellant Rs. 1,500.00 which he put into his-trouser pocket. The money was recovered from his pocket. He, however, denied the charges and said that the money might have been introduced into his pocket when he met the complainant and the police decoy. The Magistrate believed the complainant's version; but convicted the appellant only on the charge of solicitation, in view of the fact that the charges specifically alleged that the appellant accepted the gratification from the complainant. The Magistrate "discharged" the appellant on the charge of acceptance.

Held:

1. The evidence of solicitation was in respect of 17. 1. 83 and that solicitation of the gratification had been established beyond reasonable doubt.

2. In terms of the provisions of section 203 of the Code of Criminal Procedure Act at the conclusion of the trial the Judge has to record a verdict of conviction; hence the appellant was entitled to an acquittal instead of a "discharge" on the charge of acceptance.

3. Having regard to the fact that the Magistrate had accepted the complainant's version and in the light of all the facts and circumstances and the ground on which the Magistrate declined to convict the appellant on the charge of accepting the gratification, it cannot be said that this was a case in which the conviction on the solicitation charge was based on evidence which had by implication been rejected by the acquittal on the other count.

Cases referred to

1. *Nalliah v. Herat* 54 NLR 473, at 475.

2. *Sambasivam v. Public Prosecutor, Federation of Malaya* (1950) AC 479.

3. *Raphael v. The State* 78 NLR 29.

APPEAL from the judgment of the Court of Appeal.

Ranjith Abeysuriya P.C with Ms. Priyadharshini Dias for accused-appellant.

B. Aluvihare S.S.C for Attorney-General.

Cur. adv. vult.

May 21, 1998

PERERA, J.

The accused-appellant (hereinafter referred to as the appellant) was charged in the High Court of Colombo upon an Indictment on the following charges -

(1) That on 17. 1. 1983 at Kandy being a public servant, to wit, a labour officer did solicit a gratification of Rs. 3,000.00 from Don Wilfred Jayasinghe to avoid the payment of EPF dues, an offence punishable under section 19 (b) of the Bribery Act.

(2) That on 22. 1. 1983, he did accept the sum of Rs. 1,500.00 for the said purpose, an offence punishable under section 19 (b) of the Bribery Act.

(3) That on 17. 1. 1983, he being a public servant as aforesaid, did solicit the sum of Rs. 3,000.00 from the said Jayasinghe, an offence punishable under section 19 (c) of the Bribery Act.

(4) That on 22. 1. 1983, he being a public servant, did accept the sum of Rs. 1,500.00 from the said Jayasinghe, an offence punishable under section 19 (c) of the Bribery Act.

87

At the conclusion of the trial in the High Court, the learned High Court Judge found the accused-appellant guilty on counts 1 and 3 and imposed on him a sentence of 4 years rigorous imprisonment on each count, the sentences to run concurrently.

In respect of counts 2 and 4 of the Indictment, the learned Trial Judge refrained from making an order in terms of section 203 of the Criminal Procedure Code acquitting the appellant - instead the learned Trial Judge has stated thus:

"Having regard to the facts that counts 2 and 4 of the Indictment are not in accord with the evidence placed at the trial, without arriving at an adjudication on the merits on counts 2 and 4 in regard to the innocence of the accused without entering an order of acquittal, I discharge the accused on these two counts."

The precise word used by the Trial Judge in his judgment is "UTTHARANAYA" which means 'discharged'. (Vide- Paribhasika Sabda Malawa - dated 1968. 1. 31 - Published by the Educational Publications Dept.).

Section 203 of the Criminal Procedure Code, however, mandates that on the conclusion of the case for the prosecution and defence, "the Judge shall forthwith or within ten days of the conclusion of the trial record a verdict of acquittal or conviction . . ." This the Trial Judge has failed to do in the instant case.

The Court of Appeal has, however, in its judgment rightly made order in terms of section 203 of the Criminal Procedure Code acquitting the appellant on the aforesaid counts in the Indictment.

This court has granted the appellant leave to appeal on the following question -

"Having regard to the acquittal of the appellant on charges 2 and 4 of the Indictment, is it safe to permit the convictions on counts 1 and 3 to stand?"

It was the primary complaint of Mr. Abeysuriya, counsel for the appellant that the learned Trial Judge having convicted the accused petitioner only on counts 1 and 3 which related to solicitation, refrained

88

from making an order of acquittal on counts 2 and 4 of the Indictment which related to the alleged acceptance of the gratification, due to the wholly contradictory and totally unsatisfactory evidence of the main witness for the prosecution, D. W. Jayasinghe. Counsel submitted further that this was a "trap case" organised by officials of the Bribery Commissioner's Department and at the time the alleged payment of Rs. 1,500.00 was made on the 22nd of

January, 1983, the virtual complainant Jayasinghe was accompanied by a police decoy by the name of Seneviratne who was a witness to the alleged acceptance. The prosecution failed to call Seneviratne as a witness at the trial. It was Mr. Abeysuriya's submission that had the prosecution called Mr. Seneviratne to testify, the falsity of the testimony of Jayasinghe would have been established beyond doubt.

Admittedly, the sole witness who testified in regard to the solicitation and acceptance of the illegal gratification at the trial was D. W. Jayasinghe who was running a motor garage in Kandy. According to Jayasinghe, the appellant visited his garage on 13. 1. 1983 and informed him that there was a sum of Rs. 87,000.00 due to be paid by him to the Labour Department as EPF payments. He had requested Jayasinghe to call over at his office on the following day. When Jayasinghe called on the appellant at his office as requested, the appellant is alleged to have taken him to the canteen and solicited a sum of Rs. 10,000.00 for the purpose of helping him to avoid payment of EPF dues. Jayasinghe had declined to make this payment and the appellant had requested Jayasinghe to suggest an amount which he could pay. Jayasinghe had then suggested a sum of Rs. 3,000.00 and offered to pay this sum in two instalments. The appellant had then stated that he would come to the garage on Friday, 21. 1. 1983 to collect this gratification.

Jayasinghe had then informed the Bribery Commissioner's Department and a few days later on 21. 1. 1983, Jayasinghe had been questioned in Kandy by officials of the Bribery Commissioner's Department. Therefore, when the appellant called at the garage on Friday the 21st of January, 1983, Jayasinghe had put him off and informed him that he would have the money ready on the next day.

On the 22nd of January, 1983, Bribery decoy Seneviratne who was to pose off as Jayasinghe's son awaited the arrival of the appellant at the garage. Jayasinghe was also at the garage at the time. The

89

appellant on his arrival at the garage on that day had questioned Jayasinghe whether the money was ready and Jayasinghe had replied that his son had brought the money. Thereupon the appellant had called both of them (Jayasinghe and his son) to go up to the office of the garage and as suggested all three of them had gone up to the garage.

Thereafter, they had left the garage and all three of them had proceeded to a hotel to have tea. Decoy Seneviratne who posed off as Jayasinghe's son offered Rs. 1,500.00 to the appellant who accepted the payment and put the money into his trouser pocket. At about that time, four persons came and apprehended the appellant and somebody shouted, 'pocket karayo'.

The appellant was called upon for his defence by the Trial Judge and he opted to make an unsworn statement from the dock. According to the appellant, he was duly performing his duty as a labour officer when he visited this garage and gave instructions to witness Jayasinghe regarding the keeping of proper books. He denied the solicitation or acceptance of any money and he suggested that the Rs. 1,500.00 that was recovered from his trouser pocket might well have been inserted into his pocket on the occasion when he along with Jayasinghe and the Bribery decoy had gone to the hotel to have a cup of tea.

Mr. Ranjith Abeysuriya on behalf of the appellant contended that the prosecution relied only on one solitary witness, namely, D. W. Jayasinghe in order to establish the charges of solicitation and acceptance of an illegal gratification by the appellant. Counsel submitted that the evidence of this witness on every single aspect of this transaction had been contradicted at the trial - vide DI to D17. Of these, at least ten were on extremely crucial matters and those have been marked D1 to D7, D10, D11 and D12. A true copy of the entirety of the evidence given by Jayasinghe at the trial has been marked as P3.

It was counsel's contention that in the light of the testimony of Jayasinghe at the trial, it was impossible for the Trial Judge to have convicted the accused for the reason that the only evidence adduced at the trial relating to the solicitation and acceptance was that of Jayasinghe and that his testimony was highly unacceptable having regard to the contradictory nature of his evidence.

90

Counsel argued strenuously that in this case the evidence of Jayasinghe was demonstrably contradictory on several crucial aspects, hence it was not possible to act on the rest of his evidence, particularly because the prosecution refrained from calling police decoy Seneviratne who could have supported Jayasinghe if his testimony

was truthful.

Counsel contended further that the remaining two charges relating to the alleged solicitation on 17. 1. 1983 stand or fall entirely upon the claim of D. W. Jayasinghe alone. In these circumstances, he argued that it was wholly unsafe to regard the evidence of Jayasinghe as being worthy of credit in regard to the remaining part of his evidence and in the circumstances invited this court to quash the convictions and the sentences imposed on the appellant on counts 1 and 3 of the Indictment.

Counsel also submitted that upon a proper evaluation of the dock statement made by the accused-petitioner, it is manifestly clear that the appellant had given a credible explanation of his conduct and suggested that Rs. 1,500.00 could possibly have been put into his pocket without his knowledge.

The main contention of appellant's counsel was that where an accused is tried on two connected but different charges in the same proceedings, a conviction on one count cannot be based on evidence which has by implication been rejected by an order of acquittal on the other count. Counsel adverted to the Judgment of Gratiaen, J. in Nalliah v. Herat [(1)] where he followed the enunciation of this fundamental principle by the Privy Council in Sambasivam v. Public Prosecutor, Federation of Malaya [(2)]. In that case, Gratiaen, J. observed thus: "The rule is of general application and has equal force when one considers the effect which an order of acquittal on one charge could have on a connected charge in the same proceedings. A verdict on one count cannot be based on evidence which has by implication been rejected in disposing of another count at the trial" at 475.

Counsel also relied on the case of Raphael v. The State [(3)] where Tennekoon, CJ. adopted the same principle and expressly held that where the accused was acquitted by the Trial Judge on one count, he should have been acquitted on the remaining count which was based on evidence which has by implication been rejected by an acquittal on the other count.

91

Counsel strenuously urged that the acquittal on two charges relating to acceptance was entirely due to the rejection of the evidence of Jayasinghe who deposed to an alleged acceptance by the accused appellant in circumstances totally different to the version stated by him in his statement to the Bribery Department on 22. 1. 1983. Thus his evidence was unequivocally rejected in regard to the allegation of acceptance. His evidence could have been supported by the evidence of police decoy Seneviratne who was however not called by the prosecution to testify at the trial.

Senior state counsel however contended that in the present case, the acquittal of the appellant on counts 1 and 3 was not based upon the rejection of the evidence of witness Jayasinghe, but was due to failure on the part of the prosecution to establish the specific allegation that the appellant accepted the gratification from D. W. Jayasinghe. In this connection, state counsel invited the attention of this Court to the careful analysis by the Trial Judge of the evidence of witness Jayasinghe where he has taken into consideration the following matters:

(1) That the witness was 76 years of age at the time he testified at the trial.

(2) That the witness had testified at the trial in regard to the alleged incident which had occurred approximately 8 1/2 years before the date on which he testified.

(3) The fact that the witness did not have the benefit of higher education.

Having regard 'to the above circumstances, the Trial Judge has come to a firm finding that the discrepancies in the testimony of witness Jayasinghe could well be due to loss of memory in regard to the transaction which had taken place about 8 1/2 years earlier.

Senior state counsel also submitted that the evidence of Jayasinghe did not relate to an event which took place on a single occasion, but to several events that had taken place on a number of date's namely, **13th, 17th, 21st and 22nd of January, 1983.** Counsel also contended that the acquittal of the appellant on the two charges relating to acceptance was not for the reason that his evidence was

92

unequivocally rejected by the Trial Judge. On the contrary, counsel submitted that the Trial Judge has accepted the

evidence of this witness and has given specific reasons as to why he did not proceed to find the appellant guilty on the two charges relating to acceptance.

In this connection senior state counsel invited the attention of this Court to the observations of the learned Trial Judge who in evaluating the evidence of witness Jayasinghe had concluded that even the acceptance charge had been proved by the prosecution beyond reasonable doubt - vide an extract from the judgment marked P1 (a). The learned Trial Judge has observed that he refrained from finding the accused guilty on counts 2 and 4 for the reason that the said two charges specifically alleged that the appellant accepted the gratification from witness Jayasinghe at the trial. State counsel contended that in evaluating the evidence of witness Jayasinghe, the Trial Judge has stated thus: "From the detached position occupied by me as a Judge without involving myself in the controversy in this case (as opposed to counsel on both sides), I hold from the witness's conduct, deportment, bearing, inflexion and delivery, both in the examination-in-chief and under cross-examination, that the witness has given frank, honest, truthful and bona fide evidence, though due to his faulty memory, the witness may at times have made certain mistakes on rather trivial and less important aspects of this case".

In the context of the observations made by the learned Trial Judge as regards the testimony of witness Jayasinghe who was the sole witness called by the prosecution in this case, I have given careful consideration to the submission of counsel for the appellant based on the judgment in Nalliah v. Herat & Raphael v. The State (supra) on which counsel strongly relied to support his submission that where an accused is tried on two connected but different charges in the same proceedings, a conviction on one count cannot be based on evidence which has by implication been rejected by an order of acquittal on the other count.

While I am in respectful agreement with the view expressed by Gratiaen, J. in Nalliah v. Herat (supra) which has also been followed in Raphael v. The State (supra), I am of the view that these two decided cases are clearly distinguishable from the facts of the case that is presently before us.

93

As has been rightly pointed out by senior state counsel in the present case, the learned Trial Judge has not by implication or otherwise rejected the evidence of D. W. Jayasinghe. He has on the other hand commended this witness as "a frank, honest and truthful witness who has given evidence in good faith, but due to his faulty memory has made at times certain mistakes on rather trivial and less important aspects of this case". I, therefore, regret that I am unable to accept the submission of Counsel for the appellant that the acquittal of the appellant on counts 1 and 3 was for the reason that the evidence of witness Jayasinghe has been rejected by the Trial Judge by implication. In my view, both decisions cited by counsel have no application to the facts of this case.

This submission of counsel for the appellant must in my view therefore necessarily fail.

I shall now proceed to consider the question whether there was sufficient evidence adduced by the prosecution in this case to justify affirming the conviction of the appellant on the charges relating to solicitation - namely, counts 1 and 3.

Admittedly, the charges relating to solicitation refer to the 17th of January, 1983, a date anterior to the date on which the gratification is alleged to have been accepted - to wit, 21. 1. 1983. Therefore the criticism of appellant's counsel on the failure of the prosecution to lead the evidence of the Bribery decoy Seneviratne to support Jayasinghe's evidence would not arise in respect of counts 1 and 3. It is indeed the uncontradicted evidence of witness Jayasinghe that it was only after 17. 1. 1983 that he had complained to the Bribery Commissioner regarding this matter.

Further, it must be observed that on a consideration of the evidence adduced by the prosecution, there are certain items of evidence which tend to support the proposition that the appellant had taken an unusual interest in coming to the aid of a person who had acted in violation of the law. The appellant himself in his dock statement has admitted that Jayasinghe was indeed a defaulter who had failed to make payments in respect of his employees to the Employees Provident Fund. In point of fact, the appellant has admitted that he went to the garage of the complainant Jayasinghe on the 13th of January, 1983, and that at his request, Jayasinghe had seen him at his office on the 17th of January, 1983. The appellant has also admitted that he went to Jayasinghe's garage on the 22nd of January, 1983, which was the date on which the detection was made. The question arises

94

as to why the appellant without complying with the relevant provisions of the EPF Act and initiating a. prosecution against Jayasinghe for his default, adopted the course of action he did to help Jayasinghe, without any plausible reason for doing so. This conduct on the part of the appellant to my mind is, to say the least, highly suspicious, and must therefore be considered in the context of the other items of evidence which relate to the charge of solicitation.

Senior state counsel has adverted to the fact that the appellant's field notebook which has been produced marked P4 contained no entry whatsoever relating to the alleged three visits by the appellant to the complainant's garage on the 13, 17th and 22nd of January, 1983. It is significant to note that the appellant had admitted these visits in his statement from the dock. It was the submission of state counsel that the absence of entries in the field notebook P4 relating to the visits of the appellant to the complainant's garage supports the position that such visits were not official acts done in good faith. This item of evidence would also in my view tend to support the allegations set out in counts 1 and 3. It has also transpired in evidence that the appellant had in this notebook P4 made many entries relating to official work he had performed during this period. The items of evidence set out above in my view corroborate the evidence of Jayasinghe on the charges relating to solicitation set out in counts 1 and 3.

I have also given careful consideration to the statement the appellant has made from the dock when he was called upon for his defence and I am in entire agreement with the submission of state counsel that some of the facts narrated by the appellant in his statement from the dock were palpably false and must necessarily be rejected. Counsel adverted to that part of the dock statement wherein the appellant had stated that his visit to the garage of the complainant on Saturday the 22nd of January, 1983, was a chance visit and that when he came to the garage, the Bribery decoy Seneviratne was present. He did not know at that time the real identity of the decoy. If this position set out by the appellant is correct that his visit was a chance visit, then how could one explain Jayasinghe's conduct in awaiting the arrival of the appellant in the company of the Bribery decoy Seneviratne ready for the alleged detection. This circumstance necessarily suggests that Jayasinghe was awaiting the arrival of the appellant on the said date having made arrangements with the Bribery Department

95

to conduct a detection based on a complaint made by him against the appellant.

Yet another aspect of the statement made by the appellant from the dock relates to his explanation as to how a bundle of fifteen currency notes of the denomination of Rs. 100 was found in his pocket, which sum of money was handed over by him to the Bribery decoy on demand. In his dock statement, the appellant has stated that he does not know as to how the currency notes came into his trouser pocket. This explanation on the part of the appellant is most unacceptable and bears no scrutiny. Is it reasonably possible to introduce a bundle of fifteen Rs. 100 notes into the trouser pocket of a person without his being aware of it?

Upon a consideration of the totality of the evidence adduced in this case despite the contradictions that have been proved in the evidence of Jayasinghe, I hold that the charges relating to the solicitation of a gratification set out in counts 1 and 3 of the Indictment have been established beyond reasonable doubt. I therefore affirm the conviction of the appellant on counts 1 and 3 of the Indictment. The appeal against the said conviction is therefore dismissed.

Having regard to the particular facts of this case, however, I am of the opinion that the sentence imposed on the appellant is somewhat excessive. In a case such as this, it would be relevant to take into consideration the long period of time has lapsed between the date of the commission of the offence and the date of punishment - a period of over fifteen years. I have also taken into account the fact that the appellant who held office as public servant would now be dismissed from service consequent upon this conviction. I, accordingly, set aside the sentence of four years rigorous imprisonment on each of the counts 1 and 3 imposed on the appellant by the Trial Judge and affirmed by the Court of Appeal and substitute therefor a sentence of two years rigorous imprisonment on each of the aforesaid counts, which in my view, would meet the ends of justice. The sentences are to run concurrently.

G. R. S. DE SILVA, CJ. - I agree.

BANDARANAYAKE, J. - I agree.

Appeal dismissed.

Sentence varied.