1977 *Present:* **Malcolm Perera, J., Vythialingam, J. and Ratwatte, J.**

K. D. M. GUNASEKERA, Accused-Appellant

and

THE ATTORNEY-GENERAL, Respondent

S.C. 69/75—D.C. Colombo B 31

Bribery Act—Evidence—Failure of accused to give evidence—Evidence of complainant not corroborated thereby—Nature of the inference to be drawn—Bribery Act, s. 79 (1)—Misdirection by trial Judge—Evidence Ordinance, s. 114 (f)—Administration of Justice Law No. 44 of 1973, ss. 184(2) and 213(2).

The accused-appellant, who at the relevant time was the Additional District Registrar, Kalutara, was charged with having solicited a sum of Rs. 100 and with having accepted a gratification of a sum of Rs. 100 for performing an official act, namely that of issuing a birth certificate, punishable under section 19 of the Bribery Act.

On the charge of soliciting the presecution case rested solely on the evidence of the complainant. The complainant stated that his father was present when the accused asked for the money and the latter was listed as the witness on the back of the indictment. Indeed the trial had to be postponed on three occasions because this witness was absent. yet the prosecution case was eventually closed without this witness being called.

The trial Judge stated that the accused did not give evidence and since the complainant's evidence was uncontradicted no corroboration was necessary. The accused was convicted on both counts.

The accused did not give evidence or call any witness on his behalf.

Held : (1) That the fact that accused exercises the right expressly given to him by the law and remains silent does not itself render the uncontradicted evidence of a prosecution witness trustworthy and reliable. It has to be tested and evaluated in the ordinary way before it is accepted as being true. The accused's silence can never amount to corroboration of a prosecution witness's evidence, where such corroboration is necessary and this was a case where the trial Judge apparently thought it was necessary. In the circumstances of the case the trial Judge should therefore not have acted upon the uncorroborated evidence of the complainant.

(2) That it was of course, open to the trial Judge to have convicted the accused on the uncorroborated testimony of the complainant, provided he found it to be cogent and convincing, as section 79 (1) of the Bribery Act enabled him to do so. However before doing so the quality of the prosecution witnesses should be properly estimated by the trial Judge for there is nothing in the Bribery Act, section 79 (1), which of itself enhance, their credibility. Here there has been no critical examination or careful examination of the evidence nor any consideration given to the inherent improbabilities of the prosecution case.

Held further : That this was eminently a case where the presumption under section 114 (*f*) of the Evidence Ordinance should have been drawn against the failure of the prosecution to call the complainant's father. This presumption however has no application to an accused in a criminal case when he exercises his statutory right to remain silent.

Cases referred to :

Jayasena v. The Queen, 55 N.L.R. 514.

Chelliah v. The Queen, 54 N.L.R. 465.

Gunawardena v. Republic of Sri Lanka, 78 N.L.R. 209.

The Republic v. D. K. Lionel, S.C. Appeal 165/75—S.C. Mts. of 20.12.76.

Reg. v. Jackson, 1953 (1) W.L.R. 591 ; (1953) 1 All E.R. 872.

Reg. v. Sparrow, 1973 (2) All E.R. 129 ; (1973) 1 W.L.R. 488 ; 57 Cr. App. R. 352.

Tumahole Bereng et al v. The King, (1949) A.C. 253.

Rex v. Boordett, (1820) 4 B and Ald. 95.

Siriwardena v. Republic of Sri Lanka, S.C. Appeal No. 6-7/75—D.C. Colombo 245/B, S.C. Mts. of 20.12.76.

Moses v. The Queen, 75 N.L.R. 121.

Ganeshan v. The State, S.C. Appeal No. 1/75—D.C. Jaffna, 4666, S.C. Mts. of 3.8.76.

Raphael v. The State, 78 N.L.R. 219.

Chandradasa v. The Queen, 72 N.L.R. 160.

Harry Churn Chuckerbutty v. The Express, 10 *Calcutta 1409.*

APPEAL from a judgment of the District Court, Colombo.

H. L. de Silva with *Sidat Sri Nandalochana* and *Miss Pathinayaka,* for the accused-appellant.

Kosala Wijayatilake, Senior State Counsel, for the State.

Cur. adv. vult.

March 21, 1977. VYTHIALINGAM, J.

The accused in this case, who at the relevant time was the additional District Registrar, Kalutara, was charged as count 1 with having solicited an 10.7.1974 a sum of Rs. 100 and on count 2 with having on 18.7.1974 accepted a gratification of a sum of Rs. 100 from M. B. Abeyasena for performing an official act, to wit : issuing a copy of a birth certificate to the said Abeyasena, and thereby committed offences punishable under section 19 of the Bribery Act.

After trial he was convicted on both counts and sentenced to five years' rigorous imprisonment and a fine of Rs. 5,000 in default four years' rigorous imprisonment on each count. A penalty of Rs. 100 in default one month's rigorous imprisonment was also imposed on him. The accused appeals against his conviction and sentence.

The complainant Abeyasena was employed as a labourer in the Irrigation Department from 1962. In 1971 he was promoted as a temporary peon and was transferred to the head office of the Territorial Executive Engineer's section and thereafter in 1973 to the Divisional Office at Horana. He then made efforts to become a permanent employee and for this purpose, he required a copy of his birth certificate. But his birth had not been registered and so he had to take steps under section 24 of the Registration of Births and Deaths Ordinance (Cap. 110). Sometime in April 1974 his father made an application for this purpose and it was the accused who dealt with this matter.

The accused had told him that he required several documents and after they had been furnished an inquiry was fixed for 10.7.1974. On that day the complainant, his father and mother and his elder brother attended the inquiry which was conducted by the accused who recorded the statement of the complainant's father M. D. Emis Appuhamy. The inquiry was not concluded on that day as the Grama Sevaka was not present and it was postponed for 16.7.1974. The accused told the complainant in the presence of the others that it was a very difficult matter and wanted Rs. 100 for himself and another unspecified sum for the filing clerk and asked them to come on 16.7.74 with the money. This was the act of solicitation.

On 16.7.74 the complainant did not go for the inquiry but the father, the Grama Sevaka and others attended the inquiry, and their statements were recorded by the accused. The accused apparently did not ask them for the money and there appears to have been no talk about it. The complainant said that he had

telephoned the accused and told him about his difficulty and that he was not able to attend the inquiry. Thereafter he sent a letter to the Bribery Commissioner's Department about this on the advice of his superior, the Engineer in charge of the section.

On receipt of this letter the officers of the Bribery Commissioner's Department, in the words of Inspector Premaratne who laid the trap, took swift action. On 18.7.1974 they proceeded to Horana where they met the complainant and on his agreeing to assist in the detection, they took the usual precautions and laid the trap. They went to the office of the accused at Kalutara with out any prior communication with him about their coming. Police Constable Stanley went with the complainant and watched the transaction as the complainant met the accused and gave him the Rs. 100 which the accused accepted and put into his trouser pocket. On the signal being given Inspector Premaratne and constable Abeyasinghe rushed in and recovered the Rs. 100 from the accused. This in brief was the prosecution case. Inspector Premaratne, constable Stanley and an Officer from the accused's department gave evidence for the prosecution. The accused did not give evidence or call any witnesses on his behalf.

On the charge of soliciting the prosecution case rested solely on the evidence of the complainant alone. Although the complainant stated that the accused asked for the money in the presence of his father, M. D. Emis Appuhamy he was not called to support the complainant's evidence, even though his name was on the back of the indictment. It is not incumbent on the prosecution to call all the witnesses on the back of the indictment. They can rest content even with the evidence of one witness alone, if satisfied with his or her performance in the witness box. But in the instant case the prosecution considered the evidence of this witness so important to their case that the trial had to be postponed on three occasions because of the absence of this witness even though everyone else was present.

On the first date of trial he was absent without excuse and a warrant was issued. On the next two dates medical certificates were produced and he was re-cited. On the fourth date when the trial eventually took place he was again absent and summons was re-issued on him. But on that date the State Attorney closed his case without calling him to give evidence. In the circumstances the trial Judge was invited to draw the presumption under section 114 (*f*) of the Evidence Ordinance that the evidence if produced would have been unfavourable to the prose-

cution case but he declined to do so. Quite obviously Emis Appuhamy was reluctant to testify on oath and if ever there was a case where the presumption should have been drawn, this was it.

The trial Judge said that the accused did not give evidence and deny the charges and since the complainant's evidence was uncontradicted no corroboration was necessary. In other words although he thought corroboration was necessary yet because the evidence was uncontradicted by the denial of the accused on oath it could be believed. The fact that the accused exercises the right expressly given to him by the law and remains silent does not itself render the uncontradicted evidence of a witness trustworthy and reliable. It has to be tested and evaluated in the ordinary way before it is accepted as being true.

Thus in the case of *Jayasena v. The Queen,* 55 N.L.R. 514, the trial Judge in effect told the jury that " from the failure of the accused to give evidence they may hold, that what Kiri Bandiya says is the truth " for " they must suffer the consequences " " if they refrain from giving evidence ". Nagalingam, A. C. J. delivering the judgement of the Court of Criminal Appeal said " This passage taken as a whole cannot be said to be above the reasonable criticism made by Counsel for the appellants that the effect of it was that the Jury were told that they could legitimately draw the inference that Kiri Bandiya's evidence, which taken by itself may not be regarded as trustworthy could, in view of the failure of the prisoners to give evidence on their own behalf and contradict that evidence, be deemed to be true. This direction, there can be little doubt, proceeds on a wrong basis. "

Then again it would appear from that passage in the trial Judge's finding that he was of the view that the accused's failure to deny the charge of soliciting on oath was an admission that the complainant's evidence was true. This is not a proper inference at all. By remaining silent the accused admits nothing. He had pleaded not guilty to the charges and the onus was throughout on the prosecution to prove the charges beyond reasonable doubt. This was a case of flat denial and not one of " confession and avoidance ". In the case of *Chelliah v. The Queen,* 34 N.L.R. 465, Nagalingam, J. observed " If an inference that an accused person is guilty be permitted to be drawn from the fact that he has not chosen to get into the witness box and deny the case set up against him by the prosecution, whatever the infirmities of that case may be, it would be easy to see that far from the burden of proof remaining from start to finish on the prosecution it gets shifted to the accused on the close of the case for the

prosecution, whatever the case established against the accused may be, a proposition which under our law at any rate carries with it its own condemnation ".

Recently this Court had occasion to consider the effect of section 213 (2) which is the same as section 184 (2) of the A. J. L. (Act No. 44 of 1973) in the case of *Gunawardena v. Republic of Sri Lanka,* 78 N.L.R. 209. In that case what went to the jury in the Sinhala version of the charge was that if the accused does not give evidence regarding his innocence, the jury " can come to a conclusion against the accused for not giving evidence ". That is that it is in itself sufficient to justify a conclusion that the accused is guilty. It was held that was not the effect of section 213 (2). The Hon. the Chief Justice observed of the section " It has altered the law as to the situations in which inferences may properly be drawn upon such failure. It has not made it obligatory on the accused in every case on being a called upon for his defence to give evidence, if he wished to avoid being convicted. Failure to testify on the part of the accused is not declared to be equivalent to an admission by the accused of the case against him ".

The trial Judge also seems to have regarded the silence of the accused as corroboration of the complainant's evidence and that therefore no other corroboration was necessary. This is an obvious misdirection in law for the accused's silence can never amount to corroboration of a prosecution witness' evidence where such corroboration is necessary, and here the trial judge apparently thought it was necessary. A Divisional Bench of Five Judges of his Court unanimously held that it was not so in the case of *The Republic v. D. K. Lionel—S.C. Appeal No.* 165/75, *S. C. Minutes of* 20.12.1976. In the course of his judgment Tennekoon, C. J. pointed out " I might add to this also the fact of the accused not giving evidence when he is called upon for his defence does not amount to and cannot be treated as corroboration of the evidence given against the accused. Further, failure on the part of the accused to give evidence cannot be treated as an item of evidence against him. It cannot be treated as an evidential fact."

In the case of *Regina v. Jackson,* (1953) 1 W.L.R. 591, the accused was charged with being an accessory to theft and also with retaining stolen property. The evidence against him consisted in the main of accomplices of his who had been convicted of the theft of the goods in question. The accused did not give evidence. Although the trial Judge warned the jury against the danger of convicting the accused on the uncorroborated testimony of accomplices he nevertheless

indicated to them that the fact that the accused had chosen not to go into the witness box might be corroboration. In the Court of Criminal Appeal Lord Goddard, C. J. said " one cannot say because a man has not gone into the witness box to give evidence that itself is corroboration of the accomplice's evidence. It is a matter which the jury could very properly take into account and very properly would, but it is not a right direction to give a jury and it should be clearly understood that that direction is wrong in law ".

Nor can the fact that the accused does not give evidence be used to bolster up a weak prosecution case. Any such use would make the presumption of innocence meaningless and make nonsense of the proposition that the burden is always on the prosecution to prove its case beyond reasonable doubt. In the case of *Regina v. Sparrow,* (1973) 2 All E. R. 129, Lawton, L. J. pointed out at page 135 that " In our Judgment *Wangh v. R.* (1950) A. C. 203, establishes nothing more than this : it is a wrongful exercise of judicial discretion for a judge to bolster up a weak prosecution case by making comments about the accused's failure to give evidence, and implicit on the report is the concept that failure to give evidence has no evidential value ".

If the prosecution evidence is weak, that is the end of the matter, the case against the accused must fail. As Tennekoon, C. J. pointed out in *Gunawardena v. Republic of Sri Lanka (supra)* " for when there is no evidence compatible with the guilt of the accused it is a situation of there being no case whatever against the accused and not a question of there being a reasonable doubt." There is in such a situation nothing which calls for an answer from the accused. It is only where the prosecution has made out a strong *prima facie* case that the accused will be called upon to explain any matter or matters which may call for an explanation from him.

In this connection the observations of the Privy Council in *Tumahole Bereng et al,* (1949) A.C. 253 at 270, are very apposite. Their Lordships said " It is, of course, correct to say that these circumstances—the failure to give evidence or the giving of false evidence—may bear against an accused and assist in his conviction if there is other material sufficient to sustain a verdict against him. But if the other material is insufficient either in its quality or extent they cannot be used as make weight. To hold otherwise would be to undermine the presumption of innocence in a manner as repugnant to the proclamation of 1938 as to the common law of England ". It would be equally repugnant to the law of Sri Lanka.

All these cases deal with trials in High Courts and the comments which the trial judge may properly make in his charge to the jury on the accused's failure to give evidence. But they set out the circumstances in which and the nature of the proper inferences which a trial judge himself may make in trials in other courts as well. It is so much a matter of the judge's discretion and depends entirely on the facts and circumstances of each case and it is not possible to lay down any hard and fast rule to meet all cases as to what inferences would be proper and the circumstances in which they can be drawn.

The proposition was thus put by Abbot, J. in *Rex v. Boordett,* (1820) 4 B & Ald : 95 at 120, " No person is to be required to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction ; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction can human reason do otherwise than adopt the conclusion to which proof lends ". Sometimes the explanation may be evident in the prosecution case itself. Such a case was the case of *Siriwardena v. Republic* (*S. C. Appeal No.* 6—7/75—*D. C. Colombo* 245/*B.*—*S. C. Minutes of* 20.12.76.).

Siriwardena who was a surgeon attached to the General Hospital, Colombo, was convicted under the Bribery Act for having accepted a gratification of Rs. 30 from one Chandradasa for treating him. He did not give evidence and the trial Judge commented adversely on the fact that he did not give an explanation as to why he gave Chandradasa preferential treatment by taking him out of turn for an operation. But it transpired from the prosecution evidence itself that the normal procedure could be varied at the discretion of the surgeon for the benefit of medicoes and hospital employees and that medical students and hospital employees were given certain privileges. In the circumstances this Court held that the District Judge had misdirected himself in taking account adversely to the first accused of the fact that the first accused did not explain his conduct in not following ordinary routine when he arranged for Chandradasa to be operated on the 20th when the evidence before him was that Chandradasa was introduced and brought along by a hospital employee.

It was of course open to the trial Judge to have convicted on the uncorroborated testimony of the complainant provided he found it to be cogent and convincing. Section 79 (1) of the Bribery Act enables him to do so. But as Lord Hodson pointed out in the Privy Council the quality of the prosecution witnesses should be properly estimated by the trial Judge for " there is nothing in the Bribery Act section 79 (1) which of itself enhances their credibility "—*Moses v. The Queen,* 75 N.L.R. 121 at 126. The

trial Judge does say in his judgment that the evidence of the complainant "was unshaken in cross-examination on material particulars" and that he accepted his evidence as being true. But there has been no critical examination or careful analysis of the evidence. Nor has he considered the inherent improbabilities of the prosecution case.

In the course of his judgment, however, the trial Judge points out that "Admittedly there are several unsatisfactory features in the evidence of the prosecution witnesses". He has also stated that the counsel for the defence referred to various contradictions but he did not deem it necessary to consider all of them but only referred to two of them to demonstrate that those contradictions were not material to the issues to be tried by the Court which were whether the accused solicited and accepted the gratification for the doing of an official act.

This was obviously due to a misconception on the part of the trial Judge in regard to the purpose and scope of cross-examination. There is a clear distinction between cross-examination to the issue and cross-examination to credit. In the case of the former the cross-examiner will seek to obtain admissions favourable to his case in regard to matters in issue; in the latter case he will seek to discredit the witness by showing that he is one who is unworthy of credit and that his evidence in regard to matters in issue ought not to be believed. Both are equally important in extracting truth and exposing falsehood. One cannot dismiss contradictions in regard to collateral matters in the way in which the trial Judge has done in this case. Had he not done so he might have formed a different opinion in regard to the complainant's evidence.

The witnesses particularly in a "trap case" come with a prepared story and with the specific purpose of saying that the accused solicited the illegal gratification and that he accepted it. Even the most skilful cross-examination will find it well nigh impossible to obtain contradictions on "matters material to the issue to be tried by the Court". Very often in cases of this type there is collaboration and in this case too there is evidence of such collaboration. Stanley said that when Premaratne revealed his identity and asked the accused to hand over the money "the accused got up from his seat in an excited manner and handed over the money to Inspector Premaratne". The complainant also said that "the accused in an excited manner took out the money from his pocket and gave it to Inspector Premaratne". Both bits of evidence were given in examination-in-chief. While such observations may be expected

from a trained police officer who had taken part in many such raids it is surprising that a person like the complainant should have used the identical words to describe the situation.

Both Stanley and the complainant stated that the accused told them that it was not good to take the money even in the presence of the complainant's brother. Could he then have solicited the gratification in the presence of the father, mother and the brother ? This matter did not receive the attention of the trial Judge at all. There were several contradictions between the complainant and other witnesses. In examination-in-chief the complainant said that he was not aware that his birth had not been registered whereas in cross-examination he admitted that as a result of an application made in 1976 he became aware that the birth was not registered. Then there was contradiction in regard to whether Stanley told him where and why he was being taken from his office, as to the door through which Premaratne entered, as to whether Premaratne searched the files or not and as to whether his statement was recorded or not after the raid. The cumulative effect of all these contradictions and the improbabilities were not considered by the trial Judge at all.

The trial Judge also stated that there was no reason for the complainant to falsely implicate the accused. The reason suggested by the defence was summarily dismissed by the Judge as not bearing scrutiny because the complainant denied it and he accepted him as a truthful witness. There was however evidence in the prosecution case which showed that the suggestion was a distinct possibility. The reason suggested was that the complainant was angry with the accused as he had refused to issue to him a copy of the birth certificate. The complainant admitted that the accused said so. There was delay from April to July during which the accused had wanted several documents at various stages. He had asked for the school leaving certificate, householders' lists, marriage certificate of the parents, copies of the birth certificates of his elder and younger brothers and even the horoscopes of the members of the complainant's family. It is certainly not beyond the realms of possibility that the complainant might have got exasperated and as the saying goes in our country wanted "to teach the accused a lesson".

In these circumstances I am of the view that the trial Judge should not have acted on the uncorroborated testimony of the complainant. Particularly is this so when there was such evidence available to the prosecution and they chose to withhold it.

The conviction of the accused on count 1 of soliciting an illegal gratification cannot be sustained and the accused is entitled to an acquittal on that count.

In regard to the charge of acceptance of the illicit gratification the evidence of the complainant is supported by that of Stanley. The complainant said the accused asked him whether he had brought the money and on him saying that he had the accused said "Ko denna" and took the money and put it in his trouser pocket. Stanley's evidence was that the accused asked the complainant "salli genawada" and when the complainant said that he had brought Rs. 100, the accused asked for the money saying "Ko denna" and took the money and put it into his trouser pocket. Both of them spoke of no other conversations or of any other words being spoken about the money. There is therefore no evidence at all in regard to the purpose for which the money was given, apart from the uncorroborated evidence of the complainant that the accused had on an earlier occasion asked for the Rs. 100 in order to issue a copy of the birth certificate. Stanley's evidence therefore cannot corroborate the complainant in regard to the purpose for which the money was given.

In the case as *Ganeshan v. The State* (*S.C. Appeal No. 1/75 ; D.C. Jaffna 366, S.C. Minutes of* 3.8.1976) the trial Judge had held that the complainant though an unsatisfactory witness was corroborated by the police officers in regard to the acceptance of the gratification. In setting aside the conviction this court pointed out that on this charge the prosecution has to prove beyond reasonable doubt that (a) the accused accepted a gratification of Rs. 1,000 and (b) that it was accepted as an inducement or reward for procuring or securing for the complainant employment in the Department of Posts and Telecommunicaions.

After examining the evidence, Wimalaratne, J. pointed out "What is significant is that on none of these four occasions had Arasu either heard the complainant telling the accused the purpose for which the money was being offered or the accused demanding the money for the particular purpose specified in the indictment. If Arasu was aware of the purpose for which the money was being given, then Arasu became so aware not as a result of what he himself heard on any of the four occasions referred to earlier, but on some other occasion when the complainant would have mentioned it to him, or to some other

officer of the Bribery Department. But in view of the learned Judge's finding that the complainant was undoubtedly an unreliable witness, such knowledge gathered by Arasu from the complainant would not be of any evidentiary value". The position is identical in the instant case.

Since I have acquitted the accused on the charge of soliciting as the complainant was an unreliable witness the accused is entitled to be acquitted on the charge of acceptance also as the sole evidence in regard to the purpose for which the money was given was that of the complainant alone. For as Tennekoon, C.J. pointed out in the case of *Raphael v. The State,* 78 N.L.R. 29, where an accused is tried on two connected but different charges in the same proceedings a conviction on count 1 cannot be based on evidence which has by implication, been rejected by an order of acquittal on the other count".

In respect of this count, from the failure of the accused to give evidence, the trial Judge has drawn the inference that if the accused had given evidence it would have been unfavourable for his defence. His defence was a complete denial of the charges and the inference that the evidence would have been unfavourable to that denial can only mean that it was an admission of his guilt. As I have pointed out this is not a proper inference to be drawn from the accused's silence.

Besides this is a presumption which section 114 (*f*) of the Evidence Ordinance enables a court to draw against a party who withholds evidence which is available. This presumption has no application to an accused in a criminal case when he exercises his statutory right to remain silent. It is for the prosecution to prove its case beyond reasonable doubt. In the case of *Chandradasa v. The Queen,* 72 N.L.R. 160, the Court of Criminal Appeal had occasion to consider the applicability of this presumption in criminal cases, but did not decide it. But Samerawickreme, J. who delivered the judgment of the Court said, "It is a presumption of fact. One would have thought that such a presumption would not arise in a criminal case because of the fundamental rule that an accused is free to elect whether he will or will not call evidence. It has been held that the presumption in section 114 (*f*) is not one which may be drawn against as accused person because he is free to elect

whether he will or will not call evidence, and an inference cannot drawn against him by reason of his electing to take the one course rather than the other—vide *Harry Churn Chuckerbutty v. The Express*—10 Calcutta 140 ".

" The inference " he continued, " that evidence which an accused might have called but has withheld was unfavourable to him is so incompatible with the fundamental rule that an accused is free to elect whether he will or will not call evidence that it may be necessary to consider in an appropriate case whether it is an inference which should in any case be drawn ". Besides the failure to give evidence may well be due to reasons other than that such evidence would be unfavourable to his defence. In a significant number of cases it may well be attributable to no more than an understandable reluctance to submit to cross-examination by a skilled advocate in wholly unfamiliar surroundings and sometimes in a hostile atmosphere.

For these reasons I would set aside the conviction and sentence of the accused and acquit him on both counts. If the fine or any portion of it has been paid by the accused it should be refunded to him.

MALCOLM PERERA, J.—I agree.

RATWATTE, J.—I agree.

Conviction quashed.