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 and that the prosecution is not required to prove that the acquisitions were made with income or receipts from bribery. An interpretation based on the appellant's contention would defeat the very purpose for which the section was included in the Bribery Act since section 23A 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.

(2) That the presumption created by section 23A may be rebutted by the accused by proving on a balance of probabilities, that the property was acquired otherwise than by bribery.

Held further : That the amending section 26A is retrospective in its operation. The penalty contemplated under section 26 however can be imposed only on persons 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.

Sharvananda, J.—" 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 ".

Cases referred to :

Gunasekera v. The Queen, 70 N.L.R. 457.

Swami v. The State, A.I.R. (1960) S.C. 7.

Emden v. The State of Uttar Pradesh, A.I.R. 1960 S.C. 548.

Dhanavantrai v. State of Maharashtra, A.I.R. 1964 S.C. 575.

R. v. Carr-Braint, (1943) 2 All E.R. 156 ; (1943) K.B. 607 ; 169 L.T. 75 ; 59 T.L.R. 300.

State of Madras v. A. Naidyanatha Iyer, A.I.R. 1958 S.C. 61.

Public Prosecutor v. Yuvaraj, (1970) A.C. 913 ; (1970) 2 W.L.R. 226.

Miller v. Minister of Pensions, (1947) 2 All E.R. 372 ; 177 L.T. 536 ; 63 T.L.R. 474.

In re de Mel, 78 N.L.R. 67.

Director of Public Prosecutions v. Lamb, (1941) 2 All E.R. 499 ; (1941) 2 K.B. 89 ; 165 L.T. 59 ; 57 T.L.R. 449.

Buckman v. Button, (1943) 2 All E.R. 82 ; (1943) 1 K.B. 405 ; 165 L.T. 75 ; 59 T.L.R. 261.

R. v. Oliver, (1943) 2 All E.R. 800 ; (1944) K.B. 68 ; 170 L.T. 110 ; 60 T.L.R. 82.

R. v. Jackson, (1775) 1 Cowp. 297.

Attorney-General v. R. M. Karunaratne, (S. C. 16/74 D. C. Colombo B/75—S.C. Minutes of 17.6.77).

APPEAL from a judgment of the District Court, Colombo.

V. S. A. Pullenayagam, with *K. N. Chosky, N. de Alwis, Mrs. S. Moorthy* and *Mrs. S. Gnanakaran*, for the accused-appellant.

Ranjith Abeysuriya, Director of Public Prosecutions, with *Sarath Silva*, Senior State Counsel, and *G. L. M. de Silva*, State Counsel, for the Attorney-General.

Cur. adv. vult.

October 7, 1977. WIMALARATNE, J.

The accused-appellant was indicted on the following charge :—

" That between the 1st day of June, 1970, and 18th day of March, 1974, within the jurisdiction of this Court you did acquire the following property :—

(*a*) The properties described in Schedule " A " annexed hereto being properties which could not have been acquired with any part of your known income or

which could not have been any part of your known receipts or which could not have been property to which any part of your known receipts had been converted ; and

(*b*) The money described in Schedule "B" annexed hereto being money which could not have been part of your known income or receipts or which could not have been money to which any part of your known income or receipts had been converted ;

and such property being deemed by section 23A (1) of the Bribery Act to be property acquired by bribery or property to which you had converted property acquired by bribery and that you being the owner of such property are thereby guilty of an offence punishable under section 23A (3) of the Bribery Act."

Schedule 'A' describes 7 items of immovable property and 4 items of movable property acquired by the accused and valued at Rs. 309,978.25.

Schedule 'B' described 10 items of disbursements made by the accused amounting to Rs. 92,586.00. Thus the total value of property alleged to have been acquired by the accused during the relevant period is the aggregate of those two sums, amounting to Rs. 402,564.25.

The appellent was appointed a Director or the Bank of Ceylon on 17.06.70. About three lakhs of the property acquired or the disbursements made has been between 17.06.70 and 30.09.71. The main acquisitions were "Sunny Croft" a house property in Nuwara Eliya, on about 3 acres of land, which together with the furniture had cost Rs. 190,000 ; and "Saraswathy Farm" in extent about 2 acres and 3 roods in Talawatugoda, Colombo District, for which a sum of aobut Rs. 112,000 had been paid. During the relevant period the accused had also paid up arrears of income tax amounting to Rs. 42,000 or so, satisfied two court decrees entered against him in favour of the People's Bank for a sum of Rs. 17,500 and repaid a loan of about Rs. 9,000 to the State Mortgage Bank.

The Bribery Commissioner acting in terms of section 23A (4) called upon the accused to show cause why he should not be prosecuted for an offence under section 23A. As the cause shown by the accused was, in the opinion the Bribery Commissioner, unsatisfactory, these proceedings were instituted.

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	99,545.98
(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 ..	542,400.98

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.

As 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. I. 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 has 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 enire 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. 175,000 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 cannot 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.