1960 *Present :* **Weerasooriya, J., and Sinnetamby, J.**

THE QUEEN *v.* M. G. J. MICHAEL DE LIVERA *et al.*

S. C. 31A-B—D. C. (Criminal) Colombo, N 1939

Bribery Act, No. 11 of 1954, as amended by Act No. 17 of 1956—Bribery of a Member of Parliament—Ingredients of offence—" In his capacity as such member "—Sections 14 (a), 11 (b), 15, 22, 25 (2), 91.

A person cannot be convicted under section 14 (*a*) of the Bribery Act of offering a gratification to a member of the House of Representatives unless the gratification was offered to the latter for his doing an act in his " capacity " as a member of Parliament. A member of the House of Representatives cannot be regarded as acting " in his capacity as such member " within the meaning of the section except in the exercise of the functions of his office as such member ; section 14 (*a*) 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.

APPEAL from a judgment of the District Court, Colombo. The facts appear from the judgment of Weerasooriya, J.

H. V. Perera, Q.C., with *S. Nadesan, Q.C.*, *E. J. Cooray*, *J. A. L. Cooray* and *N. Satyendra*, for the 1st Accused-Appellant.

Colvin R. de Silva, with *M. M. Kumarakulasingham*, for the 2nd Accused-Appellant.

D. St. C. B. Jansze, Q.C., Attorney-General, with *L. B. T. Premaratne*, Crown Counsel, and *V. S. A. Pullenayegum*, Crown Counsel, for the Crown-Respondent.

Cur. adv. vult.

April 4, 1960. WEERASOORIYA, J.—

The two accused-appellants were tried before the District Court of Colombo on an indictment framed under the special provisions of the Bribery Act, No. 11 of 1954 (hereinafter referred to as " the Act "). The 1st accused-appellant was charged on counts 1 and 3 with having, on the 19th and 22nd December, 1958, respectively, committed an offence punishable under section 14 (*a*) of the Act in that he offered a gratification of Rs. 5,000 to one Welikala James Charles Munasinghe, a member of the House of Representatives, as an inducement or reward for his doing an act in his capacity as such member, to wit, addressing a letter to the Minister of Lands and Land Development requesting him to abandon the proposal for the acquisition of Vincent Estate, Chilaw. The 2nd

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accused-appellant was charged on counts 2 and 4 with abetment of those offences. In addition, the 1st accused was charged on count 5, and the 2nd accused on count 6, with having, on the 22nd December, 1958, abetted the acceptance by Welikala James Charles Munasinghe of a gratification of Rs. 5,000 as an inducement or reward for his doing the aforesaid act, and with having thereby committed an offence punishable under section 14 (*b*) read with section 25 (2) of the Act. They were convicted on all counts and sentenced to terms of imprisonment, and have filed these appeals from their convictions and sentences.

At the material time Mr. Munasinghe was the member for Chilaw in the House of Representatives. He was also the Chief Government Whip and General Secretary of the Sri Lanka Freedom Party. Vincent Estate is situated within his constituency and was owned by the 1st accused. On the 28th October, 1958, Mr. Munasinghe addressed to the Minister of Lands and Land Development the letter P1 strongly recommending as a matter of urgency the acquisition of Vincent Estate for alienation to the inhabitants of certain villages in the Chilaw District who had been displaced from their homes as a result of floods. P1 bears the printed heading " House of Representatives " and is signed by Mr. Munasinghe as " M. P. Chilaw ". At the time the Minister of Lands and Land Development, Mr. C. P. de Silva, was the authority empowered under the Land Acquisition Act, No. 9 of 1950, to initiate acquisition proceedings and to give the necessary directions in that behalf. The question whether Vincent Estate should be acquired or not was, therefore, primarily a matter for him.

On the representations contained in P1 the Minister decided that Vincent Estate should be acquired, and he gave the following directions to the Land Commissioner : " For early action. M. P., Chilaw asks this land for alienation in ½-acre lots for people who got ruined by the floods and those people of Chilaw town who have employment but no houses to live in. Please take acquisition proceedings immediately ". Soon afterwards, the Government Agent, Puttalam, called for a report from the Divisional Revenue Officer regarding the proposed acquisition. Before that report was received, the 1st accused who, presumably, had learnt of the steps that were being taken, saw the Government Agent. The object of the visit was clearly to dissuade the authorities from proceeding with the acquisition. The 1st accused told the Government Agent that the estate, in part, was itself liable to floods and therefore not suitable for a housing scheme. The Government Agent referred the 1st accused to Mr. Munasinghe as the member of Parliament for Chilaw and the person who put forward the proposal to acquire the estate, and he also informed the 1st accused that the final authority on the question whether it should be acquired or not was the Minister of Lands and Land Development.

It is the evidence of Mr. Munasinghe that prior to the 19th December, 1958, the 1st accused was a stranger to him, but he had known the 2nd accused well from about 1947, when Mr. Munasinghe became the Chairman of the Madampe Town Council, in which office he continued till 1956 except for a short break of about three months. During that

period the 2nd accused was the Secretary of the Madampe Town Council and closely associated with Mr. Munasinghe, whom he often visited in his bungalow. At the time of the alleged offences, however, the 2nd accused was the Secretary of the Puttalam Urban Council, while Mr. Munasinghe was residing in Kelaniya. It may be inferred that the 1st accused knew the 2nd accused and also the latter's previous association with Mr. Munasinghe. According to Mr. Munasinghe, the 2nd accused came to his house in Kelaniya on the morning of the 19th December, 1958. The 2nd accused said that he came at the instance of the 1st accused, who was "pestering" him for an introduction to Mr. Munasinghe, that the 1st accused was anxious that his estate should not be acquired and was prepared to give Mr. Munasinghe or his party or any person nominated by Mr. Munasinghe a present of money if the acquisition was stopped. Mr. Munasinghe stated that he requested the 2nd accused to come with the 1st accused at 7.30 p.m. on the same day and the 2nd accused went away promising to do so. In the meantime Mr. Munasinghe got in touch with the Police and it was arranged for some Police officers to be present in concealment at the house of Mr. Munasinghe within hearing distance of any conversation that would take place between him and the accused when they met in the evening. Mr. Munasinghe has stated in evidence that at that meeting the 1st accused offered him Rs. 5,000 in cash to stop the acquisition, that he undertook to give the 1st accused on the 22nd December, at about 9.30 or 10 p.m., being the date and time fixed for their next meeting, a letter addressed to the Minister of Lands and Land Development withdrawing his earlier application for the acquisition of the estate, in return for which the 1st accused was to hand him the sum of Rs. 5,000.

On the 22nd December the Police were again present, unknown to the accused, when the latter came to see Mr. Munasinghe as arranged. On that occasion Mr. Munasinghe gave the 1st accused the letter P3 addressed to the Minister in which he withdrew his application for the acquisition of the estate, stating that it was not suitable for housing purposes as a part of it gets submerged during seasonal floods. P3 is written on notepaper bearing the printed heading "Chief Government Whip" and is signed by Mr. Munasinghe as "M. P., Chilaw". The 1st accused took the letter and handed to Mr. Munasinghe a wrapped parcel, P6, containing the Rs. 5,000. As for the 2nd accused, apart from being present, he neither did nor said anything. When the accused were about to depart the Police officers came forward, disclosed their identity and took into custody, among other things, the letter P3 and the parcel P6.

The facts as set out above have been accepted by the trial Judge and were not challenged in appeal. It is, therefore, with reference to these facts that the questions of law which were argued before us need be considered. But conceding these facts, learned counsel for both the accused contended that the Crown has failed to prove the charges against their clients. On behalf of the 2nd accused it was contended, further, that on the same facts no offence of abetment as alleged against him has been made o t even if the 1st accused be held to have committed the offences with which he is charged.

Section 14 of the Act is as follows :

" A person—

(*a*) who offers any gratification to a judicial officer, or to a member of either the Senate or the House of Representatives, as an inducement or a reward for such officer's or member's doing or forbearing to do any act in his judicial capacity or in his capacity as such member, or

(*b*) who, being a judicial officer or a member of either the Senate or the House of Representatives, solicits or accepts any gratification as an inducement or a reward for his doing or forbearing to do any act in his judicial capacity or in his capacity as such member,

shall be guilty of an offence punishable with rigorous imprisonment for a term not exceeding seven years or a fine not exceeding five thousand rupees or both :

Provided, however, that it shall not be an offence under the preceding provisions of this section for any trade union or other organization to offer to a member of either the Senate or the House of Representatives, or for any member to accept from any trade union or other organization, any allowance or other payment solely for the purposes of his maintenance ".

The proviso, it may be stated, was not a part of the section as orginally enacted, but was subsequently added by the Bribery (Amendment) Act, No. 17 of 1956.

Section 15 of the Act reads :

" A member of either the Senate or the House of Representatives who solicits or accepts any gratification as an inducement or a reward for—

(*a*) his interviewing a public servant on behalf of any person, or

(*b*) his appearing on behalf of any person before a public servant exercising judicial or quasi-judicial functions,

shall be guilty of an offence punishable with rigorous imprisonment for a term not exceeding seven years or a fine not exceeding five thousand rupees or both :

Provided, however, that it shall not be an offence under the preceding provisions of this section for a member of either the Senate or the House of Representatives to appear as an advocate or a proctor before a Court or before a statutory tribunal of which a public servant is not a member ".

It is to be observed, by way of contrast with section 14, that under section 15 a member of the Senate or the House of Representatives who solicits or accepts a gratification as an inducement or a reward for the

doing of any act specified therein commits an offence irrespective of whether in the doing of it the offender acts in his capcity as such member or not.

Since the Rs. 5,000 offered to Mr. Munasinghe is undeniably a gratification within the definition of that term in section 91 of the Act, the substantial issue in this case is whether the gratification was offered to him for his doing an act in his " capacity " as a member of the House of Representatives within the meaning of section 14. The District Judge, in dealing with the matter with particular reference to the letters P1 and P3, stated as follows :

> " . . . . the question to be decided in this case is whether Mr. J. C. W. Munasinghe is legally competent or legally ' incapacitated ' from doing the act which he did when as a member of Parliament he wrote the letters P1 and P3 to the Hon. Minister of Lands. . . . The accused would certainly be entitled to an acquittal at the hands of this Court if Mr. Munasinghe as a member of Parliament usurped to himself the executive powers of the Minister of Lands and chose to write to the Land Commissioner directing him to take steps to acquire the 1st accused's land or if he chose to write to the Land Commissioner directing him not to take steps to acquire this land. In such an event Mr. Munasinghe the member of Parliament would certainly not have the legal capacity to act in that manner. The position here is entirely different. Mr. Munasinghe M. P. has not usurped the functions of the executive. All that he has done is to suggest to the executive authority as M. P. for Chilaw that a certain land in his electoral area be acquired to give relief to flood victims also in his electoral area. . . . This is the sort of request even a private citizen can make to an executive authority . . . . If a private citizen can do exactly what Mr. Munasinghe, M. P., has done, can it be said that Mr. Munasinghe has no legal capacity to do this act as member of Parliament for the area ? It is true that Mr. Munasinghe, M. P., can make the same suggestion that has been made in the letters P1 and P3 to the Minister in Parliament and this is a right which a private citizen who is not an M. P. does not have but merely because an M. P. has the right to make this suggestion to a Minister in Parliament is he thereby legally ' incapacitated ' as M. P. from making the same suggestion to the same Minister outside the House of Representatives ? . . . In my opinion Mr. Munasinghe was not legally incompetent or legally ' incapacitated ' as Member of Parliament from writing the documents P1 and P3 to the Hon. Minister of Lands and Land Development. In the result I have no alternative but to find the accused guilty of the charges laid against them ".

From the foregoing passage in his judgment it would seem that the learned Judge took the view that Mr. Munasinghe's " capacity " to write the letters P1 and P3 as a member of Parliament stood established from the fact that he was not prevented by any legal incapacity, either as a member of Parliament or as a private citizen, from communicating with the Minister in terms of those letters. With respect, I do not think that

the test applied by him is correct. The Attorney-General, while maintaining that the convictions entered against the accused are right, stated that he was unable to support the reasons given by the Judge for holding that P1 and P3 were written by Mr. Munasinghe in his " capacity" as a member of Parliament.

It is necessary, therefore, to consider whether there is any other basis on which it could be said that the gratification offered to Mr. Munasinghe was for his doing an act in his " capacity " as a member of the House of Representatives.

As regards the expression " in his judicial capacity " in section 14, the Attorney-General as well as counsel for the accused were agreed that while a judge may have administrative or ministerial functions to perform in addition to his judicial or quasi-judicial functions, he can be said to act in a judicial capacity only in the performance of his judicial or quasi-judicial functions. The immunity attaching to a judge in respect of an act done in his judicial capacity does not extend to acts which are of a purely administrative or ministerial character—McKerron on the Law of Delict (4th edition) 114.

The Attorney-General contended, however, that the expression " in his judicial capacity " in section 14 is not the equivalent of " in his capacity as a judge ", which latter expression (according to him) is of wider import, and would even include acts done by a judge in a purely administrative or ministerial character. By parity of reasoning he contended, further, that the expression " in his capacity as such member " in section 14 was advisedly used by the draftsman so as to bring within its ambit the acts of a member which do not strictly fall within the scope of his legal functions as a member of the Senate or the House of Representatives.

It is common ground that when a member of the Senate or the House of Representatives does an act which is exclusively within his power to do as such member, he does it in his " capacity " as such member. The Attorney-General conceded, however, that the act of Mr. Munasinghe in writing P1 or P3 does not fall into the category of acts which were exclusively within his power to do as a member of the House of Representatives. But according to him, there are other acts, falling outside that category, which a member of the Senate or the House of Representatives may do in his " capacity " as such member even though the same acts may be done by him in some other " capacity " as well. He was constrained to admit that in respect of such an equivocal act it may be difficult, and sometimes impossible, to establish the particular " capacity " in which it was done.

Assuming (without deciding) that the Attorney-General is right in his contentions, I think it will be convenient to consider at this stage what evidence is relied on by the prosecution to establish that the gratification offered to Mr. Munasinghe on the 19th and 22nd December, 1958, was for his doing an act in his "capacity " as a member of the House of Representatives. I shall first discuss the evidence regarding the gratification offered on the 22nd December, 1958. Mr. Munasinghe stated (somewhat belatedly) on being recalled by the prosecution after his evidence as a

witness had been concluded, that he wrote P1 and P3 in his " capacity " as a member of Parliament. There is also the circumstance that in signing P1 and P3 he described himself as " M. P., Chilaw ". In regard to P1 he had stated earlier that it was written as a result of a resolution passed by the Sangathatana Rural Development Society at a meeting at which he was present by invitation. He admitted that even before he became a member of Parliament he, as a politician and a " public man", and also as a prospective candidate for parliamentary office, used to make representations to the authorities on various matters. I do not think that on his election as member for Chilaw he could be regarded as having ceased to be a politician and a " public man ". On the contrary, his character as a politician and a " public man " may well have become more pronounced after his election. If P1 could have been written by him in his " capacity " as a member of the House of Representatives (in the sense contended for by the Attorney-General) the prosecution would have to concede that it could also have been written by him in his " capacity " as a politician or a " public man ", or, as the trial Judge stated, even as a private citizen. It follows that P3 could also have been written by Mr. Munasinghe in one or other of these several " capacities ". The burden on the prosecution is to establish that P1 and P3 were written by Mr. Munasinghe in his "capacity " as a member of the House of Representatives and not in any other " capacity ". It seems to me that in order to establish this the prosecution has to rely entirely on the evidence of Mr. Munasinghe. The Attorney-General submitted that in considering the question of the " capacity " in which Mr. Munasinghe wrote P1 or P3 the evidence of Mr. Munasinghe on the point should be accepted as he is in the best position to say in what " capacity " he acted or purported to act.

The prosecution contends that the vidence of Mr. Munasinghe is supported by the circumstance that in signing P1 and P3 he described himself as " M. P., Chilaw ". There might have been force in this contention if the evidence showed that Mr. Munasinghe adopted such a description only when he purported to act in his "capacity " as a member of Parliament. The contrary is, however, indicated by the fact that the letter P4, which is addressed to the 1st accused and bears the same date as P3, is also signed by Mr. Munasinghe as " M. P., Chilaw ". Even on the construction which the learned Attorney-General sought to put on the expression " in his capacity as such member" in section 14 of the Act, I do not think it could seriously be contended that P4 was written by Mr. Munasinghe in that " capacity ". There seems to be no other circumstance which supports Mr. Munasinghe when he says that he wrote P1 and P3 in his " capacity " as a member of Parliament.

On being cross-examined as to why he claims to have written P1 and P3 in his " capacity " as a member of Parliament, Mr. Munasinghe stated as follows :—

> " I told the Court earlier that I wrote the letter P1 in my capacity as a member of Parliament. I took the view that I was entitled to write it in my capacity as a member of Parliament . . . .

I thought that in my capacity as a member of Parliament there was a duty or function entrusted to me to write to the Minister in respect of that matter. I think what I thought was correct. I have opened a number of buildings. The latest building I opened was a school building. That was the Thambagalla Government School. I was invited to open that building because I was a member of Parliament. I opened it in my capacity as a member of Parliament . . .

Q : In your view what are the other things you have opened in your capacity as a member of Parliament ?

A : Rural Development Society textile centres and a number of things like that.

Q : So far as you are concerned you consider that opening of school buildings and opening of rural development society buildings, etc., you have to do in your capacity as a member of Parliament ?

A : Yes."

He also added that he had inspected certain flood-affected private buildings and even attended " some social functions " in his capacity as a member of Parliament.

In regard to his evidence that he thought that in his capacity as a member of Parliament there was a duty or function entrusted to him to write to the Minister in terms of P1, he did not indicate whence such a duty or function was derived. The fact that he thought that there was such a duty or function would not, of course, establish the existence of such a duty or function in a member of the House of Representatives. There is not a scintilla of evidence that when P1 or P3 was written the acquisition of Vincent Estate or any other land for the relief of flood victims was the subject of any action taken or contemplated to be taken in the House of Representatives.

Even more unacceptable are Mr. Munasinghe's views that in attending social functions, opening school buildings, textile and rural development society centres, which he is invited to do because he is a member of Parliament, he thereby acts in his capacity as such member. No attempt was made by the learned Attorney-General to justify these views. While the good faith of Mr. Munasinghe in holding these views may be conceded, in my opinion they are entirely misconceived, and I do not see how they can avail the prosecution in establishing that he acted in his " capacity " as a member of the House of Representatives when he wrote P1 or P3. Whether he acted in that " capacity " or not is essentially a matter for the Court to decide.

The prosecution is in an even less favourable position in regard to the gratification offered on the 19th December, 1958, because on that date the letter P3 had not yet been written. The only arrangement arrived at on that occasion for any action to be taken by Mr. Munasinghe in order that the acquisition of Vincent Estate should not be proceeded with was to address a letter to the Minister withdrawing his earlier application for its acquisition, stating as the ground for the withdrawal that a portion

of the estate gets inundated periodically. It was not envisaged by the parties to the arrangement that the letter should be written in Mr. Munasinghe's " capacity " as a member of Parliament or in any other " capacity ". There was no discussion at all on the subject for the simple reason, I think, that neither Mr. Munasinghe nor the 1st accused gave his mind to it. As far as the 1st accused was concerned, it was quite immaterial to him in what " capacity " Mr. Munasinghe wrote that letter.

The question whether the gratification offered to Mr. Munasinghe on the 19th December, 1958, was for his doing an act in his " capacity " as a member of the House of Representatives has to be decided in the light of the circumstances existing as at that date, and without reference to the subsequent letter, P3, or the evidence of Mr. Munasinghe as to the " capacity " in which he wrote it.

It seems to me, therefore, that even if the expression " in his capacity as such member " in section 14 of the Act is given the wide construction contended for by the Attorney-General, the prosecution has failed to establish that the gratification offered to Mr. Munasinghe, whether on the 19th or the 22nd December, 1958, was for his doing an act in his " capacity " as a member of the House of Representatives.

I shall now deal briefly with the submissions of learned counsel for the accused as regards the proper construction of the same expression. According to Mr. H. V. Perera—and his submissions were adopted by Dr. Colvin R. de Silva—that expression bears a meaning corresponding to the expression " in his judicial capacity " in section 14 of the Act. Therefore, he submitted, a member of the Senate or the House of Representatives acts in his " capacity " as such member only in the exercise of the functions of his office as such member, and this he does when he participates in proceedings in the Senate or the House of Representatives, as the case may be, and not otherwise.

In this connection Mr. Perera referred to certain proceedings in the English House of Commons as showing how the expressions "capacity", when used in relation to a member of Parliament, and " proceedings in Parliament " are understood in English Parliamentary practice. No objection was taken by the learned Attorney-General to these citations. One of the citations was from the debate which took place on the 30th October, 1947 (Hansard, House of Commons Debates, Fifth Series, Vol. 443, Columns 1094 *et seq.*) when a report of the Committee of Privileges in regard to an alleged breach of privilege was discussed. The Committee had taken the view in their report that the attendance of members of the House of Commons at a private party meeting within the precincts of the Palace of Westminster during the current parliamentary sessions in order to discuss matters connected with the proceedings of Parliament was attendance in their capacity as members of Parliament. But this view was not accepted by the Government, and in moving a Government motion arising on the report, Mr. Herbert Morrison, who was then Leader of the House, stated as follows :

> " With great respect to the Committee, this seems to be going too far. Their opinion is based on the conclusion that Members attending such meetings attend in their capacity as Members of Parliament. According to the precedents, however, Members are only regarded as acting ' in the capacity of Members' when they take part in Parliamentary proceedings. Indeed, even in transactions with constituents Members have never been regarded, for purposes of privilege, as acting in their capacity as Members ".

But he did not proceed to state what these precedents were, nor were we referred to any in the course of the argument in appeal. It would appear, however, that the view expressed by the Committee of Privileges on that occasion did not find favour with the majority of the members of the House of Commons.

The notion of including within the expression " proceedings of Parliament " a private party meeting appears to have been derived from an earlier report (in 1939) of the Select Committee on the Official Secrets Acts arising out of a complaint by a member relating to the privilege of freedom of speech. What was assimilated in that report to proceedings in Parliament was the sending to a Minister by a member of Parliament of the draft of a question which the member proposed to put to the Minister in Parliament, or the showing of such a draft to another member with a view to obtaining advice as to the propriety of putting the question or the manner in which it should be framed.

The more recent trend has been, however, for the House of Commons not to countenance attempts at any extension of the expression " proceedings of Parliament ". This would appear from the proceedings of the 30th October, 1947, to which I have already referred, and also from the proceedings in the House on the 8th July, 1958 (Hansard, House of Commons Debates, Fifth Series, Vol. 591, Columns 208 *et seq.*) relating to the report of the Committee of Privileges on an alleged breach of privilege the facts of which are briefly as follows : On the 8th February, 1957, a member of Parliament made representations to the Minister of Power in a letter regarding the disposal of scrap by the London Electricity Board. The letter was referred to the Chairman of the Board by direction of the Minister. In that letter various allegations of improper conduct had been made against the Board. The Chairman of the Board thereupon wrote to the member concerned stating that the aspersions contained in the member's letter were completely unjustified and requesting their unqualified withdrawal. On the member refusing to do this the Board's solicitors wrote to the member that proceedings would be taken against him for libel if he did not tender a suitable apology. The member then brought the matter up in the House of Commons, and it was referred to the Committee of Privileges. It is necessary to state only two of the conclusions of the Committee in their report, which were (*a*) that in writing the letter dated the 8th February, 1957, the member was engaged in a " proceeding in Parliament " within the meaning of the Bill of Rights, 1688, and

(*b*) that the London Electricity Board and their solicitors, in threatening to commence proceedings for libel against the member, had acted in breach of the Privilege of Parliament. If I may say so with respect, it is to the credit of the House of Commons that these conclusions were rejected, though only after a somewhat acrimonious debate.

There appears to be no judicial definition of the expressions "proceedings in Parliament" or "capacity" as a member of Parliament. But the Courts have from time to time stated what various specific matters connected with Parliament do or do not fall within the ambit of its "proceedings". These cases are referred to in Erskine May's Parliamentary Practice (14th edition) 61. They afford no precedent for holding that in writing the letters P1 or P3 Mr. Munasinghe was acting in his "capacity" as a member of the House of Representatives. I see no reason to give to "capacity" in the expression "in his capacity as such member" in section 14 of the Act a wider meaning than that which the word bears in the expression "in his judicial capacity" in the same section. I agree with the submission of Mr. H. V. Perera that a member of the House of Representatives cannot be regarded as acting "in his capacity as such member" within the meaning of section 14 except in the exercise of the functions of his office as such member. The prosecution has failed to prove that in writing P1 or P3 Mr. Munasinghe was acting in the exercise of any such function.

Before I conclude this judgment I wish to refer to an argument of the Attorney-General based on the proviso to section 14. By virtue of the proviso it would not be an offence under the preceding provisions of the section for any trade union or other organization to offer to a member of the Senate or the House of Representatives or for any such member to accept from any trade union or other organization, any allowance or other payment solely for the purposes of his maintenance. While an allowance is a "gratification" within the definition of that term in section 91 of the Act, neither the offer nor the acceptance of such gratification would *per se* be punishable as it is also necessary for the constitution of an offence under section 14 that the gratification is offered or accepted as an inducement or reward for the member's doing or forbearing to do any act in his "capacity" as such member. The Attorney-General submitted that in the case contemplated in the proviso all the elements of an offence under the preceding provisions of the section are present in that the member concerned, in utilising the allowance towards his maintenance as a member, would thereby be doing an "act" in his "capacity" as such member. On the strength of this submission the Attorney-General invited us to regard the proviso as indicating that there may be the doing of an "act" by a member of the House of Representatives in his "capacity" as such member within the meaning of section 14 even though the "act" be not done in the course of proceedings in the House. I am unable, however, to agree that a member of the House of Representatives who maintains himself is doing an "act" within the meaning of section 14, or that such member who maintains himself on an allowance which is paid to him for no other reason than that he is a member of the

House of Representatives is doing an " act " in his " capacity " as such member. If the learned Attorney-General's argument is to prevail, it could be said of a member of the House of Representatives that in eating his lunch or dinner (being part of the process of maintaining himself) the cost of which is met from the allowance paid to him, he is doing an " act " in his " capacity " as such member.

It is possible, as Mr. H. V. Perera suggested, that the genesis of the proviso to section 14 is in the findings of the Bribery Commission in its report published as Sessional Paper No. XII of 1943, that certain nominated European members of the former State Council had accepted a " gratification " within the Commission's terms of reference in that they were in receipt of a regular allowance paid to them by the Chamber of Commerce and certain other organizations. In view of these findings the legislature may have intended, in enacting the proviso to section 14, that the offer of an allowance by a trade union or other organization solely for the purposes of maintenance of a member of the Senate or the House of Representatives, or the acceptance of the allowance by such member, should be taken out of the operation of the preceding provisions of the section even if the understanding on which the allowance is paid is that the member would conduct himself in a particular way in proceedings in the Senate or the House of Representatives, as the case may be.

In considering whether this particular proviso throws any light on the construction of the preceding provisions of section 14, it is well to bear in mind, however, that while the effect of an excepting or qualifying proviso is, ordinarily, to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it, often a proviso is inserted to allay fears and to protect persons who are unreasonably apprehensive of the effect of an enactment although there is really no question of its application to their case.

In my opinion, the prosecution has failed to prove that the gratification offered to Mr. Munasinghe on the 19th or the 22nd December, 1958, was for his doing an act in his " capacity " as a member of the House of Representatives. This failure goes to the root of all the charges. In the circumstances, however reprehensible the conduct of the accused may have been, they are entitled to an acquittal on those charges. I set aside their convictions and the sentences passed on them and acquit them.

SINNETAMBY, J.—

I agree with the views expressed by my brother Weerasooriya in the judgment prepared by him, which I have had the advantage of reading, and would like to add a few reasons of my own in support of the conclusions he has reached.

The Bribery Act of 1954 was enacted with the object of cleansing the public life of this country by introducing provisions to cope with " modern methods of corruption ", some of which were not contemplated and many of which were not provided for in the somewhat

antiquated provisions of the Penal Code. It makes provisions for the prevention, detection and punishment for bribery. Part 2 deals with the offence of bribery in its various forms and enacts provisions detailing the circumstances in which a person would be guilty of the offence.

Section 14 had special reference to bribery of judicial officers, Senators, and members of Parliament. Sub-section (*a*) of Section 14 penalised the offer of any gratification to a judicial officer, as an inducement or a reward for such officer doing or forbearing to do any act in his judicial capacity, or to a member of the Senate, or the House of Representatives as an inducement or a reward to act or forbear to do any act *in his capacity as such member*. In order to understand and appreciate the significance of the term " in his capacity as such member " it would be useful to examine a few of the other provisions of this part of the Act.

In contrast to Section 14, Section 15 penalised a member of Parliament—for the purpose of this case I shall confine myself to members of Parliament—who accepts a gratification for interviewing a public servant or appearing before a judicial tribunal of which a public servant is a member : it does not postulate that the member should appear " in his capacity as a member " in order to render himself or the person who offers the gratification liable to incur the penalty. Here the mere fact that he is a member places a restriction on the right he otherwise had.

Section 22 penalises a person who offers gratification to a member of a local body or of a scheduled institution. I shall confine myself to members of a local body for the purpose of this case as they bear a closer resemblance to members of Parliament. Sub-section (*a*) (i) deals with the exercise by such a member of his rights to vote or abstain from voting at a meeting where the gratification offered is to induce him to do one or the other of these things. This sub-section penalises the person offering the bribe. Clearly in that case a member is influenced in respect of proceedings in the Council, where he acts in his capacity as a member. Sub-section (*a*) (ii) deals with the gratification given for the purpose of such member performing or omitting to perform an official act and penalises the offering of a bribe for such a purpose. The expression " official act " has not been defined but its ordinary dictionary meaning is an act pertaining to the office which such member holds ; it must, furthermore, in the context be in respect of an office in the local body or institution. It must necessarily relate to an activity the member would not be able to indulge in but for the fact that he is a member. One may, therefore, with justification, infer that it relates to an act

which a member performs in his capacity as a member ; that is to say, something which he would not have been able to do or abstain from doing but for the fact that he is a member. There is a penalisation in this sub-section of yet another kind of activity. This sub-section also penalises gratification given as an inducement or reward to a member for his aid in procuring, expediting, delaying, hindering or preventing the performance of an official act. It seems to me that, in regard to this kind of activity, it can be done, not only by a member, but also by a person who is not a member. It follows, therefore, that where a member does an act to achieve this object, though he does not do something by virtue of his membership, the giver of the gratification would nevertheless be guilty under that sub-section from the mere fact of the recipient's membership : the latter would then not be acting in his capacity as a member. Likewise, in sub-section (*a*) (iii) the offer of a gratification, as an inducement or reward for a member's aid in procuring or preventing the passage of a vote or the granting of any contract or advantage in favour of a person, is penalised ; but a member's aid may be given either because no one but a member by virtue of his membership is in a position to give it, or because the aid is of a kind capable of being given by anyone quite irrespective of whether he is a member or not, but it so happens that he is a member. In the former case he would, it seems to me, be acting in his capacity as a member but in the latter case he would not. It may be an act which even a non-member can perform by influencing those entitled to vote or grant a contract but if he happens to be a member, that mere fact makes both the giver of the gratification and the recipient liable under sub-sections (*a*) (iii) and (*c*) respectively. It will thus be seen that in Section 22 what is penalised is the giving of a gratification not only for acts to be done by a member by virtue of the rights, powers, privileges, etc., which he is entitled to enjoy by virtue of his membership, but also for similar acts which he in common with non-members is in a position to do. In the latter event the giver is penalised only if the recipient happens to be a member. If my view of Section 22 is correct, it would lend support to the view that Section 14 (*a*) 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.

A person may act in various capacities : he may act in his official capacity when he performs functions pertaining to the office he holds ; but, although he cannot divest himself of the office he holds, he may still act in a private or personal capacity, i.e., when he does something which he in common with other people who are not holders of that office are able to do. In interpreting Section 14, therefore, it seems to

me, one must first ask oneself whether the act, for the doing of which a gratification is offered, is one which the member of Parliament can do only because he is a member of Parliament. If so, it is something which he does in his capacity as such member. If it is something which he could have done even though he were not a member, the mere fact that he is a member does not bring the act within the purview of the section. In the result, in order to decide whether a person is acting in his capacity as a member of Parliament, one has first to ascertain what exclusive legal rights, powers, duties, privileges, and so on, attach to membership of Parliament. If the act falls outside the exclusive rights, powers, etc., of a member of Parliament then one cannot say that he is acting in his capacity as such member.

The learned Attorney-General contended that the words "in his capacity as such member" occurring in Section 14 is used in the popular sense to cover even cases in which a member performs an act which is not strictly referable to his exclusive legal powers. If this is so the acts penalised by Section 15, namely, the receipt of a reward or fee to appear before a public servant, etc., would be covered by Section 14. Why then was there any necessity to enact Section 15 ? The existence of Section 15 in the Act favours the view that the words "in his capacity as such member" are used in the strictly legal sense which I have endeavoured to explain ; otherwise, it seems to me, it would have been more appropriate to use the words "in any capacity" in place of the words "in his capacity as such member" in Section 14. In this connection it will also be useful to refer to certain decided cases where the same or similar expressions have been judicially considered.

In the case of *Tarttelin v. Bowen* [1] a member of the armed forces was charged with having in his possession a firearm without a certificate from the proper licensing authorities. Section 5 of the Firearms Act of 1937 provided that a certain provision of the Act, in so far as it relates to the possession of firearms and ammunition, does not apply to "persons in the services of His Majesty in their capacity as such". The Justices were of the opinion that the Act permitted the possession of a fircarm and ammunition by a Flight Lieutenant in the Royal Air Force though they had not been issued to him as a member of His Majesty's Forces. In point of fact, they had been purchased by him privately without a certificate from the proper authority. The King's Bench Division consisting of Lord Goddard, Lord Humphrey and Lord Atkinson set aside the order of the Justices. The Chief Justice, Lord Goddard, said, "This seems entirely to overlook the words 'in their capacity as such'", and held that the possession of a firearm by a member of the armed forces is an offence unless it had been issued to

[1] *(1947) (2) A. E. R. p. 837.*

him or acquired by him in his capacity as a member of the armed forces. The exemption they held did not apply to private purchases made by members of the armed forces. It seems to me that, likewise, the offer of a gratification under Section 14 to a member of Parliament to do something in his private capacity would not be an offence. In *Stephenson. v Higginson* [1] the question that arose was whether the Registrar of an Ecclesiastical Court who had prepared documents and done acts necessary for obtaining letters of administration had committed an offence in breach of Sections 9 and 10 of Act No. 54 Geo. 3, c. 68, which prohibited the doing of an act " appertaining or belonging to the office, function, or practice of a proctor, for or in consideration of any gain, fee or reward " without being enrolled as a proctor. The evidence in this case showed that it was customary for the Registrar, where there was no contest, to prepare these documents. The House of Lords held that, in construing the provisions of the Act of Parliament, the acts intended to be prohibited were those which were legally incident to the office of a proctor, not those which though usually performed by him were not of right incident to his office. Therefore, the Registrar who had prepared the documents had not subjected himself to the penalty imposed by the Act. The Lord Chancellor in the course of his judgment said " it seems to me, therefore, that the words ' appertaining or belonging ' are words used in their proper sense and meaning, i.e., in the sense of rightly and exclusively belonging to the office of a proctor." Further, the opinion was expressed that in construing an Act of Parliament, " every word must be understood according to its legal meaning, unless it shall appear from the context that the Legislature has used it in a popular or more enlarged sense ; that is the general rule ; but in a penal enactment, where you depart from the ordinary meaning of the word used, the intention of the Legislature that those words should be understood in a more large or popular sense must plainly appear ".

Having regard to the provisions of Sections 14, 15 and 22, it cannot in this case be said that the intention of the Legislature was that the words " in his capacity " should be used or understood in a larger and more popular sense. Furthermore, it is a penal enactment and, therefore, if two views are possible in regard to the interpretation to be placed upon the words, the benefit of any doubt should be given to the accused

In this connection, the learned Attorney-General contended that it is the duty of a Court to consider a statute in such a way as to " suppress the mischief and advance the remedy". He referred to a passage in

[1] *(1852) (10) English Reports—House of Lords. p. 638.*

Maxwell (10th edition, page 68) where it is stated that " even where the usual meaning of the language falls short of the whole object of the Legislature, a more extended meaning may be attributed to words, if they are fairly susceptible of it. The construction must not, of course, be strained to include cases plainly omitted from the natural meaning of the words. " He also relied on another passage in *Maxwell (10th edition, page 7)* to the effect that one " should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. "

In the case of the Bribery Act I do not think the words used in Section 14, having regard to the other provisions in this part of the Act, are fairly susceptible of the meaning which the learned Attorney-General sought to put upon it ; nor do I think that in placing the construction we have placed upon it, we would be reducing the legislation to futility or make it ineffectual.

With regard to the proviso to Section 14 and the argument based upon it, I agree entirely with the views expressed by my brother.

I would respectfully endorse the opinion of Lord Watson in *West Derby Union v. Metropolitan Life Assurance Society* [1] " If the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso. " In the same case Lord Herschell explained how meaningless provisos sometimes come to be enacted merely to allay the unreasonable fears of apprehensive persons who think that some Court may possibly apply the main provision of the enactment to their case though in point of fact they are not applicable.

The first accused, therefore, in offering the gratification to Mr. Munasinghe did not induce Mr. Munasinghe to do an act *in his capacity as a member* of the House. However reprehensible the conduct of the first accused may be, and whatever other offence he may have been guilty of, he certainly was not guilty of the offence contemplated by Section 14 (*a*) of the Bribery Act.

I agree that the convictions should be set aside and both the accused acquitted.

Appeals allowed.

[1] *(1897) Appeal Cases p. 647 at p. 652.*