1966 *Present :* **T. S. Fernando, J., and Sri Skanda Rajah, J.**

K. H. M. H. KARUNARATNE, Appellant, *and* THE QUEEN, Respondent

*S.C. 1 of 1966—D. C. (Crim.) Colombo, B/4*

(1) *Bribery Act—Jurisdiction of District Court in respect of offences committed prior to amending Act of 1965—Ingredients of offences falling within clauses (b) and (c) of s. 19—"Official act"—"Authorised by law or the terms of employment to receive"—Penal Code, s. 158—Bribery Act, as amended by Acts Nos. 40 of 1958 and 2 of 1965, ss. 14, 19, 31, 79, 90.*

(2) *Evidence—Wire-recorded speech—Admissibility.*

An offence of bribery falling within section 19 of the Bribery Act (Cap. 26, as amended by Act No. 40 of 1958) is triable by a District Court in terms of section 15 of the Bribery (Amendment) Act No. 2 of 1965 even if the offence

was committed prior to the date when the amending Act of 1965 conferring jurisdiction on District Courts was passed in consequence of the constitutional invalidity of Bribery Tribunals appointed previously under the principal Act.

" Performing an official act " within the meaning of section 19 (*b*) of the Bribery Act is not restricted to the performance of those acts which a public servant is required by law to perform, but " embraces all those acts which he does which are referable to his official capacity of a public servant or which, according to recognised and prevailing practice, he does as a public servant ".

The offence contemplated in section 19 (*c*), read with section 90, of the Bribery Act (as amended by Act No. 40 of 1958) is the solicitation or acceptance of a gratification by a public servant when he is engaged in his capacity of a public servant upon the performance of his duties as such public servant.

The accused-appellant, who was a police constable, was charged in the District Court of Colombo with having solicited on 2nd October 1961, while he was a public servant, a gratification of Rs. 100 from one P as an inducement for performing an official act, to wit, making a report favourable to P in regard to an accident in which P was involved as driver of a car. He was also charged on another count of the indictment with having solicited the gratification " which you were not authorised by law or the terms of your employment to receive ". The first charge related to an act falling within clause (*b*) of section 19 of the Bribery Act, while the second charge referred to an act falling within clause (*c*) of the same section (as amended by Act No. 40 of 1958).

The evidence showed that the accused, as investigating police officer, had to make a report about the accident to another police officer who ultimately furnished a report to anyone interested in the accident, e.g. an insurance company. P was anxious to see that the claim for repairs to his car would be met by the insurance company. The accused told him that he would submit a favourable report only if P would give him Rs. 100.

*Held*, (i) that the case was triable by a District Court in terms of section 15 of the Bribery (Amendment) Act, No. 2 of 1965, although the offences were committed on the 2nd October 1961, before the amending Act came into operation.

(ii) that the making of the report by the investigating officer was an official act within the meaning of section 19 (*b*) of the Bribery Act.

(iii) that the evidence established that the accused solicited a gratification when acting as a public servant and not in his personal or private capacity. He was therefore guilty of an offence under section 19 (*c*) of the Bribery Act.

*Evidence—Wire-recorded speech—Admissibility.*

Where evidence of a telephone conversation was led in the form of a document which purported to be a transcript of the tape-recorded conversation, and the tape recorder itself was played in court—

*Held*, that the admission of evidence of a wire-recorded speech is not repugnant to our law of evidence. But the Court should have considered the evidence of an expert who stated at the trial that (1) there are dangers in attempting to identify speakers by their voices as relayed through tape-recorders and (2) the dangers attendant upon such identification are greater in a case where what is relayed is a telephone conversation. There was, however, other independent evidence sufficient to establish the guilt of the accused.

APPEAL from a judgment of the District Court, Colombo.

*G. E. Chitty, Q.C.*, with *E. R. S. R. Coomaraswamy*, *M. Underwood*, *M. D. K. Kulathunga* and *N. Wijenathan*, for the Accused-Appellant.

*N. Tittawela*, Crown Counsel, for the Crown.

*Cur. adv. vult.*

July 28, 1966. T. S. FERNANDO, J.—

This is an appeal from a conviction by the District Court of an offence under the Bribery Act (Cap. 26), as amended by Acts Nos. 40 of 1958 and 2 of 1965.

The appellant who, at the date of the offence alleged, was a police constable of the Traffic Branch of the Colombo Police, was indicted on two charges, both punishable under section 19 of the Bribery Act. In view of certain points of law raised on the appeal it becomes necessary to reproduce below *in extenso* the two charges as they appeared in the indictment :—

(1) That on or about the 2nd day of October 1961 at Colombo you, being a public servant, to wit, a police constable, did solicit a gratification of a sum of Rs. 100 from one B. Piyasena as an inducement for performing an official act, to wit, making a report favourable to Piyasena in regard to an accident in which the said Piyasena was involved as driver of car No. EY 6939 on the said date, and that you are thereby guilty of an offence punishable under section 19 of the Bribery Act.

(2) That on the date and at the place aforesaid, you, being a public servant, to wit, a police constable, did solicit from one B. Piyasena a gratification of a sum of Rs. 100 which you were not authorised by law or the terms of your employment to receive, and that you are thereby guilty of an offence punishable under section 19 of the Bribery Act.

The first charge relates to an act falling within clause (*b*) of section 19, while the second refers to an act within clause (*c*) of the same section. The Bribery Act was enacted in 1954 (Act No. 11 of 1954), and section 19 thereof penalised only the acts described in clauses (*a*) and (*b*). The punishment then prescribed for an offence under this section was rigorous imprisonment for a term of not more than seven years *or* a fine not exceeding five thousand rupees or both. And Act No. 11 of 1954 provided for a person accused of an offence punishable under section 19 to be tried either by a District Court (section 31) or before a Board of Inquiry (section 47).

Act No. 11 of 1954 was amended by the Bribery (Amendment) Act No. 40 of 1958 by the inclusion in section 19 of a third clause (*c*) which then created a third offence of bribery, and it is an offence of this kind that was alleged in the second charge of the indictment. The 1958 Amendment by repealing section 31 of the 1954 Act deprived the District Courts of jurisdiction to try offences of bribery falling within the Bribery Act and also declared such offences triable exclusively by a Bribery Tribunal constituted in the manner provided by the amended section 41 or by a Commission of Inquiry.

The Bribery Act was further amended by the (Amendment) Act No. 2 of 1965 which altered the sentence in respect of convictions for offences punishable under section 19 to rigorous imprisonment for a term of not more than seven years *and* a fine not exceeding five thousand rupees. Thus, in respect of sentence, this latest amendment made imprisonment and fine obligatory whereas before that there was an option in the court in respect of punishment that could have been imposed. The 1965 Amendment also repealed Part IV of the original (1954) Act which related to Boards of Inquiry so that these Boards came to be abolished. Along with that abolition, the jurisdiction of the District Court was revived and made compulsory, and not merely optional as it had been from 1954 to 1958.—see S. 15 of Act No. 2 of 1965.

At the trial, the appellant was acquitted on the first charge but convicted on the second. It is somewhat difficult to understand this result, but this aspect of the case will, however, be dealt with by me later on in this judgment. I have first to deal with a question of law raised by Mr. Chitty. Relying on the acquittal on the first charge (against which, I must mention, no appeal has been preferred to this Court by the Crown), he has argued that in respect of the second and only charge of which the appellant has been convicted the District Court had no jurisdiction to try the offence as it was one falling within section 19 (*c*) of the Act and committed prior to the 1965 (Amendment) Act. The date of the commission of the offence alleged was set out in the indictment as the 2nd October 1961. The argument was to the effect that at the time of the commission of the offence the only court or tribunal contemplated by the Bribery Act as being competent to try the appellant on this charge was a Bribery Tribunal. Certain offences punishable under Chapter IX of the Penal Code, of course, remained triable by the courts, but we are not concerned here with any such offence. Relying on the decision of this Court in *Senadhira v. The Bribery Commissioner*[1] that declared the power given to a Bribery Tribunal by section 66 (1) of the Bribery Act, No. 11 of 1954 (as amended by Act No. 40 of 1958) unconstitutional for the reason that members of the Bribery Panel were not appointed by the Judicial Service Commission, counsel went on to contend that between the enactment of the 1958 Amendment and the 1965 Amendment there was no validly constituted body with legal power

[1] *(1961) 64 N. L. R. 313.*

to convict the appellant or to punish him. Act No. 2 of 1965 made all offences under the Act triable by District Courts and imposed a validly enforceable penalty ; but, in counsel's submission, this does not have retrospective operation. Counsel did contend that under this latest Amendment cognizance could have been taken by the District Court of offences in contravention of section 19 (*c*) only where the offences have been committed after that Amendment came into force.

It was apparent throughout that counsel's entire argument on the point above outlined depended on the validity of a proposition he put forward, viz. that an offence is something which is prohibited on pain of a legally valid enforceable penalty or sanction. According to the argument, if there was not at the time (2.10.1961) the alleged offence was committed a person or body of persons that could have validly taken cognizance of the offence and imposed an enforceable penalty, there was really no offence punishable under the Bribery Act which the appellant could have been charged with or of which he could have been convicted. I am unable to agree that the argument so advanced is sound. By an offence is meant an act or omission made punishable by law. This much is the substantive part of the law and must not be confused with its procedural part. That the machinery devised for trial and punishment is illegal, unconstitutional or otherwise defective cannot have the effect of rendering such act or omission not an offence. If the argument is valid, where a new offence is created by an Act of Parliament which also prescribes a new tribunal to be established under that very Act for trial and punishment of that offence, then, inasmuch as some time must necessarily elapse between the Act coming into force and the establishment of the new tribunal, no offence under that Act would be committed by anyone until such time as the tribunal is validly established. A proposition of that nature would be entirely unmaintainable. The true position in law would be that the commission, at any time after the Act has come into force, of the act or omission prohibited constitutes an offence, but trial in respect of it and punishment therefor must await the constitution of the valid tribunal. The argument that there was no offence in contravention of section 19 (*c*) before the coming into operation of Act No. 2 of 1965 fails.

In the view I have taken of the main point of law relied on by Mr. Chitty, I need hardly deal with the subsidiary point that Act No. 2 of 1965 has no retrospective operation. It is sufficient to refer to the rule that "the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the courts, even where the alteration which the statute makes has been disadvantageous to one of the parties. It matters not that the effect of a procedural alteration is to make a prosecution under a penal Act possible, where formerly it had been impossible. Although to make a law punish that which, at a time when it was done, was not punishable, is contrary to sound principle, a law which merely alters the procedure may, with perfect propriety, be made applicable to past as well as future

transactions, and no secondary meaning is to be sought for an enactment of such a kind. No person has a vested right in any course of procedure ". —Maxwell on The Interpretation of Statutes (11th edition), p. 216.

I can now turn to the facts. Shortly stated, the relevant facts are those set down below :—

The witness Piyasena was, on 2.10.61, driving a car No. EY 6939 belonging to his brother-in-law when, at the junction of Dickman's Road with Havelock Road, at a time when he had halted the car as required by traffic light signals, a car coming behind his knocked into the rear of his car. Section 161 of the Motor Traffic Act, 1951 (Cap. 203) requires a driver of a motor vehicle to report an accident forthwith to the officer in charge of the nearest police station. The officer in charge of such police station has a duty to investigate or cause to be investigated whether an offence in contravention of the Motor Traffic Act or any other law has been committed. The appellant's superior officer, Inspector Imbuldeniya, stated that when an accident occurs the investigating officer makes a report on it to the officer in charge, and at the request of any insurance company a report is furnished by the police on payment of a small fee.

The accident was reported to the Police, and the appellant and another police constable were the police officers sent to investigate thereon. On Piyasena's version of the accident he would not appear to have been in the fault, but he did say in evidence that the appellant took a different view as to which of the two drivers was to blame. Piyasena was anxious to see that the claim for repairs to the car would be met by the insurance company. According to him, after certain questions had been put and measurements had been taken, the appellant told him that he would help him in the filling up of the necessary forms relating to the insurance company if Piyasena would give him Rs. 100. As he was unable to find the money that day he informed the appellant of his situation. On the next day (3.10.61) he went to the office of the insurance company and informed witness David, the Claims Officer of the company of the request for money made by the appellant. David alerted a certain Police Officer who directed Piyasena to the Department of the Bribery Commissioner. It was there arranged that Piyasena should telephone to the Fort Police station and ask to speak to the appellant and then carry on a conversation in respect of the accident and the request for money.

Piyasena again saw the appellant on 4.10.61 and told him he had not yet got together sufficient money whereupon the appellant told him that he would be prosecuted if the money is not given and that he could " change the plans and everything ".

The telephone conversation that was arranged for on 3.10.61 did take place three days later, on 6.10.61, and this was tapped and recorded on a tape-recorder. Thereafter, the Bribery Department made arrangements for Piyasena to go over to the Fort Police station and make payment to

the appellant of the sum of money asked for. Although Piyasena did go over as arranged, the passing of the money did not take place. It is not clear from the evidence whether the trap set failed because of bungling by Inspector Imbuldeniya whose part it was to witness the passing of the money or because the appellant had become wary by this time.

Evidence of the telephone conversation of 6.10.61 was led in the form of a document which purported to be a transcript of the tape-recorded conversation. Further, the tape recorder itself was played in court. An objection taken at the trial to the admission of evidence in this form as well as to playing of the tape recorder in court was overruled by the learned trial judge. No argument was addressed to us that the document in the form it was put in was inadmissible. Mr. Chitty did say that he was refraining from submitting such an argument, but he did contend that the playing of the tape recorder in court was not sanctioned by any known law of evidence or procedure and was illegal. I am unable to agree. I might here mention that the case of *Abu Bakr v. The Queen* [1] shows that even in this Country the admission of evidence of a wire-recorded speech has been held to be not repugnant to our law of evidence. In that case too an argument had been addressed to the court that the playing of the wire-recorder in the hearing of the court was contrary to law, but, in the view the Court took about the admissibility of the evidence of the person who had recorded the speech in the form of a document when it was reproduced by the playing of the instrument, the Court did not consider it necessary to rule upon the argument. In regard to the contention of Mr. Chitty set out above, I think a reference to the recent decision of the English Court of Criminal Appeal in *R. v. Maqsud Ali* [2] will show that where this question arises in England the answer is that there is no illegality in the procedure of playing a tape recorder before the Court. As Marshall J. put it (vide p. 471), " Having a transcript of a tape recording is, on any view, a most obvious convenience and a great aid to the jury, otherwise a recording would have to be played over and over again. Provided a jury is guided by what they hear themselves and on that they base their ultimate decision, we see no objection to a copy of a transcript, properly proved, being put before them." It was sought to contend that the position is not the same under our Evidence Ordinance, but I remain unconvinced that there is any difference on this point between the English law and ours.

It was next urged on behalf of the appellant that, before the tape-recorded evidence was acted upon, the trial judge should have considered the evidence of an expert the defence called at the trial to prove, inter alia, that (1) there are dangers in attempting to identify speakers by their voices as relayed through tape-recorders and (2) the dangers attendant upon such identification are greater in a case where what is relayed is a telephone conversation, and that too a tapped telephone conversation. I think the criticism made in this regard is just. Although the

[1] *(1953) 54 N. L. R. 566.* [2] *(1965) 2 A. E. R. 464 at 471.*

trial judge has expressly accepted the evidence of Piyasena and impliedly accepted the evidence of Inspector Imbuldeniya, he has not thought it worth while to say a word about the evidence of the expert. The acceptance of the evidence of these two witnesses should have been reached only after a consideration of the expert's evidence. Piyasena claimed that he identified that voice of the appellant. Imbuldeniya was quite familiar with his subordinate's voice, but what he said in evidence was that the voice he heard was " like that of the accused ". I am unable, however, to conclude that this omission on the part of the trial judge vitiates the finding of fact that it was the appellant who solicited a sum of money on the date alleged in the charge, viz. 2.10.61. The actual solicitation charged was that of 2.10.61 ; the telephone conversation was one made on 6.10.61, and was relevant principally as corroborative evidence touching identity. A finding as to solicitation on 2.10.61 depended mainly upon the evidence of Piyasena supported as it was by Sumanasena, his companion at the time of the accident. Both these witnesses were believed by the trial judge. The judgment is, no doubt, skimpy on the point, but, where Piyasena and Sumanasena have been believed, it must follow that the solicitation by the appellant has been established.

That the solicitation was established in the opinion of the trial judge is further demonstrated by the verdict of guilty reached on the second charge. Moreover, section 79 of the Bribery Act requires that the giver of a gratification shall not be regarded as an accomplice. Why then did the learned judge find that the first charge was not proved ? It is here that his statement of reasons is most unhelpful. It is necessary in my opinion to remind trial judges that section 306 of the Criminal Procedure Code requires them to state in their judgment the reasons for the decision on the point or points for determination. There is, therefore, some justification for the criticism of learned counsel that this judgment is no more than " an extended verdict ". In a case of importance to person charged and prosecutor alike, and a bribery case is invariably one such, a trial judge owes a duty to the parties to address himself with care to all the points, particularly those on which an appeal lies to this Court.

In regard to the first charge, the learned judge has stated that he was not satisfied that the evidence supports the charge, but has not stated the reasons for that conclusion. As a finding that a sum of Rs. 100 was solicited is implicit in the judgment, the acquittal on this charge must have resulted from a conclusion he reached that he was not satisfied that this sum of money was solicited as an inducement for performing an official act, or, in other words, that the making of a report in regard to the accident was not an official act. Even if there was no statutory duty on the appellant or, for that matter, on any police officer to furnish a report to an insurance company in respect of a motor accident, the unchallenged evidence was that the investigating officer has to make a report to his superior officer, and this report is obviously the basis of any subsequent report furnished by the police station concerned to the insurance company or companies interested in the matter of the accident.

The trial judge has, I fear, misdirected himself in regard to the meaning of an " official act " in the statute. He appears to have treated an official act as being limited to an act which a public servant is required by law to perform. It has, of course, a wider meaning. Some guidance as to its meaning can be obtained by examining the argument before the Privy Council and the judgment of their Lordships in the case of *Attorney-General of Ceylon v. de Livera*[1] in which the expression " in his capacity as such member " occurring in section 14 of the Bribery Act came to be interpreted. The Supreme Court had placed on that expression (vide 62 N. L. R. 25) a restrictive meaning when it held that a member of the House of Representatives cannot be regarded as acting " in his capacity as such member " except when he is exercising the functions of his office as such member, and that it is confined to those cases in which a member does an act which he is able to do only by virtue of the legal powers vested in him as a member and which act he would not be able to perform but for the fact that he is a member. This restrictive meaning was not approved, the Privy Council stating that it puts too limited a construction on the words of the Act and might in some cases result in defeating the intention expressed by those words. As Viscount Radcliffe put it, " To make the result depend upon an inquiry into the range of the ' exclusive ' powers and duties of a Member of Parliament is likely to hang it solely upon the actual written provisions of the prevailing Constitution, and to do this may require a virtual ignoring of the plain facts of a particular case. Where the facts show clearly, as they do here, that a Member of Parliament has come into or been brought into a matter of government action that affects his constituency, that his intervention is attributed to his membership, and that it is the recognised and prevailing practice that the government department concerned should consult the local M.P. and invite his views, their Lordships think that the action that he takes in approaching the Minister or his Department is taken by him ' in his capacity as such member ' within the meaning of section 14 (*a*) of the Bribery Act. "

Similarly, " performing an official act " is not, in my opinion, restricted to the performance of those acts which a public servant is required by law to perform, but embraces all those acts which he does which are referable to his official capacity of a public servant or which, according to recognised and prevailing practice, he does as a public servant. If, as is the case here, the investigating police officer has to make a report to the officer in charge who ultimately furnishes a report to anyone interested, e.g., an insurance company, then the making of that report by the investigating officer is, in my opinion, an official act within the meaning of section 19. That being my opinion, it would follow that the appellant should have been convicted of the first charge. As, however, there is no appeal before us canvassing the acquittal, we have no power to alter the order made thereon at the trial.

[1] *(1963) A. C. 103 ; (1962) 64 N. L. R. 409.*

In respect of the second charge of which the appellant has been convicted, Mr. Chitty complains, again not without justification, that it would appear that the trial judge has once again misapprehended a question of law, this time the nature of the offence charged. The second charge is referred to by the learned judge as " a straight-forward charge that the accused being a public servant did solicit from Piyasena a gratification of Rs. 100". He goes on to say " this solicitation is itself an offence ". If by this he meant that all that the prosecution had to prove was that the public servant did solicit a gratification, I fear that one element of the offence under section 19 (*c*) has been overlooked. " Gratification " has been the subject of definition in the Act (vide section 90), but throughout carries with it here a sinister and not an innocent connotation. If the words " any gratification which he is not authorised by law or the terms of his employment to receive " are given the widest possible interpretation of which they are capable, then a public servant who accepts a personal gift from a friend, relative or neighbour, or for that matter a birthday present from his wife, would be guilty of an offence under the Act. It would be absurd to have to reduce oneself to the position that such gifts are within the mischiefs which the Act was designed to punish. Some limitation upon the wide words of the section was obviously intended by the Legislature. However wide the words of a statute may appear to be, they must be given an interpretation that accords with the intention of the Legislature. This rule of interpretation is formulated in Maxwell, *ibid*, at pp. 58–59 as follows :—

> " It is in the interpretation of general words and phrases that the principle of strictly adapting the meaning to the particular subject-matter with reference to which the words are used finds its most frequent application. However wide in the abstract, they are more or less elastic, and admit of restriction or expansion to suit the subject-matter. While expressing truly enough all that the legislature intended, they frequently express more in their literal meaning and natural force ; and it is necessary to give them the meaning which best suits the scope and object of the Statute without extending to ground foreign to the intention. It is, therefore, a canon of interpretation that all words, if they be general and not express and precise, are to be restricted to the fitness of the matter."

An examination of this part of the section—19 (*c*)—makes it apparent that what is penalised is the solicitation or acceptance of a gratification other than a legal gratification. This is therefore an indication that this part of the section contemplates occasions when a legal gratification may be accepted, but there is a solicitation or an acceptance of a gratification

other than a legal gratification. These must necessarily be occasions when the person soliciting or accepting the gratification is acting as a public servant. The mischief which this part of the section was designed to prevent is that of soliciting or accepting a gratification when acting as a public servant, i.e., when the public servant is engaged in his capacity of a public servant upon the performance of his duties as such public servant.

Even if the learned trial judge had misapprehended the true meaning of section 19 (c), it is competent now to the Crown, in resisting the appeal from the conviction, to maintain it by showing that the evidence accepted by the trial judge established that the solicitation was done on the occasion of the appellant acting as a police constable or when he was engaged upon the performance of the duties of or was acting in the capacity of a police constable. The act was clearly referable to his official capacity and was not done in his personal or private capacity. This the Crown has, in my opinion, succeeded in doing, and I would therefore affirm the conviction on the second charge and dismiss this appeal.

After this judgment came to be written, my attention was drawn to a decision of two judges of this Court in a case also of offences under section 19 (*b*) and (*c*) of the Bribery Act delivered after the date on which we reserved our judgment on this appeal. I refer to S. C. Appeal No. 2 of 1966—D. C. (Crim.) Matale No. CRM/1/B2—S. C. M. of 11.7.1966. [1] We have, of course, not heard argument of counsel in respect of this decision, but, subject to that qualification, I think it necessary here to state that I am quite unable, with due respect to the opinion expressed by these two learned judges, to agree with the interpretation there contained of (*a*) the expression 'official act' or (*b*) the scope of section 19 (*c*). I feel bound to observe, again with much respect, that the decision appears to overlook the fact that the Bribery Act was intended, inter alia, to penalise acts which this Court had ruled (e.g. in *De Zoysa v. Subaveera* [2] and *Tennekoon v. Dissanayake* [3]) were outside the ambit of section 158 of the Penal Code. In the last mentioned of these cases, Gratiaen J., echoing the words of the Chief Justice of Madras in a case under the corresponding section of the Indian Penal Code, had observed that "it is time that fresh legislation was introduced into the Penal Code to make these most dangerous offences of giving and taking bribes punishable in much wider terms than are contained in the Code at present."

SRI SKANDA RAJAH, J.—I agree.

*Appeal dismissed.*

[1] *(1966) 68 N. L. R. 524.* [2] *(1941) 42 N. L. R, 357.*
[3] *(1948) 50 N. L. R. 403.*