1978 *Present :* **Wijesundera, J., Malcom Perera, J. and Vythialingam, J.**

L. C. FERNANDO, Accused-Appellant

and

THE REPUBLIC OF SRI LANKA

S. C. 26/76—D. C. Colombo (Bribery), B/208

Bribery Act, sections, 23A, 79—Evidence Ordinance, sections 3, 5, 9, 11, 54, 114, 157—Administration of Justice Law, No. 44 of 1973, sections 11, 13, 40, 136, 354—Burden on the accused to prove the contrary of the presumption created by section 23A (1) of the Bribery Act—Nature thereof—Matters which the prosecution has to prove in a charge under section 23A of the Bribery Act—Relevance of evidence of specific acts of bribery—Evidence of bad character—Prejudice to accused—Effect.

Criminal Procedure Code, section 287—Administration of Justice Law, section 136—Right of accused to be defended by an Attorney-at-Law—Denial of opportunity to prepare for cross-examination of witness—Whether conviction sustainable.

Revision—Application by a party not on record to expunge and delete remarks in judgment relating to such party—Scope and applicability of powers of Appellate Court.

The appellant was indicted on the charge of having between 31st March, 1968, and 31st October, 1971, acquired certain properties (including monies) being properties which could not have been acquired with any part of his known income or receipts or to which any part of his known receipts had been converted which properties were deemed by section 23A (1) of the Bribery Act to have been acquired by bribery and thereby committed an offence punishable under section 23A (3) of the said Act.

The prosecution *inter alia* called witness *T* whose evidence was to the effect that he gave a bribe of Rs. 60,000 to the appellant for services rendered by the appellant in connection with the stopping of police raids on *T*'s illegal betting business.

"*T*" was not on the list of witnesses on the indictment. Application was made to add his name to the list of witnesses on 8.10.74, the accused was served with notice at 5 p.m. on that day and the witness was called to give evidence on 9.10.74. Counsel's objection to *T* being called was overruled and after *T*'s examination in chief, counsel for the accused moved for a date to cross examine the witness after obtaining instructions from his client. This was refused. The accused himself stated that after he received notice at 5 p.m. on 8.10.74 he made efforts to contact his counsel but failed to do so.

It was contended in appeal that the conviction was vitiated, *inter alia* (*a*) by the admission of irrelevant and inadmissible evidence; (*b*) by the fact that counsel who appeared for the accused had been denied an opportunity to take proper instructions and cross-examine *T* who was sprung on the accused at such short notice; (*c*) by a grave misdirection in law in regard to the burden on the appellant to prove the contrary of the presumption created by section 23A (1) of the Act.

Held (WIJESUNDERA, J. *dissenting*) : (*a*) that the evidence of "*T*" was both irrelevant and inadmissible and in view of the express prohibition against the admission of such evidence in section 54 of the Evidence Ordinance and its highly prejudicial nature, such evidence should have been excluded by the trial Judge; the improper reception of such evidence had resulted in the accused's chances of having a fair trial being prejudiced and in a failure of justice.

(b) that in the circumstances the accused had also been denied the substance of the right given to him by section 136 of the Administration of Justice Law to be defended by an Attorney-at-Law and he had thus been denied a fair trial in this respect too ;

(c) while the trial judge correctly set out the extent of the burden which lies on the appellant to prove the contra y of the presumption created by section 23A (1) of the Act, namely proof on a balance of probability, yet in applying that standard to the facts in the case, he had imposed on the appellant a very much higher standard than a mere balance of probability. For, in the course of his judgment he said that, besides proving the various sources of his wealth, the e was another duty cast on the appe lant and that is to prove that the sources are free from suspicion or doubt. If the appellant had proved that the money was not money acquired in contravention of the Bribery Act then he has successfully rebutted the presumption. There is no further burden on him to prove that the transaction was free from taint or that the character of the payments were above suspicion.

Held further : That section 79(1) of the Bribery Act which provides that the giver of a gratification shall be a competent witness against the person accused of taking a gratification does not do away with the need to probe such evidence and examine it with due care.

Per WIJESUNDERA, J. *dissenting* : (a) that the evidence of " T " was irrelevant. " ..... this is only one item in a mass of evidence. This item has no connection with any one of the transactions or deposits. It has not been taken into considera'ion in determining that the presumption in respect of any one of the t ansactions has not been rebutted Then I fail to see how the acceptance of this item of evidence vitiates the conviction ".

(b) that the trial Judge had not misdirected himself on the burden of proof that lay on the appellant to rebut the presumption created by section 23A (1) of the Act. " When the learned trial Judge said ..... that the appellant has to prove these transactions are free from taint and that the characte- of these payments are above suspicion he meant nothing other than to say that leaving a doubt alone will not be sufficient ..... "

In an application by the Hatton National Bank which was not a party, to have certain remarks made in the judgment by the learned District Judge expunged and deleted in the exercise of the Court's powers by way of revision.

Held (*by* MALCOLM PERERA, J. *and* VYTHIALINGAM, J.) : That the court has power, acting in revision to expunge and delete disparaging remarks in a judgment about a person who is no a party to the case, where such remarks are not elevant for the decision of the issues in the case nor are an integral part of the judgment, and are severable. But since in the present case the entire judgment was quashed there was no need for a separate order expunging the remarks.

Considerations which govern such expunging discussed.

PPEAL from a judgment of the District Court, Colombo.

Cases referred to :

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

King v. James Chandrasekera, (1942) 44 N.L.R. 97 ; 25 C.L.W. 1.

Jayasena v. The Queen, (1969) 72 N.L.R. 313.

Wanigasekera v. Republic of Sri Lanka, (1977) 79 (1) N.L.R. 241.

Attorney-General v. Karunaratne. S.C. 16/14 ; D.C. Colombo B/75 ; S. C. Minutes of 17.6.75.

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

Sodeman v. R., (1936) 2 All E. R. 1138 (P.C.).

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

Sarah Hobson's Case, (1831) 1 Lewin's Crown Reports 261.

Bater v. Bater, (1950) 2 All E.R. 485 ; (1951) P. 35 ; 66 T.L.R. (Pt. 2) 589.

Maxwell v. D. P. P., 24 Cr. A. R. 152 ; (1934) All E.R. Rep. 168 ; (1935) A.C. 309.

Rowton R.V., (1865) 34 L.J.M.C. 37 ; 10 Cox C.C. 25 ; 29 J.P. 149 ; 11 L.T. 745.

Roshun v. Rex, (1880) 5 C 768 ; 6 C.L.R. 219.

R. v. Kartick Chunder Das, (1887) 14 C 721 ; 7 Indian Decisions (N.S) 478.

R. v. Butterwasser, (1948) 1 K.B. 4 ; (1947) 2 All E.R. 415 ; 63 T.L.R. 463 ; 32 Cr. A.R. 81.

Makin v. Attorney-General for N.S.W. (1894) A.C. 57 ; 69 L.T. 778 ; 10 T.L.R. 155.

King v. Pila, (1912) 15 N.L.R. 453.

Queen v. Sathasivam, (1953) 55 N.L.R. 255.

Pauline de Croos v. The Queen (1968) 71 N.L.R. 169.

King v. Peiris, (1931) 32 N.L.R. 318.

Regina v. Parbhudas, (1894) 11 B.H.C.R. 90.

Ranasinghe and Another v. State, S.C. 4-5/75 D.C. Bribery Colombo 148/B ; S.C. Minutes of 14.8.1975.

Rajakaruna v. Attorney-General,—S.C. 31/75 ; D.C. Colombo 292/B ; S.C. Minutes 27.2.1976.

King v. Perera, (1941) 42 N.L.R. 526.

Peter Singhe v. M. B. Werapitiya, (1953) 55 N.L.R. 155.

Coore v. James Appu, 22 N.L.R. 206.

Manuel v. Kanapanickan, (1911) 14 N.L.R. 186.

Premaratne v. Gunaratne, (1965) 71 N.L.R. 113.

R. v. Silva, (1907) 1 A.C.R. 148.

Jayasinghe v. Munasinghe, (1959) 62 N.L.R. 527.

Queen v. Prins, (1962) 61 CLW 26.

Queen v. Peter, (1961) 64 N.L.R. 120 ; 59 C.L.W. 112.

Llewellyn Evans, A.I.R. (1926), 28 Bombay 551.

Rangasamy Padayachi, (1916) 16 G.L.J. 786.

Subramaniam v. Inspector of Police Kankesanturai, (1968) 71 N.L.R. 204

State of Uttar Pradesh v. Mohamet Naim, (1964) A.I.R. S.C. 703.

Narthupana Tea & Rubber Estates Ltd. v. Perera, (1962) 66 N.L.R. 135.

Queen v. Murugan Ramasamy, (1964) 66 N.L.R. 265 (P.C.) ; (1965) A.C. 1 ; (1964) 3 W.L.R. 632.

Gunawardane v. Inspector of Police Ragalla, S.C. 758/70 ; M.C. Nuwara Eliya 36 867 ; S.C. Minutes 26.1.1976.

Mitra v. Rala Kalicharam, (1927) 3 Lucknow 287.

In re Bikaru, 22 Lucknow 391.

Narasinghe Bhadur, (1961) A.I.R. Allahabad 447.

Mendis v. Paramasamy, (1958) 62 N.L.R. 302.

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

Dhanvantari v. The State of Maharashtra, A.I.R. (1964) S.C. 575.

Reg. v. Boardman, (1974) 3 W.L.R. 673 (1974) 3 All E.R. 887 ; (1975) A.C. 421.

D. P. P. v. Kilbourne, (1973) A.C. 729 ; (1973) 2 W.L.R. 254 ; (1973) 1 All E.R. 440.

Noor Mohamed v. The King, (1949) A.C. 182 ; (1949) 1 All E.R. 365.
Regina v. Waidyasekera, (1955) 57 N.L.R. 202.
Thompson v. R. (1918) A.C. 221 ; 118 L.T. 418 ; 34 T.L.R. 204 ; 87 L.J.K.B. 478.
Moses v. The Queen, (1971) 75 N.L.R. 121 (P.C.).
Samarakoon v. Public Trustees, (1960) 65 N.L.R. 100.
Ariyadasa v. The Queen, (1967) 70 N.L.R. 3.
Appuhamy v. Weeratunga, (1921) 23 N.L.R. 467.
Jairam Das v. Emperor, A.I.R. (1945) P.C. 94.
S. P. Dubey v. Narasinghe Bahadur, A.I.R. (1961) Allahabad 447.

E. R. S. R. Coomaraswamy, with *C. Chakradharan*, *M. Devanayagam*, *E. R. S. R. Coomaraswamy* (Jr.) and *R. K. S. Suresh Chandra*, for the accused-appellant.

S. J. Kadirgamar, Q.C., with *V. S. A. Pullenayagam* and *Mrs. S. Gunesekera*, for the aggrieved-petitioner (Bank).

Kenneth Senaviratne, Director of Public Prosecutions, with *Upawansa Yapa*, Senior State Counsel, for the Attorney-General.

Cur. adv. vult

August 10, 1978. WIJESUNDERA, J.

The appellant was indicted in the District Court of Colombo on the following charge :

> "That between the 31st day of March, 1968 and 31st day of October 1971, 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 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 or having been the owner of such property are thereby guilty of an offence punishable under section 23A (3) of the Bribery Act."

Schedule A contains details of 6 properties and schedule B two items of cash.

SCHEDULE 'A'

(1) Mount Hunnasgiriya Estate, Kandy, purchased on deed bearing No. 2640 dated 25.1.1971 and attested by H. J. C. Perera, Proctor.

(2) Property purchased on deed bearing No. 2656 dated 16.2.1971 and attested by H. J. C. Perera, Proctor.

(3) 100 shares at Rs. 2.50 each in Moolgama Estate Co. purchased on 2.6.1971.

(4) 8423 shares at Rs. 2.50 each in Gamawella Tea & Rubber Co. Ltd., purchased between July and October, 1971.

(5) Property purchased by deed bearing No. 2752 dated 3.10.1971 and attested by H.J.C. Perera, Proctor.

(6) Yelverton Estate, Badulla, purchased on deed bearing No. 906 dated 30.10.1971 and attested by R. N. J. Attanayake, Proctor.

SCHEDULE 'B'

(1) A sum of Rs. 80,000 deposited at Hatton National Bank Ltd., on 20.7.1971.

(2) A sum of Rs. 2,072.97 paid to the Industrial Finance Company between 24.6.70 and 25.8.70.

The appellant was appointed a Director of the Insurance Corporation of Sri Lanka on 6th June, 1970, a working Director on 15th June, 1970, and the Vice Chairman of the Corporation on the 14th August of the same year. He resigned from the Corporation on 6th December, 1971. As a Director he was a person to whom section 23A of the Bribery Act applied. After the appellant resigned from the Corporation the Bribery Commissioner on the 29th February, 1972, required the appellant to furnish a statement in terms of sections 3 and 4 of the Bribery Act. The appellant furnished that statement on the 6th March, 1972. Thereafter the Bribery Commissioner by two notices dated 25.5.1971 and 31.5.1971 required the appellant to show cause why he should not be prosecuted for an offence under section 23A of the Act, in view of the fact that the appellant did own the properties enumerated in the notices. The appellant showed cause by his letter dated 7th June, 1972, which will be referred to as *the explanation* hereinafter. This explanation being unsatisfactory in the opinion of the Bribery Commissioner he filed a certificate in the District Court of Colombo on the 20th May, 1974. Thereupon on the 28th May, 1974, the Attorney-General indicted the appellant on the charge set out above. The properties in schedules A and B in the Indictment differ from the properties in the two notices in two respects :—

(i) a car 4 Sri 4753 purchased by appellant for Rs. 31,000 is not included in the schedules,

(ii) the notarial and stamp fees for the execution of the deeds of conveyance of the immovable properties are not included in the schedules ; but are referred to in the summary of facts furnished by the Attorney-General.

After a lengthy trial the learned trial Judge found that the appellant "had failed to prove that property to the extent of Rs. 340,200 was not acquired from bribery" and the appellant being guilty of the charge sentenced him to undergo a term of seven years' rigorous imprisonment and to pay a fine of Rs. 340,200 in terms of section 26A of the Bribery Act in default 7 years' rigorous imprisonment. Further the learned trial Judge imposed a penalty of Rs. 340,200. The appellant now appeals from this conviction and sentence.

In view of the submissions made by the learned Attorney for the appellant on the burden and the standard of proof it is necessary at the very beginning to consider section 23A of the Bribery Act. Section 23A of the Bribery Act states :—

"23A. (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.

(3) 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, or to which he has or had converted any property acquired by him 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 five thousand rupees:

Provided that where such property is or was money deposited to the credit of such person's account in any bank and he satisfies the court that such deposit has or had been made by any other person without his consent or knowledge, he shall not be guilty of an offence under the preceding provisions of this subsection.

(4) .....

(5) .....

(6) ....."

The law which creates the offence is subsection 3 to section 23A. A person who owns property which is deemed to be property, (*a*) which he has acquired by bribery or (*b*) to which he has converted property acquired by bribery is guilty of an offence. Section 90 defines what bribery is. The prosecution then has to prove, beyond reasonable doubt, that the appellant owned such property. Subsection 1 to to section 23A states what is deemed to be property acquired by bribery. Where it is shown that a person to whom the section applies has acquired property, within the requisite period, movable or immovable and it is shown that he could not have acquired such property from his known income or known receipts or it is shown that it is not property to which any part of his known receipts has been converted that property is deemed to be property (*a*) acquired from bribery or (*b*) to which he has converted property acquired from bribery and that person who owns such property is guilty of an offence under section 23A (3) of the Act. The offence then depends on the legal presumption. But that legal presumption will apply to the property and will only last "until the contrary is proved by him." The legislature has clearly stated by whom "the contrary" is to be proved. It is not by the prosecution. It is by "him", that is the person who owns or has acquired such property. He knows best how he acquired it. It is within his special knowledge. Consequently he is in a position to show that it was not acquired from bribery. What is it that "he" has to prove or, as the learned trial Judge stated, contrary of what? Contrary of "that such property is property acquired by him by bribery." He has to prove that the property was not acquired from income or receipts from bribery, i.e., the property was not acquired from any gratification accepted in contravention of Part II of the Bribery Act. In other words, if the consideration for property had been paid by cheque, the appellant must show

how he obtained that money. If for example the cheque is met by an overdraft and the overdraft is subsequently cleared by some deposit or deposits received from bribery, depending on the circumstances, that would be a method of converting the money obtained by bribery.

It has been submitted that it is sufficient if the appellant shows that, in addition to the income and receipts the prosecution has proved, he had other sources of income or receipts without proof that the source is not a source of bribery. In other words it is sufficient if the appellant shows that he acquired a property from an overdraft of one lakh from a Bank without showing that it was not a bribe. It is then up to the prosecution to show beyond reasonable doubt that those sources were themselves sources of bribery. To start with, this construction is open to two objections :—Firstly, such a construction is in the teeth of the words of the section. The burden is cast on " him " to prove the contrary. Merely naming a source will not prove the contrary viz. that the acquisitions were not from bribery. He must proceed further and establish it. Secondly, such a construction will defeat the very purpose for which the section was enacted viz. to stamp out corruption by preventing persons to whom the Act applies from acquiring property unless they are able to show that such property was legitimately acquired. I need cite in support only what Lord Diplock said in a similar situation in construing the policy behind section 14 of the Prevention of Corruption Act of 1961 of Malaysia in *Public Prosecutor v. Yuvaraj*, (1970) A.C 226 at 233, "The section is designed to compel every public servant so to order his affairs that he will not accept a gift in cash or kind from any member of the public except in circumstances in which he will be able to show clearly that he had legitimate reasons for doing so."

The question next arises what the standard of proof required of such a person is. The legislature states " unless the contrary is proved by him." It does not say proved on a balance of evidence, or beyond reasonable doubt, which are the only two standards of proof in our law. Which of these two standards of proof is required depends on the nature of the proceedings and also on what is to be proved. In civil proceedings it is generally on a balance of evidence ; but of adultery in civil proceedings proof is required beyond reasonable doubt. In criminal proceedings proof beyond reasonable doubt, is required of the prosecution of all the elements that constitute an offence. But where an accused is required to prove an exception the standard required is proof on a balance of evidence. *King v. James Chandrasekera*, 44 N.L.R. 97. If the standard of proof required of the appellant is anything more than proof on a

balance of evidence of circumstances which will entitle him to an acquittal, then it will cast too heavy a burden on the appellant and is a standard foreign to our Criminal law.

It was further submitted that what is required to be proved is proof of a negative and therefore it is sufficient to create a doubt. To call it a negative is not accurate. If a person has acquired property not from bribery, as pointed out earlier, it is quite easy for him to discharge that burden by showing how he acquired such property. Although this requirement is couched in negative language, what is required is proof of positive facts. It has been urged that what is required of the appellant is only to create a doubt whether the properties in question were not acquired from bribery. The language of the section itself shows that this submission cannot be correct. In the words used in Yuvaraj's case, "if it were anything less than proof on a balance of evidence, it gives no sufficient effect to the reversal of the ordinary onus of proof that a fact which constitutes an ingredient of the offence shall be deemed to exist *unless the contrary is proved*" 1970 *A.C.* at 232. In the local law the words are "unless the contrary is proved by him" which is more emphatic than the Malaysian section.

It is possible to test the validity of this submission further. If the submission is correct that it is sufficient if the appellant leaves in doubt how he acquired the property, let us examine what the result is. He would be satisfying the requirement of the section even though it is left in doubt that he acquired the property, not as a result of bribery. But where a fact is left in doubt it is neither proved nor disproved. But section 3 of the Evidence Ordinance says that "a fact is not *proved* when it is neither proved nor disproved." Applying this to section 23A (1) of the Act, it will read ".....such property is deemed to be property acquired from bribery unless the contrary is *not proved* by him...." which is just the opposite of what is enacted in the section. Therefore that submission cannot be correct and as it is a requirement to be proved by the appellant which entitles him to an acquittal, proof required is proof on a balance of evidence. Vide also *Rex v. Chandrasekera*, 44 N.L.R. 97 at 125. The learned trial Judge was correct in the view he took that the burden lay on the appellant to rebut the presumption on a balance of probability that the properties acquired were not acquired from bribery. I with respect, agree with this view taken on this question in a decision of the court in *Rep. v. Wanigasekera*, 79 (1) N.L.R. 241.

The learned Attorney pointed out that the trial Judge has stated in two places that the appellant has to prove that certain transactions or sources "are free from suspicion or doubt" and

"are free from taint and the character of these payments are above suspicion." He submitted that the trial Judge had misdirected himself and required that the appellant should discharge the burden by proof beyond reasonable doubt. I will take the first instance. The trial Judge stated—"Then the accused has to prove the various sources of wealth, besides proving that another duty was cast on the accused, viz. *that the sources are free from suspicion or doubt.* Now it seems obvious that the accused has to prove that he had some other sources of income or receipts which would account for the acquisitions he made and the money he received from these sources are not gratifications." Then it is evident that what the trial Judge meant was that the appellant must prove that from the sources he did not receive gratifications. He stated immediately afterwards— "The quantum of proof in discharging that presumption is no doubt on a balance of probability.... There is a duty cast on the court not merely to examine the sources of income but also to examine the character of each payment, and it is not enough for the accused to leave a doubt in the mind of the court, because leaving a doubt alone will not be sufficient." Here there is no doubt that the trial Judge had the case of *Jayasena,* 72 N.L.R. 313, in mind. This is, with respect, a correct statement of the burden that lay on the appellant and that is the yardstick applied by the trial Judge in determining whether the presumption has been rebutted. When the learned trial Judge said in the second instance that the appellant "has to *prove* these transactions are free from taint and that the character of these payments are above suspicion" he meant nothing other than to say that "leaving a doubt alone will not be sufficient" as in the first passage. Further another sentence illustrates what was meant by "tainted." He has stated "therefore if Ellabodawatte has been bought from the proceeds of bribery, the Rs. 14,000 (i.e., the money realised from its sale) also is tainted." In fact in the course of the arguments in this court the learned Attorneys—the Director of Public Prosecutions more frequently—used the expression "taint" and "suspicion" in this sense. Therefore there is no merit in this submission. Consequently there is absolutely no reason for me to consider the wealth of decisions cited showing that where there is a misdirection on the burden of proof, there should be a retrial.

Then the prosecution has to prove beyond reasonable doubt (*a*) that the appellant during the relevant period acquired the properties enumerated in schedule A and the money in schedule B and (*b*) that the known income and the known receipts of the appellant did not amount to the sum total of the cash and the consideration and other expenses paid for the properties. This

task is simple. Once this is done, unless the appellant satisfies the court that these properties were not acquired by bribery on a balance of probability, he would be guilty of the offence. This means that if the appellant relies on a receipt from a firm AB, he has to show that (i) it was received and (ii) it was not from bribery, both on a balance of evidence. If he fails in either, he would be guilty of the offence.

The appellant was residing during this time at Uyana, Moratuwa with a wife and five children in a house paying a modest rent of Rs. 125 per month. In 1961 he started a business called Eastern Trades & Agencies in partnership with his father and brother. There were no profits. In 1966 the appellant sold the goodwill to a Mr. Gunawardena for Rs. 2,000. From December 1967 he joined Ceylon Insurance Company at a monthly salary of Rs. 800. From June 1968 to October 1968 he was in the Ceylon Shipping Agency. From November 1968 he was employed up to 23.4.1978 as a Shipping Director of the Free Lanka Trading Co. with no monthly salary but received one-third profits from the Shipping Department. The income derived he testified was used for his expenses. When the appellant severed connections with this firm on the 23rd April, 1970, he accepted a sum of Rs. 1,150 in full settlement of all dues.

On 31.3.1968 the appellant had sworn an affidavit in D.C. Colombo 26334/S when he was noticed to appear to be examined under section 219 of the Civil Procedure Code. That was an action filed by Messrs. Moosajees, Ltd. to recover a sum of Rs. 2,247.85 from the appellant. In that affidavit he had stated that he was possessed of no immovable property or movable property other than the personal belongings. The action filed by Messrs. Moosajees, Ltd. was settled on 23.1.71. There were three other actions against the appellant filed prior to the date he was appointed a Director of the Insurance Corporation. The Industrial Finance Company Ltd. filed action No. 29085 in D.C. Colombo to recover money due from the appellant on a promissory note for Rs. 2,000 dated 17.6.1967. This action was settled by 12.9.1970 after paying Rs. 1,771.32. The Peoples' Bank filed action against the appellant, his father, and brother in respect of debts incurred in their business. The Finance Company Ltd. of Union Place, Colombo 2, filed action No. 62769/M in District Court, Colombo to recover a sum of Rs. 2,709.62 in respect of a Vauxhall car or the return of the car. This case was also settled in 1971. The appellant had two Bank accounts one at the People's Bank, the other at the Bank of Ceylon both of which were closed before he was appointed a Director of the Corporation. However out of all the earnings prior to June 1970, it is his clear admission, at the time he joined the corporation in June 1970,

he had with him a sum of about Rs. 2,000 or Rs. 3,000 which he had saved. Then to determine how the acquisitions were made the starting point is June 1970.

The prosecution duly proved that as Vice Chairman of the Insurance Corporation his duties included attending to petitions and complaints; recruitment, appointment and dismissal of employees; supervisory functions in connection with general claims and specially motor claims; workmen's compensation claims. The appellant whilst in that post acquired the properties in the two schedules. It transpired that in fact the appellant had purchased only a half share of Mount Hunnasgiriya Estate, the other half share being bought by one S. H. Maharoof, Negombo. As this purchase was subject to a mortgage the amount invested by the appellant was Rs. 50,000. The total investments in the two schedules amount to Rs. 542,079. To this sum must be added the notarial fees incurred in executing the deeds of transfer. The fees total upto Rs. 28,683, the grand total of these investments being Rs. 570,762 in *sixteen months*. The appellant stated in his explanation that (i) he had an income of Rs. 27,500 from the corporation; Free Lanka Trading Company gave him Rs. 30,000 and the firm of Rotan-Vanda Associates, a sum of Rs. 20,300. (ii) the profits obtained by sale of three cars amounted to Rs. 29,000 during this period and (iii) a number of loans amounting to Rs. 463,000, were obtained from a Bank, money lending firms or agencies. The appellant gave evidence and produced the explanation. After he was appointed Director he opened a Bank account No. F007 or F7 which will be called his personal account in the Hatton National Bank with a deposit of Rs. 1,000 in July 1970. After he bought Hunnasgiriya in partnership with Maharoof he opened an account for that estate No. F029 or F29 in the same bank on 23rd January, 1971. He produced the bank statements of the estate account F29 and of his personal account F7. He was cross examined for a number of days.

It was the submission of the appellant's Attorney that the cross examination of the appellant was unduly long and unfair, because the questions were repeated and documents were not shown to the witness. The learned Attorney referred to section 120(6) of the Evidence Ordinance which empowered the presiding Judge to limit the cross-examination. Section 120(6) is in the following terms:—" ....that so far as the cross examination relates to the credit of the accused, the court may limit the cross examination to such extent as it thinks proper, although the proposed cross-examination might be permissible in the case of any other witness." It is apparent that the power to limit the cross-examination, permissible in the case of other witnesses, is only regarding

the credit of the accused as a witness. The power to limit the cross-examination in other matters is the same as in the case of any other witnesses. The appellant gave evidence in order to prove that the properties acquired for which he paid over half a million rupees were not acquired from bribery and stated that in addition to the loans and income already referred to, he received or obtained a number of loans in small sums e.g. Rs. 1,500 from one Shelton Perera and at times savings from his wife to which reference will be made in due course.

He produced the bank statements of his personal and estate accounts. So that, submitted the Director of Public Prosecutions, it became necessary to cross-examine him on the deposits and withdrawals in the two accounts in detail. The complexity of the transactions, the different answers of the appellant on various issues arising from the deposits necessitated a detailed cross-examination.

It was contended on behalf of the appellant that the State was not entitled to cross-examine the appellant on the fairly large amounts, which have regularly been deposited both in his personal and in the estate account because he had not been called upon to explain those deposits in the notices under section 23A(4). I do not think that the contention is correct. To establish that the properties in question were legitimately acquired the appellant spoke of various loans or transactions from which he received money. When the prosecution asked the appellant what a particular deposit was, the appellant was not being questioned on the basis that that money formed the subject matter of the charge in that it was given as property in the schedules of the indictment, but rather to show that (*a*) that deposit could not be money obtained legitimately and (*b*) such deposits constituted the consideration for the properties in these schedules. These were being used as items of evidence to show that the contention of the appellant cannot be accepted. To take an example :—it was proved and accepted by the appellant that he paid a sum of Rs. 60,000 in late January 1971 by cheque as part of the consideration for Hunnasgiriya. It was then necessary to examine how this cheque was met and that could only have been done by reference to the account for January 1971 at least. In fact the learned Attorney for the appellant had to concede at one stage that it was so. Except for April and May 1971 during the other months some payment or other had been made for the acquisitions in question by cheque and therefore it was necessary to cross-examine the appellant on those payments. Besides the appellant contended that he saved money from his salary. His salary was credited to his personal account.

Thereupon the Director of Public Prosecution cross-examined him on the deposits and withdrawals and proved that no part of his salary was available for that purpose.

It was urged that in the cross-examination the questions were repeated to the prejudice of the appellant. The cross-examination lasted 15 days. It started on the 22nd October, 1974; next dates were 31st October and 1st November; then 8th November; thereafter 18th and 19th November; next 3rd, 4th and 5th December; followed by two days 17th and 18th December. The cross-examination then went on to January 15th, 23rd and February 7th and 27th, 1975. It was to accomodate the two Attorneys and sometimes on the special application of an Attorney that the trial was postponed in this manner. But I must hasten to add that there is no better method to dispose of a criminal case than to hear it from day to day. In several places the appellant stated that he would be able to answer questions "on the next day" or after checking on some other documents. So he was questioned again and in some instances he did answer on the next day. Consequently the Director of Public Prosecutions submitted that he had to revert to that topic again. The transactions of the appellant are involved and complicated as will appear soon and have taken place within a short time. Consequently there had been repetition some of which could have been avoided. It is up to the court of trial to interfere as seems best in the circumstances. But it is to be remembered that repetition "when used sparingly and against a witness who in the cross-examiner's belief is falsifying, there ought not to be judicial interference; for there is perhaps none of these lesser expedients which has so keen and striking an efficiency, when employed by skilful hands in extracting the truth and exposing the lie." Field, Law of Evidence, Vol. VI, p. 4792.

The next charge levelled against the cross-examination is that at times the appellant was cross-examined without the documents being shown to him in spite of his answers "I will be able to explain that, if I see the cheque." The Director of Public Prosecution stated that all the cheques were obtained from the bank along with the paying in slips on various dates and every one of them was shown to the appellant and examined by him. There have been occasions when documents were not available to be shown to him, and he had been questioned to start with without the documents being shown. But the documents concerned were invariably cheques. They were his own cheques and their counterfoils were with him or available to him. These documents were subsequently shown to him. He

had in May 1972 furnished a written explanation with schedules, showing the loans and expenditure. He had made statements to the Bribery Commissioner about the deposits. He therefore must have been well aware of his cheques and the deposits in his bank. On a perusal of the record the appellant had been given an opportunity of examining all the documents produced by the prosecution. If I understood the learned Attorney for the appellant correctly, when the Director of Public Prosecutions was answering the charges levelled against the cross-examination he did submit that "he was not pressing that matter."

What one tends to forget in this case is that the law casts a burden on the appellant to rebut a presumption, relating to properties worth over half a million and once evidence was given for that purpose, the prosecution had to cross-examine him on all those transactions. So it had to be long. I therefore do not think that the cross-examination was unfair.

The learned Attorney submitted that the appellant has by leading evidence, on a balance of probability, proved that these properties were not acquired by bribery. The first property *Mount Hunnasgiriya* was acquired on the 25th January, 1971, for Rs. 150,000, the notarial charges being Rs. 5,253. It was bought by the appellant and Maharoof. Of the consideration Rs. 50,000 was secured by a mortgage of the same date in favour of the seller, the Procurator-General of the Oblates of Mary Immaculate; and of the balance, Rs. 60,000 was paid by cheque drawn by the appellant and the rest in cash, Rs. 25,000 by Maharoof and Rs. 15,000 advance paid by the appellant in December '70. The appellant being co-owner his investment on that property was Rs. 52,625.50. The second property *Elabodawatte* is a land at Moratuwa bought by the appellant for Rs. 18,000 on 16.2.71, the notarial charges being Rs. 541. So that by this date the appellant had invested a sum of Rs. 71,167.50 on these two properties. Both attorneys made their submissions on these two properties together. The finding of the trial Judge is "Rs. 50,000 for Hunnasgiriya, Rs. 18,000 for Elabodawatte were all tainted and which I consider proceeds from bribery."

By this date the available sources of income and receipts on the evidence of the appellant himself were (*a*) the Rs. 2,000 or 3,000 which the appellant said he had saved up to the date he was appointed Director, (*b*) his earnings from the corporation which, inclusive of salary for February 1971, amounted to Rs. 12,400, (c) Rs. 10,000 by cheque from Free Lanka Trading Co. paid on 3.2.71 and Rs. 5,000 in cash paid a few days before, (*d*) Rs. 20,300 from Rotan-Vanda Associates (*e*) Rs. 20,000 loan from Bartleet & Co., (*f*) a loan of Rs. 5,000 from Hatton National Bank

and (g) a loan of Rs. 10,000 from Maharoof totalling up to Rs. 84,000. These need to be examined one by one. Of the first there is no dispute. Next in order is the *Corporation Income.* His salary as Director was Rs. 1,000 and as Vice Chairman Rs. 1,750. In his explanation to the Bribery Commissioner under section 23A (4) he had stated that nearly half the salary was saved. But the entirety of the salary was paid into the Bank. The State contended that he did not save anything from his salary. The appellant was cross-examined regarding every withdrawal during the early months in this account with this end in view. It transpired in cross-examination that in July 1970, in the financial straits he was in, he had paid sums Rs. 125, 150 and 155 to three clubs, spent on a cooker valued at Rs. 2,584.00 and altogether drawn Rs. 5,924.50 ending the month with a debit balance of Rs. 2,238.75. He had deposited other than his salary cheque and the opening amount, a sum of Rs. 1,700. In the next month he had withdrawn Rs. 5,130 and deposited Rs. 4,265 ending the month inclusive of Bank charges and so forth with a debit of Rs. 3,945.44. In September he had withdrawn Rs. 5,469 and deposited Rs. 1,200 and another Rs. 5,000, a loan from the bank. It was only when the Rs. 5,000 was credited did the account show a credit balance, vis., Rs. 98.81. The bank statement revealed a number of cheques for amounts like Rs. 50 which were cashed at a pharmacy called Nathan's at Moratuwa. It was the appellant's evidence in cross examination that these small sums were for his home expenses and it was shown that the entirety of his salary and more was so spent. For October he has spent Rs. 2,087.50 on his personal expenses and paid Rs. 1,000 to a Paint Co. November the total is Rs. 4,170. December, January and February '71 the amounts are Rs. 1,750 ; 1,100 ; 2,532. Then the bank statement F7 coupled with his evidence in cross-examination, shows that he has utilized on his expenses nearly Rs. 30,000, from July '70 to February '71, inclusive of Rs. 1,322.97 paid to Industrial Finance, Rs. 20,000 to Moosajees, Rs. 1,000 Mercantile Credit, Rs. 1,000 to a Paint Company, the money for purchase of the cooker, and a loan of Rs. 1,500 to a Mrs. Wickremasinghe. There is no evidence that this loan was returned. So that his salary was not available for investment, unless he or his wife had saved from his drawings. He stated that his wife saved Rs. 4,000 in these eight months. The wife not being a witness the trial Judge did not accept it.

Next is the *Loan from the Hatton National Bank of Rs.* 5,000.

His personal account F7 as already referred to was overdrawn in the first few months. The overdraft limit was also being increased and on the 14th September, 1970, the bank instead of the overdrafts, gave him a loan of Rs. 5,000. This money was

consumed to settle the moneys overdrawn and for the first time there was a credit balance at the end of that month of Rs. 98.81. So that the Rs. 5,000 could not have been available for any investment.

The loan of Rs. 10,000 from Maharoof. The appellant stated that of the Rs. 18,000 paid for Elabodawatte Rs. 10,000 was a loan from Maharoof. Next he took up the position that it was not a loan but Rs. 10,000 which Maharoof gave him for transferring a permit he obtained for a Jeep to Maharoof. Ultimately he stated that it was not the money for the Jeep but it was a loan. It is clear then that on his own evidence he was shifting his position. But Maharoof denied that he gave a loan of Rs. 10,000 to the appellant for this purpose or a sum of Rs. 10,000 for a Jeep. Further in his explanation to the Bribery Commissioner the appellant stated that the money for the purchase of Elabodawatte came from his earnings from Free Lanka Trading Co. for 1969, '70, '71 and the salary from the corporation. What happened to his salary has already been shown. He admitted that the money from Free Lanka Trading Co. was drawn for his expenses and in June 1970 all he had from those earnings was a sum of Rs. 2,000. Therefore leaving aside the earnings for 1971 which will be examined, the evidence of the appellant is contradictory of the explanation and is contradicted by his own witness Maharoof, his partner in business and a co-director of Gamwella Tea & Rubber Co. A court then cannot conclude that the appellant received this money from Maharoof.

Rs. 20,000 from Bartleet & Co. Bartleet & Co. were the agents who negotiated the sale of the Hunnasgiriya Estate. The appellant stated that he saw Mr. Mallory Wijesinghe and requested that this loan be granted for this purpose and he agreed. Rs. 20,000 was credited to the account of the appellant on the 22nd of January, 1971. The appellant also produced a letter wherein the firm had stated that although they "had suspended granting advances we are according to your request treating this as a special case." The loan was to be repaid in 10 monthly instalments with interest. Only one instalment was paid. It was given on the appellant signing a promissory note. No counterfoil of the promissory note, no book of promissory notes was produced. There was no crop-bond taken as it was usual for the firm to do when granting such loans. Ultimately Bartleets in July 1973 sued the appellant. An Accountant from Bartleets was called but he was not able to say what the special considerations mentioned in the letter were. It is correct that only Mr. Mallory Wijesinghe could have explained what they were. Although he was not a witness, it was obvious that a consideration was that the appellant was the Vice Chairman of the Insurance Corporation, however tem-

porary such office may be. But Bartleets were the brokers who negotiated this sale and it is reasonable to presume that this loan was rather to advance the sale of the estate. Regard must also be had to the quantum of the loan. It was only Rs. 20,000. Even if Mr. Wijesinghe was called he would have said that and if there was any other reason the prosecution would have questioned the appellant. There were no such questions. The burden being on the appellant to prove that this loan was not a bribe, there is sufficient evidence on which the appellant has discharged that burden on a balance of probability. The trial Judge was surmising when he observed that Bartleets would have written this off as a bad debt if there were no investigations by the Bribery Commissioner.

Rs. 15,000 from Free Lanka Trading Company. The Proprietors of the Free Lanka Trading Company were Justin and Aloysius. They were in the Export and Import trade and in addition had a Shipping department. The appellant was employed in this company and before he joined the corporation was in charge of this department. There was some oral agreement whereby the appellant was to be given 1/3 profits from the shipping department. The appellant had drawn moneys as and when he needed money for his expenses and by March 1970 he had overdrawn his account to the extent of Rs. 15,344.87. When he severed connections with this firm on the 23rd April, 1970, he was paid Rs. 1,150 in full settlement of all claims as evidenced by a receipt produced by the appellant himself. However from all this money he had only Rs. 2,000 in June 1970. The appellant stated that on 3.2.71 he received from this firm a sum of Rs. 15,000 as 1/3 share of profits from these ships *S. S.* Panagiotis Xilas, *S. V.* Lucy and *S. S.* Captain Pantalis. The appellant produced another receipt in support giving these details. Rs. 15,000 was paid Rs. 10,000 by cheques, and Rs. 5,000 by cash a few days before 3:21.71. This money was used for the purchase of Hunnasgiriya. When the payment is examined it transpires that the account of the appellant was overdrawn to the extent of Rs. 15,344.87 by 31.3.70 and a further sum of Rs. 1,150 was again paid on 3.2.71. The net profit of the shipping department from these three named ships and from other ships, is Rs. 27,181.87 for the year which ended on 31.3.71. But the appellant was paid as 1/3 share from three ships on 3.2.71 a sum of Rs. 15,000. The accountant of the firm, Dharmalingam a Chartered Accountant, was unable to say on what basis this amount was paid except that it was a rough calculation. At another stage he said "it was paid in excess." To show that money was due and this payment was made, the ledger was produced. This showed that the income consisted of the agency charges amounting to Rs. 23,292.05 from all the ships and FEECS

at the rate prevailing then, 44% of Rs. 23,292.05 has been calculated at Rs. 35,393.44, written in pencil and thereby arrived at the gross income of Rs. 58,686.43. It is from this figure that the net profit of Rs. 27,181.09 was calculated. But the FEECS upon a correct calculation amounts to Rs. 10,348.92 and the gross income is then Rs. 33,641. According to the accountant the working expenses were Rs. 31,504.61. The true net profit is Rs. 2,137 and the profit from the three ships must amount to much less and the one third share will not be more than a few hundred rupees. In the previous year the profits from the shipping department was Rs. 3,420.39 and the appellant's share was Rs. 1,140.13. In the profit and loss account for the year ended 31.3.71 the appellant although he severed connections with the firm from 23.4.70 has been paid a sum of Rs. 13,590.43 for that year as being the Manager's 1/3 share. It is after giving credit to the appellant for this figure the profit was calculated at Rs. 27,181.87. It must be noted that in the previous year when the appellant was in the firm he was not given that allowance. In fact the evidence of the Accountant, appellant's employee at one stage and his witness, is that there was no manager. In this year when the appellant was working Director and Vice Chairman of the Corporation he has been paid Rs. 13,590.43 for managing a department at Free Lanka Trading Co. together with Rs. 15,000 as profit ! The accounts become still more complicated because in the Balance Sheet for that year the appellant is shown as a debtor in sum of Rs. 19,154.44 although there is a separate place for Trade debtors.

Then the documents that the appellant produced are contradictory of one another :—(*a*) The receipt says that Rs. 15,000 is 1/3 profit from 3 ships due to him, but the ledger does not show that there was in fact a profit of this amount, (*b*) this Rs. 15,000 is money due to the appellant, and is an addition to the Manager's share of profits which is a new position regarding the reimbursements of the appellant, but the balance sheet shows him as a debtor. There are obvious errors in the computation of the accounts and the appellant was bold enough to produce these accounts. Therefore the correctness of the accounts produced on behalf of the appellant is in grave doubt.

It is the complaint of the appellant's Attorney that the trial judge failed to consider Aloysius's evidence. Aloysius gave evidence after the accountant of the firm. I have already referred to the evidence of the accountant. Aloysius was also a defence witness. He took up several positions regarding the payment of this Rs. 15,000. He at first stated that there was an understanding that the appellant was to be given 1/3 share of the profits from the shipping department. He then stated that there was was a

gentlemen's agreement that the appellant was to be paid "a commission as he did the entire shipping work". But later he stated that the appellant had asked for money and he ordered that the money be given because he "felt an obligation to give the money". At another stage in answer to Court he stated that it was not paid as 1/3 share of profits from the 3 ships. Still later he said the agreement was to give not strictly 1/3 share but a share of the shipping department as long as it exists. These different positions are inconsistent and contradictory of the evidence (*a*) of the witness himself (*b*) of the appellant, and (*c*) contradictory of what is stated in the receipt produced by the appellant and of the documents. By this evidence of Aloysius the burden that lay on the appellant could never have been discharged. This evidence therefore could have accrued not to the advantage of the appellant but to his disadvantage and consequently no prejudice has been caused to the appellant by the failure of the trial judge to consider the evidence. One cannot help asking the question whether this is not a cover for some activity of the appellant, which he does not want to disclose and as the trial judge said "whether the accused was sending back his own money" and the finding of the learned trial judge is the only correct and rational finding.

Rotan Vandor Associates Rs. 20,300. Rotan Vandor Associates are "a ship broking firm, Shipping Agents, Charter agents and brokers" according to the appellant. The parters are Shelton Perera and Vandersyl. Originally the firm was at Sulaiman Terrace and later shifted to Church Street, Fort. In the explanation furnished by the appellant he said he received Rs. 20,300 from this firm in seven cheques whose numbers, amounts and dates he gave. The attorney for the defence in his opening of the defence stated that this was a commission from the firm. The appellant stated so in evidence and that this sum was received by cheque details of which he again gave and stated they were credited to his account F7. He stated that he gave no receipts. The appellant further stated that he got the numbers of the cheques from the books of the firm and that the cheques were in his name. It is then obvious that on the day he furnished the explanation the books of the firm were available to him. Cheques as in his explanation and in his evidence, drawn on the Bank of Ceylon, Foreign Department are :—

No. 872801 of 15.9.70 for Rs. 400
No. 837598 of 20.9.70 for Rs. 1,000
No. 872808 of 3.10.70 for Rs. 600
No. 872819 of 12.10.70 for Rs. 500
No. 872837 of 4.11.70 for Rs. 3,000

No. 872885 of 3.12.70 for Rs. 6,800
No. 872894 of 21.1.70 for Rs. 8,000

The appellant then in cross examination was confronted with his Bank statement F7 and it was found that only the last cheque of Rs. 8,000 had been credited to this account. Then the appellant took up the position that the cheques were written out not in his name, but instead of crediting it into his account he endorsed the cheque and gave it to the firm who gave him the money. On a subsequent date the prosecution confronted him with the cheques. Then it was found that cheque No. 872801 was for Rs. 1,747.50 drawn on 24.9.70 in favour of the Postmaster General. Cheque No. 872885 was also in favour of the Postmaster General on 12.2.71 for 1,321.50. Cheque No. 837598 is a cash cheque endorsed by Cooke the Accountant for Rs. 1,000 on 29.9.70. Cheque No. 872808 for Rs. 600 on 3.10.70 was a cash cheque endorsed by Cooke. Cheque No. 872837 for Rs. 3,000 drawn on 14.11.70 is a cash cheque endorsed by one Perera, a person unknown to the appellant.

When confronted with these cheques he then said that he remembered signing some vouchers and " these particulars were read to me from the ledger ", having first said that he did not give any receipts and he got the numbers from the books and Cooke had the books. Throughout his evidence he maintained that the books were available to him and that books were being inspected by the Accountants to make a reconciliation or cash flow statement and that such a statement will be produced. No such statement was ever produced. The books were said to be lost later on. He said he will be calling Shelton Perera but " summons could not be served on him ". He was never called although a special date was obtained to call him as the only defence witness left.

The appellant also had the balance sheet of the company produced. It is dated 16th July, 1973. So that books were available till then. Since 31.3.71 the accounts of this firm had not been audited. In that balance sheet the appellant is shown as a debtor. In fact he started the evidence with the assertion that this was a commission due and paid to him. In the balance sheet there is no profit and loss account. No cash book, no ledger is available for inspection. Cooke, the Accountant, stated that he did not know why the payments were made and did not know where to charge this payment. If this was a commission it should have been separately shown. Further Cooke was employed in that firm from its inception and he stated that there was no one employed for the purpose of canvassing business. The appellant did not work to enable him to earn a commission.

In evidence in chief Cooke produced on 23.5.75 seven receipts for the seven payments with the cheque numbers and all the seven state these were advance payments "for professional services rendered and business introduced" signed by the appellant. These receipts he stated were written at the request of Shelton Perera and signed by the appellant "Q. Can it be after 1974? A. May be. It was after the case started." In the receipts the numbers of the cheques given are different from those in the explanation and the evidence of the appellant. In respect of the cheque for—

Rs. 6,800 the No. in the receipt is 872855
Rs. 400 the No. in the receipt is 872806
Rs. 600 the No. in the receipt is 872807
Rs. 500 the No. in the receipt is 872815.

It has to be borne in mind that the appellant must prove first that he received this money and then it is not from bribery. On a consideration of all this material it is evident that when he says he received the money from the first six cheques it is open to the gravest doubt. The finding of the trial Judge is "under all these circumstances it can be inferred that these payments were not in fact made." It is obvious here he is referring to the first six payments. He dealt with the last payment, 2 paragraphs later and said "it can be safely proved that" at least Rs. 8,000 which went into his account shows that they were proceeds of bribery. So that in his view that last payment was received but it was in contravention of the Bribery Act. Having dealt with this particular payment, he proceeded to say that "that payments were received in contravention of sections 17 and 20 of the Bribery Act." There is no inconsistency in this statement. He was referring to the last payment. He of course might have been more accurate and it was not necessary that there should be a finding on sections 17 and 20 of the Bribery Act.

The prosecution brought out the fact that the the appellant had not declared this "income" in his tax returns for the year 72/73 anywhere and that he was questioned by the Income Tax authorities about the large deposits into his bank account. The prosecuting attorney asked the appellant whether he gave the explanation given in evidence that some of these deposits was money he received from Rotan Vandor Associates to Mr. Sabapathy of the Income Tax. The answer was "I cannot remember. It was a long interview." Then the record reads: "Counsel for the accused moves the following fact to be recorded: that the prosecution will be calling Mr. Sabapathy of the Income Tax Department." I will proceed on the basis that the prosecuting attorney did give that undertaking. The next question was "when

you were interviewed by Mr. Sabapathy and when you sought to explain the cash deposits and cheques did you ever disclose to Mr. Sabapathy that some of these cash deposits represent monies that you got on cheques given to you by Rotan Vandor Associates? *A.* I cannot remember." Mr. Sabapathy was not called and objection has been taken by the learned attorney for the appellant that "the trial Judge acted on this evidence although Mr. Sabapathy was not called to prove the contradiction."

The trial Judge formed the view, from the answers given in court thereafter, that the appellant did admit that he did not tell the Tax Officer that there were deposits from Rotan Vandor Associates. So far as he was concerned then there was no necessity to call Mr. Sabapathy. Everybody at the trial appears to have acted on the footing that Mr. Sabapathy could be called. The Director of Public Prosecutions submitted that there was no necessity to call Mr. Sabapathy as the appellant admitted it. In any event he could not have called Mr. Sabapathy in view of the provisions of section 124 of the Inland Revenue Act, No. 4 of 1963, which is same as the provision found in Cap. 242. This section provides that no Tax Officer can disclose anything in the tax files "except to produce any documents or to disclose any information to a court for the purpose of carrying into effect the provisions of the Inland Revenue Act". These proceedings not being under the Inland Revenue Act the Tax Officer could not have been called unless there was some other special provision overriding this section. Section 4(1)(*d*) of the Bribery Act requires the Commissioner of Inland Revenue to furnish all information he has regarding the tax affairs of the appellant to the Bribery Commissioner who is required to treat all such information "with the strictest secrecy and shall not divulge such information to any person other than a court or an officer engaged in any prosecution for bribery". The Bribery Act does not state how the information shall be placed before court. But it provides in section 5 that a record of the investigations shall be furnished to the Attorney-General and this record must necessarily include the information from the Commissioner of Inland Revenue. Consequently it is in the hands of the officer engaged in the prosecution.

The learned Attorney for the appellant submitted that the method contemplated was to place the information received in the hands of the Judge, again if I understood him right by the Bribery Commissioner. The appellant would then not have an opportunity of answering any questions that may arise unless the judge decided to question him before acting on it. The prosecuting officer may question the assessee i.e., the appellant on any

relevant matters. That is how information is placed before a Court. It may not be strictly in terms of the section, but it is the least objectionable. No undertaking should have been given and no undertaking sought that Sabapathy would be called unless of course the appellant required the tax officer's evidence. No question should have been asked and no questions allowed on the basis that Sabapathy could and would be called. As it was at the instance of the Attorney for the defence that the undertaking was given and recorded I do not think that any complaint can now be made.

In any event irrespective of this evidence, the trial Judge would have come to the same conclusion. The trial Judge stated that " these payments were in fact not made to the accused. The position is strengthened as these receipts were not disclosed to the Income Tax authorities. " The trial Judge was utilizing the failure of the appellant to disclose these receipts as another reason to strengthen the belief he has already formed. It was, I stress, only an additional reason. Consequently this is not a ground for interfering with this conviction.

Consequently the finding of the trial Judge on the Rs. 50,000 for purchase of Hunnasgiriya and Rs. 18,000 for the purchase of Elabodawatte need only be altered to " Rs. 30,000 for the purchase of Hunnasgiriya and Rs. 18,000 for the purchase of Elabodawatte. "

The next item is the Gamawella transaction. This consists of the purchase of Gamawella shares and the deposit of Rs. 50,000 in the Marginal Account in the Hatton National Bank. These two items have to be considered together. The appellant acquired 8,423 shares at Rs. 2.50 per share in the Gamawella Tea & Rubber Co. during July and August 1971 for a sum of Rs. 21,057.50. During that time Mr. S. E. R. Perera purchased 7,100 shares for Rs. 18,288.50 and Maharoof 5,165 for Rs. 12,750. Mr. Perera's money was paid direct to Somerville & Co. and this Court is not concerned with that payment or purchase. The appellant paid for Maharoof's shares on Maharoof giving the appellant Rs. 25,000 by cheque and Rs. 7,500 in cash. In order to take over Gamawella Tea & Rubber Co. it became necessary to pay off Whittalls Estates and Agencies. For this purpose a sum of Rs. 80,000 had to be deposited in Hatton National Bank. This was done by three payments Rs. 45,000, Rs. 10,000, Rs. 25,000 on the 20th and 25th July. The nominee of Whittalls resigned from the Board of Directors and Maharoof and the appellant were appointed to the Board on 10.8.71, appellant, the Chairman. Thereupon the agency was transferred to Consolidated Commercial Agencies Ltd. The

Board made arrangements with the Mercantile Bank to extend overdraft facilities up to Rs. 100,000 to the Gamawella Tea & Rubber Co. The money deposited in the Marginal Account according to the appellant comprised of the Rs. 32,500 given by Maharoof, Rs. 45,000 loan from Mubarak Thaha and Rs. 2,500 by the appellant. The appellant paid by his cheques for Maharoof's shares. Within a few weeks of the completion of these transactions the appellant withdrew the entirety of Rs. 80,000, with Maharoof's consent, and utilized a part of it for the next investment.

The appellant in his explanation stated that the monies for these, the Gamawella transaction, were derived from (*a*) the sale of cars, a business he was doing, (*b*) bank overdraft, (*c*) shipping income (*d*) corporation money, (*e*) Thaha's money. In evidence he referred to an additional source of income, viz. proceeds from the sales of tea from Hunnasgiriya in a sum of nearly Rs. 41,000. There has been considerable evidence and cross-examination on this transaction. But the only finding of the trial Judge in this connection is about the profits derived from the sale of two cars. It is unnecessary to set out those involved transactions. It is sufficient to state that the submission of the learned Attorney that the presumption does not attach to the profits from the sale of cars is correct because the appellant was not asked to account for how he purchased these two cars.

Further the appellant has stated that he utilised Rs. 41,000 being the income from Hunnasgiriya for this transaction. Once the presumption in respect of Hunnasgiriya has not been displaced in view of section 23A (2) the income from Hunnasgiriya is income from bribery and cannot be computed in accounting for the Gamawella transaction. As the trial Judge has failed to come to a finding on this transaction, it is unnecessary to state anything further.

The appellant in evidence took up the position that the moneys drawn from the Marginal Account, viz., Rs. 80,000 were utilized for the next investment. In fact the trial Judge in his order has accepted it. But if the appellant does not rebut the presumption in respect of the Rs. 80,000 and it is found that he utilized it for the next purchase, Yelverton Estate, in view of section 23A (2) this Rs. 80,000 cannot be set off from the consideration paid for that Estate as being duly accounted for. Fortunately for the appellant there is no concrete finding on the Gamawella transaction. In the face of these admissions I do not see the necessity of retrying the appellant as the learned Attorney repeatedly urged.

The next purchase by the appellant is a land called *Madangahawatte*. This was bought out of the proceeds of the sale of *Elabodawatte* for Rs. 14,000. Consequently as Elabodawatte is deemed to be property acquired from bribery, the proceeds of sale will be such money and the presumption will apply to Madangahawatte as well. But the consideration paid for Madangahawatte cannot be included in the value of the properties in respect of which the appellant has failed to displace the presumption if the consideration paid for Elabodawatte is included in it. It has to be one of the two, and accordingly Madangahawatte is excluded.

The last item in schedule A is *Yelverton Estate, Badulla*. The appellant purchased it for a sum of Rs. 350,000 on the 30th October 1971, from the Estate Co. of Uva. In addition to the consideration paid on the date of attestation of the deed of sale he paid a sum of Rs. 45,762.09 on the 4th November, 1971, for "articles like tea chests, unsold tea" and so forth. He also took over certain liabilities regarding compensation for workers and according to his own evidence the purchase cost him about 6 lakhs. In January 1973 he valued it for purposes of wealth tax at Rs. 1.037 millions.

Of the consideration of 3 1/2 lakhs, Rs. 35,000 had been paid as an advance on 1st September, 1971, the appellant had undertaken to complete the transaction by 30th October, 1971. The balance was paid by three cheques. The first for Rs. 50,000 from Forbes & Walker, Rs. 100,000 from L. B. Finance Co., and Rs. 165,000 by cheque drawn on the Hatton National Bank making up Rs. 315,000. The cheque from Forbes and Walker was a loan on a Crop bond and so far as that was concerned it was a legitimate transaction. L. B. Finance Company gave a loan of Rs. 1,000,000 and guaranteed another Rs. 100,000 in respect of this purchase to the Hatton National Bank. On the strength of this guarantee of Rs. 1,000,000, a loan of Rs. 30,000 from Mr. J. E. R. Perera and another loan of Rs. 20,000 from a Mr. Kotagama for the sale of a car, the appellant who had overdraft facilities up to Rs. 15,000 issued the 3rd cheque for Rs. 165,000. There is no dispute regarding the loan advanced by Mr. J. E. R. Perera. The trial Judge found that the appellant has failed to prove that (*a*) the loan from L. B. Finance, (*b*) advance of Rs. 100,000 by the Hatton National Bank, and (c) the Rs. 20,000 from Kotagama are not from bribery.

On the 11th October, 1971, the appellant applied for a loan of Rs. 100,000 payable in 60 monthly instalments from L. B. Finance Co. Since the application, as evident from a minute in the application itself, the appellant had seen or met the Managing Director, one Duwearatchchi. Duwearatchchi recommended the granting

of the loan subject to the usual rate of interest and the loans committee on 22.10 approved the loan subject to 4 conditions— (*a*) there was to be a primary mortgage of the estate executed at the time the conveyance was made, (*b*) a title report had to be forwarded, (*c*) a valuation report, and (*d*) a letter for A. I. C. C. that a loan of 1 lakh has been approved and that the cheque will be sent direct to L.B. Finance Co. This last condition was necessitated by the statement contained in the recommendation of the Managing Director that the appellant had applied for a loan to the A. I. C. C. and on receipt of that loan the applicant intended to settle the loan to L. B. Finance. In fact the appellant had applied for such a loan to the A. I. C. C. and even paid the fees for a survey on 5.10.71.

In that recommendation was another endorsement by Duwearatchchi that the appellant had also applied for a guarantee to the Hatton National Bank for Rs. 1,000,000 on a secondary mortgage of the estate. Duwearachchi recommended that also. In the application for a loan of Rs. 1,000,000 by the appellant no request was made for a guarantee to Hatton National Bank of another lakh. There was no separate application for a guarantee. It was contained only in the recommendation of Duwearatchchi to the loans committee of which he himself was a member. So that after the 11th October the appellant had seen or arranged with Duwearatchchi for this guarantee. The A.I.C.C. on the 28th October, 1971, wrote to L. B. Finance Co., that the A.I.C.C. is still proceeding with the investigation into the condition of the property and a decision will be taken only in the latter part of November whether or not to grant the loan. Then it was clear that the four conditions imposed for the granting of the loan could not be complied with. There was no valuation report. There was no title report. But on the 29th October instead of referring the application for the loan back to the board, Duwearatchchi telephoned the Manager, Hatton National Bank and wrote a letter to him that L. B. Finance Co. was agreeable to issue the guarantee required. On the same day the loan applied for was given. No mortgage was executed. Only a pro note was signed by the appellant. On the 30th October utilizing this loan and the guarantee from L. B. Finance Co. the appellant had the estate conveyed in his favour free of any mortgage primary or secondary. On the 1st November Duwearatchchi put up a memorandum to the Board that due to the urgency of the matter the loans committee decided to grant the loan and to issue the guarantee. There was no evidence of such a decision. In that memorandum he has stated that Yelverton Estate has been valued at 1.5 million. The board found that Rs. 100 000 had

already been paid and finding that a guarantee had been promised decided to issue the written guarantee which was given on the 5th November, 1971. Duwearatchchi is no longer at L. B. Finance Co.

Duwearatchchi did not give evidence. One Adihetty from L. B. Finance Co. gave evidence and stated that there was a legal impediment to the execution of the mortgage bond. This is totally incorrect. It is then clear that the Board of Directors imposed conditions for granting the loan. They sanctioned the grant of the loan only in the way of their business. It is equally clear that Duwearatchchi failed to see that the conditions so imposed were complied with. L. B. Finance Co. were the victims. The nett result was that on the security of a pro note, L. B. Finance Co. advanced Rs. 100,000 to the appellant and guaranteed another Rs. 100,000 already advanced by the Hatton National Bank to the appellant. It cannot be a coincidence that at this time, Dharmarajah the Manager of Hatton National Bank attempted, through the appellant, to get the Insurance Corporation to deposit a part of the corporation money with that Bank and by the time the written guarantee was given Dharmarajah had failed in that attempt.

The next question is what transpired between Duwearatchchi and the appellant. What arrangements there were between the appellant and Duwearatchchi there is no evidence. Adihetty cannot speak to it. Hence the burden that lay on the appellant cannot be discharged unless Duwearatchchi is called. Therefore the appellant has not displaced the presumption regarding this transaction.

The next transaction is the *Rs. 100,000 advanced by Hatton National Bank* for the purchase of this estate on the same date as the loan by L.B. Finance Co. The appellant was by this time well known to this bank. He had two accounts. He was allowed overdraft facilities. During this time it was the policy of the Government that departments and institutions like public corporations of the Government should bank with the State Banks. Hatton National Bank had just started business and they were anxious to secure business from these institutions. With this end in view the manager of the bank Dharmarajah met the appellant and offered a higher rate of interest than the rate paid by the State banks if the corporation were to bank a part of their money with them. Dharmarajah stated when questioned whether he was unaware what the State policy was regarding banking said "I was not fully aware but I had a feeling because we were not committed by it". He stated he went and met the appellant because he was the Vice Chairman and knew him and

" thought he would recommend my offer ". True to his expectations on the 21st September, 1971, the appellant put up a board paper on the subject and stated that " it will be advisable for the corporation to explore the possibility of depositing a portion of the funds ". Incidentally this is the only board paper by the appellant regarding bank deposits. On the 3rd of November, 1971 " the board was unable to agree to the suggestion made by the Vice Chairman. The board was of the view that it will not be prudent for the corporation to go outside the State institutions to invest its funds ". This decision could have been known by Dharmarajah on that day itself. On the 5th, the written guarantee of L. B. Finance Co. signed by Duwearatchchi and another director was given, the attempt to have corporation money deposited in the Hatton National Bank having failed.

On the 4th October, 1971, within two weeks of his submitting the board paper the appellant applied for a loan of Rs. 100,000 from Hatton National Bank stating that it will be guaranteed by L. B. Finance although it was only on the 11th October that an application for a loan was made to L. B. Finance. By this time the board paper of the appellant had already been submitted. The manager Dharmarajah granted the loan on the 29th October without any security. Dharmarajah cannot say when he ordered or decided to give the loan. It must be before the 29th October and after the 4th October. Questioned as to when he got the guarantee, the answer was " we got the guarantee the day after I gave the loan because it was an agreement between myself and the managing director of L. B. Finance. It was Duwearatchchi who asked me to give the cheque and that he would forward the guarantee the next day ". A few questions later he had to admit that this was wrong and the guarantee was obtained much later. But Duwearatchchi could not have said when the guarantee was to be given, because the Board of Directors had still not approved of what Duwearatchchi had done. It was only on the 1st November that he sought the sanction of the board of L. B. Finance for what had been done. A letter dated the 29th October, 1971, was produced by the defence to the effect that Duwearatchchi had written to the Hatton National Bank to give the loan that L. B. Finance is agreeable to issue the guarantee.

The most striking feature in the loan by the Hatton National Bank is that there is evidence of some positive act of the appellant in his capacity as Vice Chairman of the Corporation performed for the bank. This element is absent in the case of the loans from Bartleets and L. B. Finance Co. There is in addition the presumption operating. There is not even a sugges-

tion of it in those two cases. It was urged that the loan was secured and it is the usual practice for banks to advance loans of this nature. The loan was secured after the issue which is after the Corporation had turned down the suggestion of the appellant. Therefore the trial Judge was correct in arriving at the finding that the appellant has failed to prove the loan of Rs. 100,000 from the Hatton National Bank is not from bribery.

The last item is " the Kotagama transaction ". There was a Morris Trailer belonging to the Estate Co. of Uva. This car was transferred to the appellant after the sale of the Estate on the 2nd November. The appellant said he transferred it to one Kotagama for Rs. 20,000 paid in cash a few days before which the appellant utilized for this payment. The trial Judge refused to accept this. On a perusal of the deed of transfer all wagons belonging to the owners were sold on that deed. Therefore if the position of the appellant in that matter is correct he has accounted for Rs. 20,000. But the difficulty is if the appellant has failed to displace the presumption in respect of the purchase of the Estate, any amount realised later by sale of the Estate or its machinery or vehicles will be veiled with that same presumption.

The trial Judge made no finding on the Moolgama shares and the money paid to the Industrial Finance Co. These two items are, therefore left out of consideration in this order.

On the 21st May, 1975, the attorney for the appellant in the lower Court called a witness Issidore Peiris, credit manager of Hatton National Bank. He had already been called by the prosecution and cross-examined by the defence very much earlier. The defence moved to produce two letters through him (*a*) a letter dated 12.7.71 written by the appellant to the manager Hatton National Bank for a loan of Rs. 1,000,000 for the Gamawella transaction, (b) the reply dated 19.7.71 from Dharmarajah the manager. The appellant had concluded his evidence. Dharmarajah had concluded his evidence. The State objected. The trial Judge upheld the objection and gave no reasons but presumably for the reasons stated by the prosecuting attorney. It has been contended that this order was wrong.

The application was to lead in evidence through this witness a letter written by Dharmarajah to the appellant after both Dharmarajah and the appellant had concluded their evidence. Peiris could not have testified to the letters and to the reference in the letter to " the discussion I had with you ". There was no indication whatsoever that Dharmarajah would be recalled. The prosecution could not have called the appellant. There was no indication at all that this appellant would be recalled. As the defence was relying on the truth of the contents of the two

letters it was necessary that at least one of these two witnesses should have been recalled. The appellant had not referred to these two letters in his evidence or in his explanation. The learned Director of Public Prosecutions stated further that the witness Peiris was present in court throughout the evidence of Dharmarajah. The defence could have recalled Dharmarajah particularly when that witness had in open court desired to make submissions after his evidence was concluded. It is my view that, even if the presence of the witness in court is ignored the trial Judge acted correctly in upholding the objection.

This witness thereafter gave evidence and the defence moved to have the documents ruled out filed of record. The prosecution objected and the application was refused. The trial Judge was in error in refusing that application. Where a document is ruled out the higher court cannot determine whether the ruling is correct or not unless the document is available in the record for perusal. In this case however although it was not available in the record, the attorney for the appellant furnished the court with the copies of the two documents.

Soon thereafter the defence moved to mark two other documents (a) a letter dated 4th October, 1971, which the appellant sent to the manager, Hatton National Bank applying for a loan (b) a letter dated 29.10.71 the reply by L. B. Finance. The State objected to both these letters. But a perusal of the record shows that on that very day a copy of the letter of the 29th October, 1971, was produced in evidence by a director of L. B. Finance Co. as D 40. On the previous date of trial, 7.5.75 witness Dharmarajah had produced the letter dated 4th October, 1971, as P 115. In fact that witness has even been questioned on D 40. So that both learned attorneys had forgotten that these two documents were in evidence already. When this was pointed out it was submitted that the application was to mark the original of the letter dated 29.10.71. I do not see any difference between the original and the copy. I do not think there is any substance in the objections. The true position is that both attorneys at the trial and also in the appeal did not notice that the documents were already in evidence.

It was repeatedly urged that the evidence of A. M. Thaha was irrelevant and prejudicial to the appellant. Thaha's name was not included in the list of witnesses whom the prosecution intended calling. In the summary of facts no reference was made to the evidence of Thaha. In the explanation furnished by the appellant to the Bribery Commissioner under section 23A (4) reference was made to loans from Thaha. On the 8th of October, 1974, the Attorney-General moved to file an additional list of witnesses and to summon A. M. Thaha who at this time was

undergoing imprisonment after he was sentenced by the Criminal Justice Commission (Exchange Control). That same day the defence was given a copy of the statement of Thaha made to the Commission on the 3rd of February, 1972, and the prison authorities were informed by telephone to produce Thaha the next day. On the next day 9th October, the prosecuting attorney moved to call Thaha. This application was allowed after the objections of the defending attorney were overuled. Thaha testified to 3 matters : (1) He came to know the appellant after the appellant was appointed Vice Chairman of the Insurance Corporation and he used to cash post dated cheques for the appellant. (2) He discussed the question of raids on bucket shops with the appellant " as he was influential with Mr. T. B. Illangaratne and Mr. L. Jayakody. " Within two weeks prior to the 5th April, 1971, he gave Rs. 50,000, and later Rs. 10,000 to the appellant being his one third share of a sum of 2 lakhs, " meant to be paid to somebody else "—Thaha's own words—for either legalising betting or for stopping the police raids on book makers. (3) He gave a loan of Rs. 45,000 to the appellant on a cheque out of which a sum of Rs. 23,000 was repaid. The learned Director stated in this Court that he called Thaha because the evidence was relevant.

The Bribery Act in section 10 (1) requires that a list of witnesses whom the prosecution intends calling be included in the indictment. Section 11 of the Bribery Act empowered the prosecution to call any witness although not listed in the indictment. The section has to to be given a meaning. The section does not provide for notice. An amendment of 1976 to the Bribery Act provides that notice should be given. The trial in this case was in 1974 and 1975. But to ensure a fair trial adequate notice should be given to the defence. How adequate the notice is depends on the circumstances of the case. Then the only complaint available is whether or not adequate notice, so as to ensure a fair trial, has been given. Only a day's notice was given and it was because this notice was insufficient the defence applied for time on the conclusion of the evidence in chief, till the next day to cross examine the witness. Whether or not such an application should be granted is essentially a question for the trial Judge to be decided after considering the contents of the statements, the state of the trial, the notice given of the evidence and the fact that the law permitted the prosecution to call this witness. At the same time it must be remembered that although he was sprung upon the case, his evidence on two points was of use to the defence and supported the appellant. Perhaps the learned trial Judge was abrupt in refusing that request for a day's postponement of the cross-examination.

The learned trial Judge in accepting the evidence of Thaha stated that he " did not overlook the provisions of section 79 (1) ". Section 79 (1) of the Act states—

> " In any proceedings for bribery....the giver of a gratification shall be a competent witness against the person accused of taking the gratification and shall not be regarded as an accomplice...."

Even if these proceedings are for bribery as defined in section 80, the giver of a gratification is not be regarded as an accomplice in proceedings where the person who accepted that gratification is accused of accepting that gratification. So that for section 79 (1) to operate in favour of Thaha, the appellant must be *accused* of accepting that sum of Rs. 50,000 or 60,000. That is not the accusation here. Consequently section 79 (1) has no application and the trial Judge has misdirected himself on this point.

This is an appropriate place to consider another submission made on behalf of the appellant. The prosecution called 6 other witnesses whose names were not on the list of witnesses. It was not seriously contended that the evidence of these six witnesses was irrelevant. In fact the evidence appears relevant. I do not think that so far as these six witnesses were concerned, the evidence being of such a formal nature, that any justifiable complaint can be made because the law at that time allowed the prosecution to call those witnesses.

The objection is to item (2) of Thaha's evidence. The offence with which the appellant is charged is for owning property deemed to have been acquired by bribery. To establish that offence, as already pointed out, it is unnecessary to establish specific instances of bribery. In fact the legislature appears to have contemplated action under section 23A when there is no evidence of specific instances of bribery but where there is evidence of such an accumalation of wealth which a person could not have accumalated from his known income. If the accused person in trying to explain his acquisitions states that he acquired property A out of a loan X it may be open to the prosecution to prove that the loan X is in fact a bribe. If the appellant for example showed how he bought the various acquisitions it is certainly open to the prosecution to call evidence to show that in fact some of these receipts are bribes. The learned Attorney for the appellant conceded that in those cases it would be so.

Thaha stated that he gave Rs. 50,000 about two weeks before 5th April and Rs. 10,000 thereafter. It was submitted that if the acquisitions of the appellant up to the end of August be examined, the total of the money spent on acquisitions and his

expenditure taking the figures on the evidence of the appellant himself exceed the income and receipts given by the appellant by more than Rs. 60,000, and that this evidence shows how the appellant made good the shortfall. The sum of Rs. 50,000 given by Thaha being a bribe by virtue of section 23A(2) cannot be included in the receipts. Therefore there is no necessity to lead that evidence as the shortfall necessary between expenditure and receipts to establish the charge is maintained, unless it be rebut anything contained in the explanation or in the evidence. That is not the position here. Therefore this evidence is irrelevant.

Unlike in the innumerable cases cited, this is only one item in a mass of evidence. This item has no connection with anyone of the transactions or deposits. It has not been taken into consideration in determinig that the presumption in respect of anyone of the transactions has not been rebutted. Then I fail to see how the acceptance of this item of evidence vitiates the conviction.

It was urged that the evidence of Thaha even if relevant, to highly prejudicial to the appellant. A number of cases were cited in support of the submission that there should be a retrial of the appellant on the same charge. In *Rajakaruna's case* S.C.31/75 *D.C. Colombo 293/B*, S.C.M. 27.2.76 the prosecution led evidence of another incident of bribery in addition to the one charged. This was a trap case where the question was the belief or disbelief of a witness who gave the bribe. The evidence in the case of *Moses v. R.*, 75 N.L.R. 121, was also of the same nature. A large number of cases were cited to show that where there has been irrelevant or inadmissible evidence of character the conviction has been set aside and a retrial ordered. Even in a jury trial where inadmissible or irrelevant evidence has been admitted the verdict will be set aside if "it is impossible to say that the reception of this evidence was not the deciding factor which made the jury give their verdict" *Maxwell v. D.P.P.*, 1935 A.C. 323. It is needless to refer to any further authority on this question. I do not think that in view of the rest of the evidence, Thaha's evidence was the deciding factor which compelled the trial judge to return the present verdict. I do not think it correct, considering the evidence I have set out, to state, that the evidence of Thaha that he paid Rs. 50,000 to the appellant for the purpose stated prompted the Judge to reject the appellant's evidence and find the appellant guilty. That decision is unassailable because :—

(*a*) The evidence of the appellant has been so hopelessly contradicted by his own witnesses, that his evidence could never have been accepted by any Court.

(b) The appellant has given so many inconsistent or contradictory answers on very many matters. Instances are numerous.

(c) Fabricated documents and false accounts have been produced in this case. I will mention two instances; (i) cheques in favour of the Postmaster General drawn by Rotan Vandor Associates were accounted for by the appellant as monies paid to him by that firm, (ii) the acount book of Free Lanka Trading Co. shows that FEECS at 44% of Rs. 23,292 has been calculated at Rs. 35,393;

(d) The deposits to the Bank Account of the appellant amounting over 7 lakhs (figure given by the learned attorney) during this period.

(e) My observations at page 337 in the Gamawella transaction last para.

Therefore in my view the evidence should be considered and can be considered leaving the evidence of Thaha on this point aside. Even in the case of a jury trial such a course is not without precedent, vide 71 N.L.R. 169 case of *Pauline de Croos*. The proviso to section 11 of the Administration of Justice Law says that "no error.... unless there is a failure of justice." The preponderance of evidence in this case is so great that there is no alternative but to affirm the conviction. No judgment or proceedings of a trial is one hundred per cent correct. There is always some error. What relief should be granted depends on what the error is and above all the evidence.

It was urged by the learned attorney for the appellant that in a retrial the appellant will be in a position to call Duwearatchchi, Shelton Perera of Rotan Vandor Associates and others whose absence from the witness box has been the subject or cause of adverse comment and inference. Retrials have been ordered in criminal case where evidence not available at the trial has subsequently surfaced. No retrials have been ordered to enable the parties to call evidence which the defence at the trial thought was not necessary and to compel reluctant witnesses to testify.

The appellant has failed to rebut the presumption in respect of Rs. 30,000 for Hunnasgiriya; Rs. 18,000 for Elabodawatte; Rs. 100,000 obtained through Duwearatchchi from L. B. Finance Co.,; Rs. 100,000 from Hatton National Bank and Rs. 20,000 from the Kotagama transaction. This totals up to Rs. 268,000. I affirm the conviction in respect of this amount. Consequently I reduce the sentance of imprisonment to a period of four (4) years rigorous imprisonment. The penalty recoverable will

accordingly be reduced to Rs. 268,000. In terms of section 23A (3) I sentence the appellant to pay a fine of Rs. 5,000. Subject to these variations the appeal is dismissed.

The application of the Hatton National Bank

After the arguments in the appeal were concluded Mr. Pullenayagam made his submissions on this application. This is an application by the Hatton National Bank to have the following observations made by the learned trial Judge expunged from the record :—

> "No doubt, certain Banks and money lending institutions have advanced brazenly large sums of money to the accused without any principle attached to the payment.
>
> One has to consider whether the payment made by those institutions were bona fide or paid with an ulterior motive, with an idea of getting further help from the accused who was holding such an influential position in the Insurance Corporation. I am firmly of opinion that the payments made by the Hatton National Bank to the accused were so tainted that one could hardly see even the basis for those payments.
>
> After examining all the deposits and withdrawals from his account, there is no doubt whatever that Rs. 1,000,000 from the Hatton National Bank were all tainted transactions and which I consider proceeds obtained from bribery."

The Manager of this Bank Dharmarajah gave evidence for the appellant and after the appellant had concluded his evidence After his evidence was concluded and after two other witnesses had concluded their evidence, Dharmarajah stated from the well of the court that "he wished to make certain submissions in regard to the evidence he gave". He was the Manager of a Bank and should have known that he could not have done it. His conduct showed that he was concerned over his evidence. If there was anything more to be said the attorney who led his evidence would have recalled the witness. But he was not. Unperturbed the learned trial Judge told him that there was no provision in law for the witness to do that.

Now the present application is to have the remarks referred to, because of the transactions which Dharmarajah put through on behalf of the Bank expunged. There are no reported instances where the observations made by a trial Judge about a witness have been expunged. Even in the case of Ramasamy, 66 N. L. R. 265, the Privy Council did not expunge the remarks but only said that they did not associate themselves with the remarks made in that instance. In the present case, many submissions were made about the transaction of the appellant with the Bank.

Mr. Pullenayagam submitted that "even if this Court were to affirm the conviction on other grounds" the transaction with the Bank was a perfectly legitimate one. But I have already stated my reasons why the finding of the learned District Judge is correct in regard to this transaction. In coming to that conclusion he must necessarily comment on the evidence and should be free to comment on the evidence as the occasion demands. I do not find anything in the evidence to show that the learned trial Judge should not have made these observations. The learned trial Judge has kept well within the bounds of propriety. In the circumstances it is unnecessary for me to consider any other question.

I refuse this application.

MALCOM PERERA, J.

The accused-appellant appeals to this Court against the conviction and the sentence, in respect of a charge made against him which is punishable under section 23A (3) of the Bribery Act.

The charge against the appellant reads as follows :—

That between the 31st day of March, 1968 and 31st day of October, 1971, 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 receipts had been converted.

And such property being deemed by section 23A (*a*) of the Bribery Act to be property acquired by bribery or property to which you have converted property acquired by bribery and that you being or having been the owner of such property are thereby guilty of an offence punishable under section 23A (3) of the Bribery Act.

At the conclusion of a long and protracted, and strongly contested trial, the appellant was convicted and sentenced to the maximum term of seven years' rigorous imprisonment, a fine of Rs. 340,200 in terms of section 26A, in default seven years'

rigorous imprisonment, and was further ordered to pay a penalty of Rs. 340,200 under section 26.

The following are the main questions that arise for determination, in this appeal :—

(1) "Did the learned trial Judge misdirect himself on the burden of proof that lies on the appellant to prove the contrary of the presumption, under section 23A (1) of the Bribery Act ?

(2) Did the Judge admit irrelevant and inadmissible evidence, that gravely prejudiced the case of the appellant ?

(3) Did the Judge adopt an unfair attitude towards the defence ?

I shall now deal with the first question. The trial judge in his judgement sets out the burden that lies on the appellant to prove the contrary of the presumption fairly clearly and correctly. He says,

"The quantum of proof in discharging that presumption is no doubt on a balance of probability. This presumption is attached to the property and not to the person."

However, the matter does not rest there, for when he began to apply the law to the facts of this case he wandered away from the right course which he had earlier set, for himself. Says he—

"Once the presumption arises, then the burden of proving the contrary falls squarely on the accused. What is the contrary the accused has to prove ? In my opinion it is that the property so acquired was not acquired by the acceptance of gratification in contravention of the statute. Then, the accused has to prove the various sources of his wealth, besides proving that, *another duty is cast on the accused, viz.. that the sources (are free) from suspicion and doubt*" (page 703).

Still in another place, he says,

"He has not only to prove that alone, but he has to prove these transactions *are free from taint and that the character of these payments are above suspicion*" (page 727).

In more than one place, he has stated that the accused has to prove that the transactions were free from taint and suspicion.

So that it is quite apparent that, when he came to examine the evidence both oral and documentary in regard to each transaction, the learned judge, placed on the accused a burden higher than contemplated by the law.

In effect the judge has placed on the accused the burden not merely of proof by a balance of probabilities, but has called upon him to remove taints, suspicions, and all doubts, in regard to every transaction that comes under purview of the charge. Thus he required the accused to satisfy him they were not proceeds of bribery, beyond doubt, suspicion and free from taint.

What then is the burden that lies on an accused person, who is charged under section 23A of the Bribery Act ?

I shall answer the question in this way.

In my view, the prosecution must convincingly prove, that is prove, beyond reasonable doubt that the accused acquired property, which cannot be acquired or which it was not possible to be acquired with his sources of income or receipts known to the prosecution after a proper and thorough investigation. The prosecution however is not required to satisfy Court that the acquisitions were made with income or receipts from bribery. For, if it was incumbent on the prosecution to prove the acquisitions were proceeds of bribery, then it would defeat the very purpose for which the legislature included the section in the Bribery Act. As I understand, the meaning of section 23A, it is intended to catch up a person in respect of whom there is no actual evidence of bribery, but there is only presumptive evidence of bribery.

Considering the same question Wimalaratne, J. expressed the view, " the prosecution is not required to prove that the acquisitions were made with income or receipts from bribery ". (*Wanigasekera v. Republic of Sri Lanka,* 79 (1) N. L. R. 241).

Thus if the prosecution establishes beyond reasonable doubt the ' basic facts ' ; the Court must draw the presumption that the acquisitions were proceeds of bribery. Section 23A reads " ..... 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. "

Thus upon proof of the basic facts by the prosecution, the burden of proving the contrary of the presumption shifts to accused.

What is this burden that is on the accused ? I think words of Lord Hailsham, L.C. in the case of *Sedeman v. R,* (1936) 2 A.E.R.1138 at 1140, are most appropriate. Says he—

> " The suggestion made by the petitioner is that the jury might have been misled by the judge's language into the impression that the burden of proof resting on the accused

to prove the insanity was as heavy as the burden of proof resting upon the prosecution to prove the facts which they had to establish. In fact there is no doubt that the burden of proof for the defence is not so onerous.....it is certainly plain the burden in the cases in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendant in Civil proceedings. That this is the law is not challenged."

In the case of *the Attorney-General v. Karunaratne,* S.C. 16/74; D.C. Colombo Bribery B/75; S.C. Minutes of 17.6.75, Samerawickrema, J. observed:

" What a person has to prove is that a property was not acquired by bribery or was not property to which he has converted any property acquired by bribery.

The ordinary and the 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 a bribery. *As this is a matter in which the onus is on the accused person, it will be sufficent if he establishes it on a balance of probabilities."*

Section 2 of the Prevention of Corruption Act of 1916 of England, provides, amongst other things, that, where in any proceedings against any person for an offence under the above Act, it is proved that any consideration has been given, to a person in the employment of a department of the Government, by the agent of a person holding a contract from a Government Department, the consideration shall be deemed to have been given corruptly, as such inducement or reward as is mentioned in the Act, *unless the contrary is proved.*

In the case of *R. v. Carr-Briant,* (1943) 2 A.E.R. page 156, a charge was laid against the appellant under the provisions of the Prevention of Corruption Act, above mentioned. The judge directed the jury as follows:—

" What has the accused to do? He has not only to discharge the burden of proof to the contrary of corruption, he has not only to prove that he gave it without a corrupt motive, but he had to do so beyond all reasonable doubt."

Humphreys, J. said—

'In our judgment in any case, where either by statute or at commen law, some matter is presumed, against an accused person, " 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 the case beyond a reasonable doubt, and the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish."

In the Malaysian case of *Public Prosecutor v. Yuvaraj*, (1970) A.C. page 913, the Privy Council considered the provisions of sections 3 and 4 of the Prevention of Corruption Act of 1961 of Malaysia. Section 14 of the said Act provides :

> "Where in any proceedings ..... for an offence under section 3 or 4 it is proved that any gratification shall be deemed to have been paid or given.....corruptly ..... unless the contrary is proved."

It was held, there where an Act creating an offence expressly provided, that if upon proof of other facts, a particular fact, the existence of which was a necessary 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."

The degree of proof required to discharge the burden that lies on a party in a civil case has been concisely stated by Denning, J. thus : " This degree is well settled. It must carry a reasonable degree of probability, but not so high as 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. (*Miller v. Minister of Pensions* (1947) 2 A. E. R. page 272 at 274 paragraph *A*).

In the instant case, when the trial judge required the appellant to prove the contrary of the presumption beyond "suspicion" and "taint", he placed a burden heavier than that which law has placed.

In the case of *Wanigasekera v. The Republic of Sri Lanka*, 79 (1) N. L. R. 241, the accused had claimed that a loan of Rs. 20,000 from Messrs Caves Finance and Land Sales Ltd. on a hire-purchase agreement, was part of his known income and receipts during the period contemplated in the charge. Caves had not taken any steps to recover the money due on the loan, until after the accused had ceased to be a director of the Bank of Ceylon ; further the Board of Directors of the Bank at a meeting in which the accused participated had sanctioned overdraft facilities to Caves to the tune of five lakhs of rupees.

Upon this material the trial judge held that the sum of Rs. 20,000 was given and received as a bribe under the guise of a loan. However in appeal the Court held that the accused had proved on a balance of probabilities, that it was a genuine loan. Wimalaratne, J. said—

> "In this instance too there appears to have been 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 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."

Thus it is apparent, that in a given transaction although there may be "taint", "doubts" and "suspicions", yet on a balance of probability, it can be held to be a genuine transaction.

Before I pass on to the next question for determination, I would like to refer to section 3 of the Evidence Ordinance, which reads as follows:—

> "A fact is said to be *proved,* when after considering the matters, before it the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.
>
> A fact is said to be *disproved,* when after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition, that it does not exist.
>
> A fact is said not to be proved when it is neither proved or disproved."

The provisions of the Evidence Ordinance are equally applicable to both civil and criminal proceedings, except of course where there are special provisions in our Law of Evidence, which are peculiar to criminal proceedings, e.g., provisions relating to bad character, confessions, and those peculier to civil cases, e.g., provisions in respect of estoppel, admission and character.

The words of section 3 of the Evidence Ordinance do not draw a dividing line between the matters that should be proved in a criminal proceeding and the facts required to be proved by either the plaintiff or defendant in a civil case.

Therefore can it be concluded that by the provisions of a mere single 'definition section' the long established and historic distinction, between the burden of proof which is placed upon the prosecution in criminal proceedings to establish the ingredients of the offence beyond reasonable doubt and the burden which lies on the plaintiff to prove the cause of action or the defendant to prove his defence, on a balance of probabilities. has been wiped out ?

I venture to think that the provisions of our Evidence Ordinance never intended to abolish so basic and fundamental a principle, that has not only been accepted and acted upon by our Courts, but has by the test of time, been stamped with the seal of permanence in our legal system.

There is no doubt a marked difference as to the effect of evidence in civil and criminal proceedings. In a criminal case the fundamental principle is, as was said by Holroyd, J. in *Sarah Hobson's Case* (1 Lewin's Crown Counsel—261) :

> "It is better that ten guilty men should escape than one innocent man should suffer."

However, in a civil case mere preponderance of probability would suffice to obtain judgment in a favour of a party.

In this connection the words of Denning, L. J. in *Bater v. Bater,* (1950) 2 A. E. R. page 458 at 459, are most illuminating and helpful. He said—

> "It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond all reasonable doubt, but there may be degrees of proof within that standard. Many great Judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderence of probability, but there may be degrees of probability within that standard."

Acting on this principle our Courts have insisted upon a much higher degree of proof in criminal cases than in civil cases. The rule above stated is nowhere found in the Evidence Ordinance, but even if it is not a rule of law, it certainly is a rule of prudence founded on public policy, for the consequences of an erroneous conviction are more far reaching both to the accused and to the community than those of a wrong acquittal.

In view of my decision on the law, I hold that the learned trial Judge has placed upon the accused-appellant, a burden far more onerous than required by a law to rebut the presumption created

by section 23A (1) of the Bribery Act. In view of this grave misdirection of law the conviction cannot be allowed to stand.

I now come to consider the second question, "Did the Judge admit irrelevant and inadmissible evidence, which gravely prejudiced the case of the appellant ?"

Mr. Coomaraswamy most strenously argued, contending that the evidence of witness A. Mubarak Thaha was not only irrelevant and inadmissible, but also highly prejudicial.

Before I deal with this witness's evidence, it is both revealing and interesting to note the circumstances under which he was called to the witness stand.

The Journal Entry of 4.10.74 indicates that the trial was adjourned for 9.10.74. On the day before the trial, that is on 8.10.74 the Attorney-General filed an additional list of witnesses, which included the name A. Mubarak Thaha and moved for summons on him.

Journal Entry No. 10 of 8.10.74 states that further trial was fixed for 9.10.74. No time to issue summons. Mention on 9.10.74. that is on the trial date.

Journal Entry No. 11 of 8.10.74 is most revealing :

> "1.40 p.m. on 8.10.74. Instructions have been given to the prison authorities to produce witness A. M. Thaha at 8.30 a.m. on the 9.10.74. Police Officer Thirunuwakasu has been instructed to serve the notice."

Now the indictment has been signed by the acting Attorney-General on the 28th of May, 1974. The names of twenty one witnesses have given in the indictment, but Thaha's name is not among the names of the twenty one witnesses.

The indictment with a copy of it was received in Court on 5.6.74.

The summary of facts does not even hint at any transactions the accused has had with Thaha.

On the 4.9.74, the Attorney-General filed an additional list of witnesses and moved for summons. Again on 23.9.74 the Attorney-General has filed another list of additional witnesses and moved for summons.

On neither of these occasions has there been any great urgency to bring witnesses to Court.

The decision to summon Thaha appears to me to be an eleventh hour decision of the prosecutor, but what I note is that all the King's horses and men have been mustered with remarkable

expedition to produce Thaha in Courts with unusual swiftness. Thaha did arrive in Court on 9.10.74. Mr. Bartlett, the junior counsel for the appellant, objected to Thaha's evidence on the grounds that it was both irrelevant and inadmissible.

Mr. Seneviratne, however, submitted that this evidence is relevant, stating that " if this witness Thaha says that he gave a Rs. 50,000 bribe to the accused and the Court is prepared to accept that evidence, the presumption is irrebuttable, and that would buttress the presumption to that extent that a bribe was alleged to have been given to the accused of a specific act of bribery." After this submission, Court made order thus :

> " I overrule the objection raised, in view of the submissions made by Mr. Seneviratne and I allow the witness to be called."

Thaha's evidence briefly was that he was a book-maker and that the police were raiding his place of business.

He therefore approached the accused to influence some one to get the bucket shops legalised or in the alternative to stop the police raids. On the 5th of April Government passed legislation and the police raids stopped. Therefore he paid the accused Rs. 60,000 as a bribe.

Now I have already decided that once the prosecution has established the basic facts beyond reasonable doubt, the presumption that the acquisitions were proceeds of bribery, must be drawn by the Court. It is significant to note that at the concluding stage of the prosecution case when Thaha presented himself in the witness box, prosecution had led evidence to show that there was a considerable disparity between the acquisition and the sources of income and receipts of the accused, known to the prosecution. Thus the prosecution has established the basic facts from which the Court must presume that the relevant property was acquired by bribery. The presumption under section 23A requires no evdence " to buttress " it. The Court is bound to draw the presumption unlike in case of presumptions under section 114 of the Evidence Ordinance.

I may mention that it was the position of the accused that he had taken a loan of Rs. 45,000 on a post dated cheque from Thaha, and this sum was included as part of receipts of the accused. Thaha himself in his evidence supported the accused on this point and the prosecution conceded it. But it was never the position of the accused that the sum of Rs. 60,000 was a portion of income or receipts with which he endeavoured to bridge the gulf between

his acquisitions and the known income and the receipts. Had this been the case, it was open to the prosecution to prove that it was a bribe and not part of known income or receipts.

Thaha, no doubt added colour to a long and protracted trial, and if the prosecution case was a lily it needed no gilding, particularly by a gilder of Thaha's reputation.

This evidence did not advance the case of the prosecution in any manner. Its probative value was nothing. Thaha's evidence was worthless. Where the prosecution failed to elicit through Thaha any material of evidential value, it succeeded in introducing into case matter that gravely prejudiced the case of the accused. This success brought defeat—defeat for justice.

Surely this evidence is totally irrelevent and inadmissible. I cannot escape the conclusion that this highly prejudicial evidence could have distracted the mind of the learned trial judge from the real issues of the case. The prejudicial effect of this lethal evidence appears to have spread through the entire body of evidence, like an evil cancer. No explanation in respect of any of the transactions relevant to the charge from the accused person. who had within a short period of time amassed properties valued at about four and half lakhs of rupees, was likely to have been considered, assessed and evaluated, by the judge without some sort of bias and prejudice. After all the meaning of Thaha's evidence is that the accused is a bold bribe taker.

I may add, that the accused, did not in any way put his character in issue.

Now section 54 of the Evidence Ordinance reads as follows:

> "In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless the evidence has been given that he has a good character, in which case it becomes relevant."
>
> *Explanation* 1:— This section does not apply to cases in which bad character of any person is itself a fact in issue.
>
> *Explanation* 2:— A previous conviction is relevant as evidence of bad character in such case.

The provision in this section is founded on the principle that such evidence tends to prejudice the Court against the accused and is likely to interfere with the calm and dispassionate decision of the case. This is "one of the most deeply rooted and jealously guarded principles of our criminal Law," said Sankey, L.C. in *Maxwell* (24 C.A.R. 152).

In *Rowton's Case,* (1865) 34 L.J.M.C. page 57, Willes, J. observed that this evidence is "excluded for reasons of public policy and humanity, because although by admitting it you might arrive at justice in one case out of a hundred, you would do injustice to the other ninety nine."

It is interesting to note that in India, as the section originally stood, it allowed previous convictions to be led in evidence against an accused person. That section read as follows:—

> "In criminal proceedings the fact that the accused person has been previously convicted of any offence is relevant; but the fact that he has bad character is irrelevant; unless evidence has been given, that he has good character, in which case it becomes relevant."
>
> *Explanation.*—This section does not apply to cases in which bad character of any person is itself a fact in issue."

However, notwithstanding this express provision, the High Court of Calcutta, in the case of *Roshun v. R,* (1880) 5 C. 768, refused to allow evidence of a previous conviction being led. After the decision in the full bench case of *R v. Kartie Chunder Das,* (1887) 14 C. 721, the present Indian section which is identical with ours was introduced, and brought the law in line with the principles of the English Law.

The English law principle has been set down in the well-known case of *R v. Butterwasser,* (1948) 1 K.B. page 4. In that case the accused was charged with wounding, with intent to do grievous bodily harm. The prosecutor and his wife gave evidence, that the accused slashed the prosecutor's face with a razor. These two witnesses were cross-examined as to their bad record. A police officer gave evidence of the accused's bad character and of the previous convictions. The accused did not give evidence or put his character in issue.

Lord Goddard, C.J. said:

> "We have to consider whether what was done in this case was in accordance with law. When it became clear that the appellant's counsel, after having attacked witnesses for the prosecution, was not going to call the appellant, the prosecution sought and were allowed to give evidence in chief of the prisoner's bad character. A police officer was called, who testified to the prisoner's previous convictions and general character. In the opinion of the Court, that was a course which cannot possibly be allowed as the law is at present. It is elementary law that ever since it became the practice, as it has been for the last one hundred and fifty or two hundred years, of allowing a prisoner to call evi dence of good character, or where he has put questions to

witnesses for the Crown and obtained or attempted to obtain admissions from them that he is a man of good character, in other words where the prisoner himself puts his character in issue, evidence in rebuttal can be given by the prosecution to show that he is in fact a man of bad character. Evidence of character nowadays is very loosely given and received and it would be well if our Courts paid attention to a well known case in the Court of Crown Cases Reserved, *R. v. Rowton* (*supra*) in which a Court of twelve judges laid down the principles which should govern the giving evidence of character and of evidence in rebuttal of bad character. It was pointed out that the evidence must be of general reputation and not dependent upon a particular acts or actions. But however that may be *there is no case to be found in the books and it is certainly contrary to what all the present members of the Court have understood during whole of the time they have been in the profession that where the prisoner does not put his own character in issue, but merely attacked the witnesses for the prosecution, evidence can be called for the prosecution to prove that the prisoner is a man of bad character.*"

According to the principles stated above, it would be apparent that it would be difficult " to find a case in the books of Sri Lanka to justify the calling of Thaha to give evidence that the appellant is a bribe-taker, that is to give evidence of his bad character."

In the Privy Council Case of *Makin v. Attorney-General,* (1894) A.C. page 57, it was stated that " it is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is been tried."

In the case of *King v. Pila,* 15 N.L.R. page 453, where in a murder case, a principal witness for the prosecution explained his delay in reporting what he has seen by his fear of the accused persons, who according to him were " reputed rowdies." Further evidence was led to support this witness to the effect that the accused were by repute men of bad character and were generally feared by the villagers. Defence Counsel did not object to this evidence. The Supreme Court held that the evidence of bad character was inadmissible.

It has been held where evidential value of character evidence is slender, whereas the prejudicial effect which its reception might have upon the Court would potentially be so substantial

as seriously to impair the fairness of the trial, such evidence should be excluded (*The Queen v. Sathasivam*, 55 N. L. R. pages 255, 258).

In the instant case the learned trial judge admitted Thaha's as he thought it was relevant under sections 9 and 11 of the Evidence Ordinance. He says in his judgment :—

> "Now comes the moment when the Court has to consider Thaha's evidence on this point, because his evidence is relevant. On the accused's testimony in relation to the car transaction, the sources of the money he obtained remained unexplained. Therefore the presumption is that they were all obtained from proceeds of bribery. In this context it is positive, that the accused has got a bribe during this period and that possibly could be the source of his funds, and accordingly the provisions of sections 9 and 11 of the Evidence Ordinance are relevant. The accused's testimony is that he had been cashing cheques with Thaha and on the day of Thaha's arrest the accused had gone and paid the money to Thaha having taken the earlier check back. When considering the source of funds for the accused, Thaha's evidence is relevant."

Section 9 of the Evidence Ordinance reads thus :—

> "Facts necessary to explain or introduce a fact in issue or relevant fact, which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person, whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom such fact was transacted, are relevant in so far as they are necessary for that purpose."

Section 9 may be said generally to provide for facts which are explanatory of the facts in issue or relevant facts. These facts are admitted, because they accompany and tend to explain the main fact, such as identity, names, dates, places, the description, circumstances and relations of the parties and other explanatory and introductory facts of a like nature (vide Norton on Evidence page 119). The particulars admissible will of course vary with each particular case. All unnecessary and irrelevant details will be excluded.

In the case of *King v. Peiris*, 32 N. L. R. page 318, two persons were charged, the first person with attempting to sell a defaced stamp as genuine, and the second with aiding and abetting him. The evidence of the second accused was not direct and the prosecution adduced evidence to establish that in an earlier insolvency

proceedings, in which the second accused was the petitioning creditor, a treated stamp had been used as genuine and was affixed to his petition. The District Judge who discovered this not only testified to his discovery but also produced the defaced stamp.

The Judge gave evidence that he reported the matter to the Criminal Investigation Department. Objection was taken to this statement, Akbar, J. relied on the following passage of Lord Herschell's judgment in *Makin v. Attorney-General of New South Wales (supra)*—

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion, that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is tried.
>
> On the other hand the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if relevant to an issue before the jury and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused. The statement of these general principles is easy, but it is obvious that it may be very difficult to draw the line and to decide whether a particular piece of evidence is on one side or the other."

Akbar, J. stating that this passage "sets forth the principles in clear terms", held that the District Judge's statement, "is relevant under section 9 of the Evidence Ordinance as a fact necessary to explain a fact in issue, namely, as to how a trap came to be laid against the second accused."

In the instant case the learned trial judge erred in thinking that Thaha's evidence was admissible under section 9 of the Evidence Ordinance. In view of my interpretation of section 23A of the Bribery Act, the prosecution is not required to ascertain the source of the income or receipts used for obtaining the acquisition. Nor is it the function of the trial judge to inquire into it, for if the accused is unable to remove the disparity that exists between his known receipts and income which have been established and the acquisition then the presumption remains unrebutted and he would be guilty of the offence.

If however the accused is able to bridge the gap with sources of income and receipts, other than bribery, then he had succeeded in proving the contrary and thereby he has rebutted the presumption.

If such be the case, the Court cannot come to the conclusion merely because the accused had received a bribe during the period in question, that he would have acquired the impugned properties, with the proceeds of the bribe, and not with the disclosed sources of receipts and income. So then would Thaha's evidence be relevant to " Support or rebut an inference suggested by a fact in issue or relevant fact ? " I think not. I am of the view, that Thaha's evidence would not be relevant under this section to support the inference that it was with or together with, the Rs. 60,000 which Thaha gave, that the accused acquired the impugned property. Nor would Thaha's evidence be relevant to rebut the inference that he acquired the properties with sources of income and receipts which do not amount to bribery.

The next matter is to consider whether this evidence is relevent under section 11 of the Evidence Ordinance. That section reads as follows :—

" Facts not otherwise relevant are relevant—

(*a*) If they are inconsistent with any fact in issue or relevant fact ;

(*b*) If by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. "

Though at first sight the scope of the section appears to be very wide, there are indications to show that limitations have been placed on it. The very nature of the illustrations given under the section demonstrate it. Though provisions of the section appear to be wide, they are controlled by other provisions regarding relevancy. Evidence led under this section must be logically relevant, that is to say absolutely essential. They cannot be too remote. Even this would not ensure admissibility. It must also be legally relevant. For example section 11 is controlled by section 54.

In the leading Indian case of *Regina* v. *Parbhudas*, (1894) 11 B.H.C.R. 90 at 91, West, J. in discussing the scope of section 11 stated :

> "Section 11 of the Evidence Act is no doubt expressed in terms so extensive that any facts, which can by a claim of ratiocination be brought into connextion with one another, so as to have a bearing upon a point in issue may possibly be held to be relevant within its meaning."

> "But the connexion of human affairs are so infinitely various and so far reaching, that thus to take the section in its widest admissible sense would be to complicate every trial with a mass of collateral inquiries limited only by the patience and means of the parties. One of the objects of the law of evidence is to restrict the investigations made by Courts within bounds prescribed by general convenience, and this object would be completely frustrated by the admission, on all occasions, of every circumstance of either side having some remote conjectural probative force, the precise amount of which might itself be ascertainable only by a long trial and a determination of fresh collateral issues, growing up in endless succession, as the inquiry proceeded. That such extensive meaning was not in the mind of the legislature, seems to have been shown by several indications in the Act itself. The illustrations to section 11 do not go beyond familiar cases in the English Law of Evidence."

If recourse is being had to this section, the object would be to establish that Thaha's evidence would show that it is inconsistent with the fact that the accused acquired the properties with sources of income and receipts other than bribery. Or again the object would be to establish that this evidence would show that it is highly probable that the acquisitions were made by sources of income and receipts from bribery, or highly improbable that they were acquired from means not obtained by bribery.

What would be the resulting position to permit the prosecution to lead Thaha's evidence, on these grounds ? It would amount to allowing the prosecution, on the pretext of "buttressing" the presumption arising under section 23A (1) to establish a specific act of receiving a bribe, in respect of which there is no presumption, by a standard of proof less than proof beyond reasonable doubt. Such a course would be against all canons of criminal jurisprudence, that obtain in this country. Thus I hold that the learned trial judge misdirected himself on the law, when he admitted Thaha's evidence under sections 9 and 11 of the Evidence Ordinance.

However Thaha's evidence would have become relevant and admissible, if the accused had sought to establish by a preponderance of probabilities that the properties were not acquired by bribery, without disclosing the source from which he obtained the property.

Samerawickrema, J. said,

> "I do not think, however that there is any reason, why in an appropriate case, an accused person may not show on the probabilities, that the property was not acquired by him

by bribery, without disclosing the source from which he obtained the property, if in the particular circumstances of the case he can persuade the judge of that fact. The learned Deputy Director of Public Prosecutions has also submitted that an accused should not establish such a fact by a bare assertion from the witness box. Whether or not an assertion by an accused person on oath should not be accepted must depend on the circumstances of each case ; credibility which the trial judge is prepared to accord to the witness who gave that evidence and other circumstances." (*In re Karunaratne—supra*).

But what do we have in this case ? The accused, when he gave evidence setting forth his defence referred to Thaha's evidence by saying—

"I state that I never took any sum from Mr. Thaha as a bribe except cashing of cheques on commission."

He never set up as a general defence in the case that he had not acquired the impugned properties by bribery. Nor in his explanation to the Bribery Commissioner has he taken up this position. I am not unmindful that at the concluding stage of his evidence he said that he never accepted a gratification or bribe from anyone, as an inducement or reward for helping such person in his capacity as the Vice Chairman of the Insurance Corporation. But this denial would not mean that he put forward the general defence that he had not acquired the properties by bribery.

Neither the cross-examination of prosecution witnesses by accused's Counsel, nor the general pattern of the defence indicate that such was his defence. I do not think that the prosecution led the evidence of Thaha for the purpose of countering this possible defence. I think it was most unfair and it was not in the interests of justice, to have led the evidence of Thaha in this case.

In the case of *Ranasinghe and another* v. *State*, S.C. 4—5/75 ; D.C. Bribery Colombo 148/B ; S.C. Minutes of 14th August, 1975, Rajaratnam, J. commented strongly against the leading of evidence of bad character of the accused. Said he—

"The incidents spoken to above are by no reason connected to the alleged transaction and I find it difficult to see their strict admissibility under any section of the Evidence Ordinance. On this matter, I may state, that the essentials of justice did not require these items of evidence referred to. I am unable to hold that they would not have unfairly operated against the accused. Evidence tending to show that the accused has been guilty of criminal acts, other than those

covered by the indictment is not admissible unless upon the issue whether the acts charged against the accused were designed or accidental or unless to rebut a defence otherwise open to the accused. (*Makin* v. *Attorney-General of New South Wales,* (1894) Privy Council A.C. 57).

It is not open to the prosecution to lead evidence of bad character and similar offences and rely on general sections like ss. 6, 8, 9 & 11 of the Evidence Ordinance."

In the case of *Rajakaruna* v. *Attorney-General,* S.C. 31/75 ; D.C. Colombo 292/B ; S.C. Minutes of 27.2.76, where evidence of bad character of the accused was led, Sirimanne, J. observed :

"There appears to be a trend in recent times to lead this type of evidence in cases under the Bribery Act. Thus in the recent case of *Ranasinghe* v. *State,* Rajaratnam, J. commented adversely on the prosecution leading inadmissible and highly prejudicial evidence of previous similar incidents and that was one of the grounds on which the conviction in that case was set aside. Fairness in prosecution and the interests of justice (of which fairness is a fundamental part) require that evidence of a previous similar act, as was led in this case should never be led, unless it fell strictly within the provisions of the Evidence Ordinance which clearly made it admissible, as such evidence merely deepens suspicion without proving guilt and it is so prejudicial to the accused that it deprives him of the substance of a fair trial."

It has been urged that even if Thaha's evidence was improperly admitted, its reception was not fatal to the conviction, because the accused had been tried by a judge trained in the law. In the case of *King* v. *Perera,* 42 N.L.R. page 526, it was held that the evidence of bad character of the accused given in a trial before the District Court is not fatal to a conviction, if the circumstances of the case are such that there is other evidence to convict the accused, and there is nothing to indicate that the District Judge was influenced by the evidence in convicting the accused.

In the case of *Peter Singho* v. *M. B. Werapitiya,* 55 N.L.R. page 155, where evidence of bad character was led, Gratiaen, J. observed :—

"Learned Crown Counsel conceded, that this evidence should not have been admitted, but he invited me to hold, as was done in *King v. Perera,* that its improper reception was not fatal to the conviction, because the accused had been tried not by lay jurors but by a Magistrate trained in the law. I do not see how this distinction can be drawn, where a judge

of first instance has in spite of his legal training and experience permitted himself, through the improper appreciation of the law, to allow evidence to be led which was of such a character as to prejudice the chances of a fair trial on the real issues in the case."

I think that due to the improper reception of Thaha's evidence the chances of a fair trial on the real issues in the case, have been prejudiced, resulting in a failure of justice.

In the case of *Coore v. James Appu*, 22 N.L.R. 206 at 214, Bertram, C.J. said,—

> "The expression "failure of justice" has not so far been fully discussed, but it is generally accepted that anything which has proved prejudicial to the interests of the accused in the trial should be considered to have led to a failure of justice."

In an earlier case Bertram, C.J. had this to say regarding irregularities and improper reception of evidence in criminal trials :

> "Here as in India, the legislature has foreseen these points, and has expressly provided that irregularities in criminal proceedings, shall be no ground for reversal or alteration of sentences on appeal unless there has been a failure of justice, and that no new trial or reversal of any decision, shall be allowed in any case on the ground of the improper admission of evidence, if it appears that independently of the evidence, so admitted, there are sufficient materials to justify the conclusion at which the trial judge has arrived."—(*Manuel v. Kanapanikan*, 14 N.L.R. 186 at 189).

I have given most careful consideration to Thaha's evidence in the light of the principles of law which I have enunciated, and I think that due to the improper reception of Thaha's evidence, the chances of the accused having a fair trial have been gravely prejudiced, resulting in failure of justice.

I would like to remind myself of the words of Lord Sankey :—

> "It must be remembered that the whole policy of English Criminal Law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed."

I am of the view that because of the improper admission of the prejudicial evidence of Thaha, the conviction should be quashed.

I come to the third question, viz., Did the judge adopt an unfair attitude towards the defence ?

It is well to remember that though Mr. Bartlett's commendable and valiant effort to prevent the reception of inadmissible evidence, ended in an unfortunate failure, he continued most vigilantly and dutifully to conduct the defence of his client. At the conclusion of the examination in chief of Thaha, Mr. Bartlett, made a very proper and reasonable application for an adjournment of the trial for him to take instructions to cross-examine Thaha. This application was refused, by Court. The reasons given by the trial judge for his refusal are that on 3.10.74 it was understood that the trial would continue from day to day. However on 4.10.74 defence Counsel intimated that the only date available was 9.10.74.

It is relevant to note, that Thaha was a witness who emerged with suddenness and surprise to the accused. The accused had received notice regarding Thaha only at 5 p.m. on 8.10.74. It was only at 1.40 p.m. on 8.10.74 that the judge issued notice on the accused. The accused's position was that he was not able to contact his Counsel that evening to give him any instructions. Even Thaha appeared to be unaware that he was brought to Court to give evidence, till the morning of 9.10.74. The senior counsel of the accused's choice was not present on this day.

I shall now determine the important question whether the accused had been denied the right to be defended by an attorney-at-law of his choice. The right is enshrined in section 136 of the Administration of Justice Law, No. 44 of 1973.

That section states :

> "Every person accused before any Criminal Court may of right be defended by an attorney-at-law."

This section is identical with section 287 of the Criminal Procedure Code, except that in that section the word "Pleader" is used for "Attorney-at-law."

The observations of T. S. Fernando, J. in the case of *Premaratne* v. *Gunaratne,* 71 N.L.R. pages 113, 115, in respect of this right are stated thus :

> "The right of a person who is accused of a criminal offence to be defended by a lawyer of his choice is one now ingrained in the Rule of Law which is recognized in the Law of Criminal Procedure of most civilized Countries, and is one expressly recognized by section 287 of our Criminal Procedure Code which enacts 'that every person accused before any Criminal Court may of right be defended by a pleader'."

This section however does not give the accused a right under all circumstances, to be defended by any pleader whom he may choose.

In *R. v. Silva,* (1907) 1 A.C.R. 148, where a proctor who appeared for the accused on being refused a postponement, threw up his brief and retired from the case, the Judge thereupon adjourned the trial to enable the accused to retain another proctor, but on the trial date, the same proctor appeared and claimed the right to conduct the defence. This, the judge refused to allow, and proceeded with the trial, and eventually convicted the accused, who refused to take part in the proceedings, as he was not represented by a pleader. It was held that in the circumstances the accused was neither entitled to an acquittal nor a new trial. It was held further, that section 287 does not give the accused a right under all circumstances to be defended by any pleader, whom it may please him to select, or that it should be allowed to override the power of the court to decline to hear any particular pleader on sufficient grounds, e.g. in case of contempt or contumacy.

In the case of *Jayasinghe v. Munasinghe,* 62 N.L.R. page 527, the accused-appellant who was in the custody of the police from the time of his arrest, was produced in Court and charged with the commission of an offence. He then applied for time to retain a lawyer. His application was however refused on the ground that a postponement even of twenty-four hours would involve the complainant who was a foreign being deprived of the opportunity of leaving Ceylon as arranged by her.

T. S. Fernando, J. stated :

> "It would appear that the refusal to grant time to the appellant to enable him to instruct a lawyer was influenced by the desire of the Magistrate to ensure that the prosecution would not be deprived of the evidence of the most material witness. However understandable this desire may have been, a trial at which an appellant was deprived of one of the most valued legal rights of an accused person, in spite of his expressed desire to exercise that right cannot be said to be a fair trial. I have therefore set aside the conviction and sentence."

Can it be said that this right which is "one of most valued legal rights of an accused person", which "is ingrained in the rule of law", has been enjoyed by the accused in the present case ? It is not enough that an attorney-at-law is appearing for the accused. The lawyer must be afforded sufficient time and opportunity to receive instructions to prepare his case. From what has transpired in this case, it is clear that this right has

not been "effectively afforded." The reasons given by the judge in refusing the defence application are most inadequate.

In the case of *Queen* v. *Prins*, 61 C.L.W. page 26 where, defence Counsel at a trial indicated to the Court that he was suddenly taken ill and asked for a postponement which was granted without objection. On the next day the Proctor for the accused informed the Court that Counsel was unable to attend Court owing to illness, and asked for a postponement even for twenty four hours. The Court then asked the Proctor who made the application, to defend the accused. The Proctor declined, and he informed Court that the accused wanted to be defended by Counsel. The Court thereupon granted two hours time to retain Counsel. The Proctor was unable to retain Counsel within that time. In quashing the conviction and acquitting the accused, Basnayake, C.J. said :

> "Under our law an accused person has a right to be represented by Counsel or pleader. The refusal to give an accused person reasonable time to retain Counsel is a denial of that right. We are of the opinion that the learned Commissioner acted wrongly in not granting the accused reasonable time to retain another Counsel. We therefore quash the conviction and direct that a verdict of acquittal be entered."

In the instant case at the end of Thaha's examination in chief when the Court refused an adjournment of the trial, on the application of Mr. Bartlett, who wanted time and opportunity to prepare to cross-examine witness Thaha, but in effect asked Counsel to proceed to cross-examine, by stating "the trial will proceed", the Court did not comply with the spirit of the section.

In the case of *Queen* v. *Peter*, 64 N.L.R. page 120, the facts were that when the case was taken up for trial before the Supreme Court, the retained Counsel was absent. At 11 a.m. Counsel was assigned to defend the accused and at 12.30 p.m. the case was taken up for trial. In appeal it was submitted that the time allowed for the assigned Counsel to prepare the brief was insuffiicient, and the defence was gravely prejudiced. Basnayake, C.J. in agreeing with the submission of the Counsel for the appellant said :

> "We agree that assigned Counsel should have been allowed sufficient time for the preparation of his case and for obtaining instructions from the accused."

I think the position of Mr. Bartlett was no better than that of the assigned Counsel in that case, if not worse.

Section 340 (1) of the Criminal Procedure Code of India contains a provision corresponding to ours. That section reads:

> " Any person who is accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader. "

This provision has been construed to mean, that the section not only contemplates that the accused should be at liberty to be defended by a pleader at the time the proceedings are going on, but also implies that he should have a reasonable opportunity, if in custody of the police, of communicating with his legal advisor, for the purpose of preparing his defence. (*Hewellyn Evans,* (1926) 28 Bombay 426). In the *Rangasamy Padayachi,* (1916) 16 G.L.J. 786, the section has been interpreted to mean that full opportunity should given to the accused to obtain proper legal assistance and advice, before he is called upon to cross-examine the witnesses of the prosecution.

I am of the view that the provision in section 136 of the Administration of Jutice Law must be construed with a reasonable degree of liberality in favour of the accused. I think it most necessary that opportunity should be given to the accused persons to retain lawyers to represent them in Court at every stage of the trial. Their presence in Court at the stage of examination in chief can be no less necessary than during the stage of cross-examination. A lawyer's knowledge, training, skill and experience can bring real advantages to the defence at the stage of the principal examination by objecting to irrelevant, inadmissible and prejudicial evidence, or objection being taken to leading questions, or improper production of documents or other exhibits.

The words of Weeramantry, J. in the case of *Subramaniam* v. *Inspector of Police, Kankesanturai,* 71 N.L.R. 204 at 206, are most apposite to the instant case. He says—

> "It needs little reflection to realize that the right we are considering is a many faceted one, not truly enjoyed unless afforded in its many varied aspects. Thus the right to a pleader means nothing if it is not associated with the time and opportunity to retain one, nor can there be a true exercise of this right where a pleader has in fact been retained but been clearly afforded insufficient time for the preparation of his case, and for obtaining instructions from the accused. Indeed this Court has, despite the complainant, a foreign tourist, being scheduled to leave the country within 24 hours, nevertheless held that an accused person who is in police custody from the time of his arrest, should be granted time to retain a lawyer. Hence the right does not

> mean merely that an accused person is entitled in theory to be defended by a pleader but also that he might enjoy all the concomitant privileges without which the right is reduced to a cipher."

It is with much sadness that I express my conclusion on this question. I think the accused has been greatly embarassed in his defence, by denying his Counsel an opportunity to take instructions and prepare the case, and thereby "reducing to a cipher", this cherished right guaranteed in setcion 136 of the Administration of Justice Law. I think the learned judge's attitude to the defence has not been fair.

For these reasons I hold that the appellant has been deprived of the substance of a fair trial, resulting in a miscarriage of justice.

There remains one more matter concerning the testimony of Thaha, namely whether the learned trial judge had an improper appreciation of the provision in section 79 (1) of the Bribery Act, which reads as follows :

> "In any proceedings for bribery before the District Court or commission of inquiry, the giver of a gratification shall be a competent witness against the person accused of taking the gratification and shall not be regarded as an accomplice, and the decision or finding of the Court or commission shall not be illegal merely because it proceeds upon the uncorroborated testimoney of such giver."

When the defence submitted that Thaha's evidence should not be acted upon as he was an accomplice the learned judge said :

> "I cannot overlook section 79 (1) of the Bribery Act",

and merely referred to its provisions. He seems to have thought that Thaha's evidence could be accepted without a proper evaluation.

Section 79 (1) provides that a giver of a gratification shall be a competent witness against a person accused of taking a gratification. It provides further that the 'giver' shall not be regarded as an accomplice and that a finding can be legally founded upon his evidence without corroboration. But it must be remembered that there is always a duty imposed on the Court, to scrutinize the evidence, and make a proper assessment and evaluation of it. In doing so the judge will take into consideration the character and the antecedents of the witness and his demeanour. I see nothing in the provision to indicate that a giver of a gratification is robed with the garment of credibility. In an appropriate case such evidence, if not worthy of credit, must be rejected. It is not

necessary for me in this appeal to refer in detail to the unimpressive evidence of Thaha, but considering its quality I cannot see how a Court can so readily accept his evidence without corroboration. As I have said earlier Thaha's evidence could have influenced the mind of the judge in regard to every aspect of this case.

In conclusion, I wish to deal with the submission of Mr. Seneviratne, that even if the Court were to accept the totality of the appellant's evidence, it could be shown by a simple process of calculation, that the accused had failed to bridge the gulf that existed between income and receipts on one side and the acquisitions on the other. In order to substantiate his claim he forwarded to Court a calculation of figures by him. It is therefore obvious that this calculation is not made on the basis of the entirety of the accused's evidence. It is worked out by selecting some items and excluding others. Can we sitting in appeal without giving due consideration to all the evidence in the case, reach a finding as to the guilt or otherwise of the accused, on mere figures arrived at by an arithmetical process ? I think not This was not the basis on which the trial judge was invited to arrive at a verdict. It would be most unfair and unjust by the accused for us to take this course. Had this been the basis upon which the trial proceeded in the Court below I cannot say what questions would have been asked or what explanations the accused may have given. All I can say is that the accused was not afforded such an opportunity. By a computation of figures, Mr. Seneviratne has shown in his calculations a considerable disparity between acquisitions and receipt and income. At the maximum terminal he has worked out a figure of Rs. 141,182 and at the minimum terminal, his computations point to sum of Rs. 60,182. However to reach these figures, he has omitted some terms and picked out others. Not willing to be outdone in arithmetical computations, Mr. Coomaraswamy has worked out his own sum, covering the whole of the relevant period of time, and by his calculations he claims that there is an excess in and over Rs. 70,600. Both learned attorneys, I presume are good arithmeticians, and each one claims the correctness of his computation.

In Mr. Coomaraswamy's method of calculation, the whole period is taken into consideration, but Mr. Senevratne is content go up to only the 19th of August, 1971.

The purchase of Yelverton Estate on Deed 906 of 30.10.71 (P4) for a consideration of Rs. 350,000 was not only the biggest of the acquisitions, but it also involved several other transactions with individuals, business houses and Banks. But yet Mr. Seneviratne is satisfied with computing only up to the 19th of August, 1971. No explanation is given by him for this. I must admit, I am mystified.

I do not intend to deal with the figures for I am inclined to think, that in this case, one cannot ignore the rest of the evidence and go purely on arithmetical calculations, particularly on account of the fact that this was not the basis on which the trial was conducted.

In view of my findings on the three questions mentioned earlier, I quash all proceedings held on 4.9.74 and on all subsequent days and set aside the conviction and sentence.

The question that has vexed me in this appeal is whether I should acquit the appellant or order a trial *de novo*.

I am mindful that the policy that underlies section 23A of the Bribery Act is to eradicate corruption in public life. In the case of *Public Prosecutor* v. *Yuvaraj* (*supra*) the Privy Council in reference to section 14 of the Corruption Act of 1961 which is similar to our section said :

> "Corruption in the public service is a grave social evil which is difficult to detect, for those who take part in it, will be at pains to cover their tracks. The section is designed to compel every public servant so to order his affairs that he does not accept a gift in cash or in kind from a member of the public except in circumstances in which he will be able to show clearly that he had legitimate reasons for doing so."

I also take into consideration that during a short period of about ten months the appellant, whose pecuniosity was not all that high, had made acquisitions worth Rs. 460,007.50 cts.

However it is a basic principle of the criminal law of our land, that a retrial is to be ordered only, if it appears to the Court that the interests of justice so require.

The charge laid against the accused is of a serious nature, and it may be, a trial Court may find the accused guilty at a retrial upon relevant and admissible evidence.

But it must be remembered that the acquisitions have been made about seven years ago.

In the case of *Peter Singho* v. *Werapitiya* (*supra*) Gratiaen, J. in considering the question of retrial after a lapse of four years from the date of the commission of the offences, said :

> "……but here we are concerned with offences alleged to have been committed over four years ago, and it does not seem to me just to call upon him to defend himself a second time after such *an unconscionable lapse of time*. I therefore set aside the convictions and acquit the accused."

Further the trial had been long and protracted. There have been no less than *thirty five trial dates*. The accused would have to bear undue hardship and heavy expense to defend himself again. I must also state that the defence in no way contributed to the reception of inadmissible and irrelevant evidence, which prejudiced the trial.

Under these circumstances, it seems to me to be harsh, and unjust to order a retrial. It does not appear to me that the interests of justice require a retrial. I therefore acquit and discharge the appellant.

In the matter of an application under section 354 (1) and (2) of the Administrative of Justice Law, No. 44 of 1973

Hatton National Bank Limited,
16, Janadipathi Mawatha,
Colombo 1.
The aggrieved-Petitioner.

There remains to be considered the Revision Application filed by the aggrieved petitioner.

The aggrieved petitioner, the Hatton National Bank Limited, applies to this Court by way of revision to expunge and delete from the text of the judgement of the learned trial judge the following observations and strictures, which adversely affect and damage its business integrity, reputation and standing to which it is entitled :

> "No doubt, certain Banks and money lending institutions have advanced brazenly large sums of money to the accused without any principle attached to the payments.
>
> One has to consider whether the payments made by these institutions were bona fide or paid with an ulterior motive, with an idea of getting further help from the accused who was holding such an influential position in the Insurance Corporation. I am firmly of opinion that the payments by the Hatton National Bank to the accused were so tainted that one could hardly see even the basis for those payments.
>
> After examining all the deposits and withdrawals from this account, there is no doubt whatever that Rs. 100,000 from the Hatton National Bank were all tainted transactions and which I consider proceeds obtained from bribery."

The question that I have to determine is whether the Court can grant the relief prayed for, namely the expunction from the record of the passage in the judgement complained of by the petitioner.

Section 40 of the Administration of Justice Law requires consideration in this connection, and it is in the following terms:

> "The jurisdiction vested in any Court by this law shall include all ministerial powers and duties incidental to such jurisdiction, and nothing in this law shall be deemed to limit or affect the power of any Court to make such orders as may be necessary to do justice or to prevent the abuse of the process of the Court."

This section is in two parts, the first part deals with the ministerial powers, duties and functions of the Court and the second part, deals with the inherent powers of the Court "to make such orders as may be necessary to do justice or to prevent the abuse of the process of the Court."

The present application falls within the second part of the section.

The Criminal Procedure Code of India has a similar provision in relation to the High Court. That section which is section 561A reads as follows:

> "Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court, to make such orders as may be necessary to give effect to any order under this Code, or to prevent the abuse of the process of any Court or otherwise to secure the ends of Justice."

In the case of the *State of Utter Pradesh v. Mohamed Naim*, (1964) A.I.R. S.C. page 703, where the conduct and behavior of a particular Police Officer was in question, the judge made disparaging statements against the entire Police Service, the Supreme Court directed that the derogatory material should be expunged.

It is clear that in that cause the ends of justice did not require those offending remarks. In the case of *Narthupana Tea and Rubber Estates Ltd.* v. *Perera*, 66 N.L.R. pages 135, 138, where there were observations in the judge's pronouncement, which suggested lack of restraint, Sansoni, C.J. remarked:

> "I regret that it should be necessary to remind the learned judge that the parties were entitled to a judgement written without exaggeration or passion. Chief Justice Stone of the United States of America once said, "Precisely because judicial power is unfettered, judicial responsibility should be discharged with finer conscience and humility than that of any other agency of Government."
>
> "The ampler the power, the greater the care with which it should be exercised. And the very circumstance, that absolute privilege attaches to judicial pronouncements imposes

a correspondingly high obligation on a judge to be guarded and restrained in his comments, and to refrain from needless invective."

The right of making disparaging remarks in a judgment is one that should be exercised with great reserve, moderation and restraint, especially where the person disparaged has had little or no opportunity of explaining or defending himself. For it must be remembered that such remarks imputing crime, moral delinquency or improper conduct to a person are a constant source of irritation and uneasiness, to him. Such remarks are bound to lower him in the public estimation and can haunt him like a spectre for life, and even bequeathing the evil to his children. Being fraught with such serious consequences, I think they should be made by Court, where any hesitation or reluctance in making them would impede the course of justice. A judge who makes such remarks should give adequate reasons on a proper analysis of the facts. However a judge who condemns a person unheard acts unfairly. Persons to whom ignominous or improper conduct is attributed in judicial determinations, though they were neither parties nor witnesses in the case have therefore, a just cause for complaint against unjust treatment.

In the case of *Queen* v. *Murugan Ramasamy*, 66 N.L.R. pages 265, 284, where certain strictures were passed by Basnayake, C.J. in the Court of Criminal Appeal, the Privy Council observed:

> "It only remains to place on record one further observation which arises out of certain strictures contained in the judgment of the learned Chief Justice reflecting upon the handling of the prosecution's case at the trial and the evidence of Sergeant Jayawardene. His comment on the conduct of counsel for the Crown are to be found in the last two paragraphs of his judgment, and it is sufficient to note in referring to them they attribute to the prosecution a lack of proper fairness and detachment in the presentation of the case and even a conscious attempt to mislead the Court..... Their Lordships must dissociate themselves from any endorsement of the learned Chief Justice's words of censure."

> "As to Sergeant Jayawardene's evidence at the trial, it is described by the Chief Justice as a reprehensible attempt at *suggestio falsi et suppressio veri* ..... Their Lordships ..... will merely state in regard to this witness that neither their own analysis of his evidence nor the criticisms of it made by the learned Chief Justice have seemed to them to require so hostile a conclusion."

In the recent case of *Gunawardena* v. *Inspector of Police* Ragalla, S.C. 758/70; M.C. Nuwara Eliya 36 867, S.C., Minutes of 26.1.76, this Court took the view that it had power to expunge

disparaging remarks even on the application of those persons who were neither parties nor witnesses, whose conduct has been assailed in judicial pronouncements.

Though the jurisdiction of the Court exists and is wide in its scope, I think it should be exercised only in exceptional cases to prevent gross injustice (vide *Mitra* v. *Rasa Kali Charam*, (1927), 3 Lucknow 287 and *In Re Bikaru*, 22 Lucknow 391.) For, it must be remembered that Courts below should be allowed to perform their duties and functions freely and fearlessly without undue interference by this Court.

In view of my conclusion I hold that this Court has the power to expunge from the record any derogatory remarks contained in a judicial prononucement, if the interests of justice require such expunction.

However in view of my order quashing all proceedings from the date on which the trial commenced, that is on the day he pleaded to the indictment namely on the 4th of September, 1974, it does not become necessary for me to make such order of expunction. I am inclined to think that once the proceedings are quashed the objectionable observations of the learned judge cease to exist.

Chitaley and Rao in their commentary on the Criminal Procedure Code of India say,

> "Where the entire judgment of the lower Court has been quashed there is no necessity for any separate order, expunging the adverse remarks made against the witness (Vol. 3, 6th Edition, 1966, page 3875)."

Vide also the case of *Narasinghe Bhadur*, (1961) A.I.R., Allahbad, 447 at 450.

In conclusion I wish to state that, this Court has the jurisdiction and power, by acting in revision under section 354 (1) and (2) of the Administration of Justice Law, to expunge the disparaging remarks complained of, by an aggrieved person. I find support for my view in the case of *Gunwardene v. Inspector of Police, Ragalla* (*supra*).

VYTHIALINGAM, J.

The appellant in this case was charged with having between the 31st day of March, 1969 and 31st day of October, 1971, acquired (*a*) the properties described in schedule A and (*b*) the money described in schedule B annexed to the indictment, being properties or monies which could not have been acquired with any part of his known income or which could not have been

any part of his known receipts or to which any part of his known receipts had been converted and which properties or monies are deemed by section 23A (*a*) of the Bribery Act to have been acquire by bribery and thereby committed an offence punishable under section 23A (3) of the Act.

After trial he was convicted and sentenced to seven years' rigorous imprisonment which is the maximum term of imprisonment which could have been imposed for the offence, a fine in terms of section 26A of Rs. 340,200 which in the opinion of the trial judge was not less than the amount acquired by the appellant by bribery, in default to another term of seven years, rigorous imprisonment, and under section 26 to a penalty in the same amount. The appellant has appealed against the conviction and sentence. The 31st March, 1968, was apparently chosen as the commencement of the period during which he had acquired the impugned properties because, in D. C. Colombo Case No. 26334/S in which he was sued by Messrs Moosajes Ltd., in respect of a sum of Rs. 1,771.32 being balance principal due on a promissory note for Rs. 2,000, the appellant had filed an affidavit dated 31.3.1968, setting out that apart from a monthly salary of Rs. 800 he had no other sources of income and no other movable or immovable properties.

However the appellant became a member of a scheduled institution for the first time only on 6.6.70 when he was appointed a Director of the Ceylon Insurance Corporation. On 15.6.70, he was appointed a working Director and became the Vice-Chairman of the Board of Directors on 14th August, 1970. He resigned on 6.12.71, after some questions had been asked in the National State Assembly in regard to his acquisitions. All the impugned properties set out in schedules A and B of the indictment were acquired by him between 25.1.71 when Mount Hunasgiriya Estate was purchased by him and on 30th October, 1971, when Yelverton Estate was bought, that is to say a short period period of ten months. It is but right to point out at the outset that these acquisitions are admitted by him. The only question was whether they were acquired by him from his known income and receipts or whether they were the proceeds of bribery. Where they are not acquired from his known income and receipts the section deems them to have been acquired by bribery until the contrary is proved.

Mr. E. R. S. R. Coomaraswamy who appeared for the appellant submitted that the conviction, and sentence ought not to be allowed to stand on account of (i) the admission of irrelevant and inadmissible evidence, (ii) the grave misdirections of law particularly in regard to the burden on the accused to prove the

contrary of the presumption, (iii) the unfair manner and length of the cross-examination of the appellant, and (iv) the attitude of the trial judge towards the defence, and (v) the incorrect appreciation of the facts and misdirections on material questions of facts.

In regard to the first matter the main objection was to the admission of the evidence of the witness Mubarak Thaha whose evidence, it was strenuously contended, was both irrelevant and inadmissible. The witness was at that time serving a sentence of imprisonment, having been convicted by the Criminal Justice Commission for exchange control violations on a massive scale. In connection with these offences he had been taken into custody on 14.8.1971 by officers of the Criminal Investigations Department and had been grilled by them for several days. In the course of the questioning he had made the statement D2 to them in regard to his transactions with the appellant which however had nothing whatever to do with exchange control violations. He had stated that the appellant used to obtain loans from him on post-dated cheques and that on one occasion he had given him Rs. 60,000, for services rendered by him in connection with the stopping of police raids on his illegal betting business and in legalising it. He understood that this amount was to be paid to someone. He made no statement to any authorised officer of the Bribery Department in regard to this matter.

His name was not on the back of the indictment as a witness for the prosecution. His name was included in a list of witnesses and filed in Court on the day before the last date of the prosecution evidence. On 4.10.1974, further trial was postponed for 9.10.74 and on 8.10.74, the Attorney-General filed this additional list and moved for summons on A. M. Thaha and summons was ordered to be issued (J.E. of 8th October, 1974). On the same day there are two other minutes. Journal Entry 10 states that there is no time to issue summons as further trial was fixed for 9.10.74, the following day, and this was directed to be mentioned on 9.10.74. Later however at Journal Entry 11 it is minuted that summons was to be issued by special messenger and the jail authorities were directed to produce the witness in Court at 8.30 a.m.

On the following day Thaha was produced in Court and after the evidence of two witnesses had been led Mr. Seneviratne moved to call Thaha. Mr. Bartlett who was appearing for the appellant in the absence of senior counsel objected to this evidence on the ground *inter alia* that the evidence was both irrelevant and inadmissible and also that it was highly prejudicial to the accused. Mr. Seneviratne submitted that "If this

witness Thaha says that he gave a Rs. 50,000 bribe to the accused and the court is prepared to accept the evidence, the presumption is irrebuttable (*sic*) and that would buttress the presumption to that extent that a bribe was alleged to have been given to the accused, i.e., of a specific act of bribery".

The trial Judge thereupon made the following order "I overrule the objection raised in view of the submissions made by Mr. Seneviratne and I allow the witness to be called". In other words, the witness was called for the specific and only purpose of giving evidence to the effect that during the relevant period he gave a bribe of Rs. 50,000 to the appellant and Thaha duly gave that evidence. Thereafter the prosecution closed its case.

The fundamental principal in a criminal trial is that where the defendant pleads not guilty every essential matter bearing upon the issue of his guilt must be proved by the prosecution. The main general rule governing the entire subject of relevance, admissibility and weight of evidence is that all evidence which is sufficiently relevant to an issue before the court is admissible and all that is irrelevant or insufficiently relevant should be excluded. These principles are embodied in our Evidence Ordinance (Cap. 14) which contain the rules of evidence which we are bound to administer, except in the case of *casus omissus* where such a question must be determined in accordance with the English Law of Evidence for the time being (Section 100).

Chapter 11 of our Ordinance deals with relevancy of facts and section 5 sets out that "Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereafter declared to be relevant and of no others." In other words all other facts are irrelevant and are to be excluded. Sections 6 to 55 declare certain facts to be relevant. Relevance is a condition precedent to admissibility and if a fact is not relevant to a fact in issue or to a relevant fact it is irrelevant and inadmissible.

In the case of *Mendis v. Paramasamy*, 62 N.L.R. 302 at 306, which was a civil case in which the question for decision in the appeal was whether a letter D1 was admissible or not, Basnayake, C. J. said "Under our Evidence Ordinance, evidence may be given in any suit of the existence or non-existence of every fact in issue and of such other facts as are declared to be relevant by that Ordinance and of *no others* (section 5). Unless a fact is declared to be relevant by a section of the Evidence Ordinance, no evidence of it can be given and there is no section which declares D1 to be relevant".

In a charge under section 23 A of the Bribery Act the burden is on the prosecution to prove that the appellant acquired certain properties during that period and secondly that such properties could not have been acquired with part of his known income or receipts or to which such had been converted. In this context "known income or receipts" obviously means known to the prosecution. In India the Prevention of Corruption Act 1947 contains the same words and in the case of *C.D.S. Swami v. The State,* A.I.R. (1960) S.C. 7 at page 11, Sinha J. who delivered the judgment of the Supreme Court said "Now the expression 'known' source 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 section 106 of the Evidence Act".

Once the prosecution has established these two facts and shown that there is a disparity between the known income and receipts and the acquisitions then the section provides that "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". In the instant case the appellant sought to discharge this burden by proving that he had other income and receipts besides those which were known to the prosecution. The latter may then show that the appellant did not in fact receive such income or receipts or that such income or receipts were in fact bribes for sub-section 2 of sections 23A sets out that "in subsection (1) 'income' does not include income from bribery and receipts do not include receipts from bribery".

One test of relevancy is to ask oneself the question what does this evidence of Thaha prove in relation to those facts in issue or to facts declared to be relevant to them? The answer obviously is precisely nothing. On the other hand it is gravely prejudicial to the appellant as it brands him as a bribe taker. It was not the appellant's case that this sum of Rs. 60,000 was part of his income or receipts with which he sought to bridge the gap between his income and receipts and his acquisitions. In such a case it was open to the prosecution to prove that it was in fact a bribe, not to show that he was a bribe taker, but to exclude it from his income and receipts in terms of section 23A (2).

Indeed, the appellant had included a sum of Rs. 45,000 obtained by him as a loan on a post-dated cheque from Thaha, among his income and receipts. Thaha in the course of his evidence confirmed this and the prosecution did not contest it. He had in fact repaid Rs. 22,000 out of it to Thaha on the day of the latter's arrest and a further sum of Rs. 5,000 after that to his wife.

Mr. Seneviratne submitted that there was no restriction on the number of witnesses he could call or the nature of the evidence he could lead to establish his case. This is undoubtedly true. But such evidence should pass both tests, of relevance and admissibility. Mr. Seneviratne argued that the evidence that the appellant had accepted a bribe of such a large sum during the relevant period would show that the appellant must have used this sum to acquire some at least of the impugned properties, and in this sense it would "buttress" the presumption.

But a presumption which the law requires a Court to draw on the proof of the basic facts needs no buttressing. Unlike the presumptions in section 114 of the Evidence Act which the Court may or may not draw, the presumption under this section is one which it is incumbent on the Court to draw on the proof of the basic facts, for the words used in the section are "it shall be deemed" until the contrary is proved. In India in section 4(1) of the Prevention of Corruption Act (1947) the words used are ".... it shall be presumed unless the contrary is proved.."

In the case of *Dhanavantrai* v. *The State of Maharashtra*, A.I.R. (1964) S.C. 575 at 580, in considering these words Mudhelkar, J. said " It is well to bear in mind that whereas under section 114 of the Evidence Act it is open to the court to draw or not to draw a presumption as to the existence of one fact from the proof of another fact and it is not obligatory upon the Court to draw such presumption, under subsection (1) of section 4, however, if a certain fact is proved, that is, where any gratification (other than legal gratification) or any valuable thing is proved to have been received by an accused person, the court is required to draw the presumption that the person received that thing as a motive or reward, such as is mentioned in section 161 I.P.C. Therefore the court has no choice in the matter once it is established that the accused person received a sum of money which was not due to him as a legal remuneration". Once the basic facts are proved then the existence of the presumed fact must be taken to be proved and no further evidence is necessary either to prove its existence or to buttress the presumption.

Besides there is no burden on the prosecution to establish the sources with which the properties were acquired or that they were in fact bribes. As Samerawickreme, J. delivering the unanimous judgment of a Bench of 5 judges of this Court pointed out in *Karunaratne*, S.C. 16/74—D.C. Colombo 75/B ; SC. Minutes 20.6.1977, which was also a case in which the accused was charged under this very section " 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 ".

In *Wanigasekera*, 79(1) N.L.R. 241, the defence took up the position that in discharging the burden of proving the basic fact, it was incumbent on the prosecution to establish not merely that the income and receipts were not what they purported to be, but also that they were proceeds of transactions tainted with bribery. In rejecting this submission Wimalaratne, J. with the other Judges agreeing said, " 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 ".

By the time Thaha's evidence was led the prosecution had already established a wide disparity between the sources of income and receipts known to the prosecution which were only the appellant's earnings from the Insurance Corporation and the acquisitions and the presumption operated. As far as the case for the prosecution was concerned Thaha's evidence proved nothing. It probative value was nil. It was wholly unnecessary, and totally irrelevant.

On the other hand it was highly prejudicial to the accused. Section 54 of our Evidence Ordinance provides that " In criminal proceedings the fact that the accused person has a bad character is irrelevant ; unless evidence has been given that he had a good character in which case it becomes relevant ". In the instant case the accused did not put his character in issue. In this connection the classic formulation of the principle by Lord Herschel in *Makin v. Attorney-General of New South Wales*, (1894) A.C. 57 at 65, has been accepted as correct in England, and has been consistently followed in our country as being applicable to our law, ever since, and has recently been approved by the House of Lords in *Boardman*, (1973) 3 W.L.R. 673.

It is as follows :—

> " It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury and it may be so relevant if it bears upon the question whether the facts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which could otherwise be open to the accused."

The principle enunciated is in two parts : the first deals with the exclusion of such evidence and the second with the circumstances in which such evidence is relevant and admissible. The general rule of exclusion referred to in the first part was stated by Viscount Sauky, L.C. in *Maxwell*, (1935) A.C. 309 at 317, to express " .....one of the most deeply rooted and jealously guarded principles of our criminal law ". Two reasons have been advanced for this exclusion. One is that such evidence is simply irrelevant. No number of similar offences can connect a particular person with a particular crime. Such evidence has therefore no probative value and so has to be excluded. The other is that the prejudice created by the admission of such evidence outweighs any probative value it may have.

Thus in *Kilbourne*, (1973) A.C. 729 at 757, Lord Simon of Glaisdale explained this reason as follows : " The reason why the type of evidence referred to by Lord Herschel in the first sentence of the passage is inadmissible is not, because it is irrelevant but its logically probative significance is considered to be grossly outweighed by its prejudice to the accused so that a fair trial is endangered if it is admitted ". Such a " deeply rooted and jealously guarded principle of our criminal law " cannot be permitted to be eroded by some nebulous considerations of " buttressing " a presumption created by law. In this connection the words of Lord Du Parcq in *Noor Mohamed*, (1949) A.C. 182 at 191, are quite apposite. He said " A plea of not guilty puts everything in issue which is a necessary ingredient of the offence charged and if the Crown were permitted ostensibly to strengthen the evidence of a fact which was not denied and could not be subject of rational dispute, to adduce evidence of a previous crime, it is manifest that the protection afforded by the jealously guarded principle first enunciated would be gravely impaired ".

He continued at page 192 " It is right to add, however, that in all such cases the judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial having regard to the purpose to which it is professedly directed to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the judge will be right to exclude it ". These words were quoted with approval in *Sathasivam*, 55 N.L.R. 255 at 258, by Gratiaen, J. In that case a letter written by the deceased to a Superintendent of Police expressing apprehension in regard to the impending arrival in the Island of the accused, her husband, was sought to be led as evidence of motive. In rejecting the evidence Gratiaen, J. said " It is important to realise in this connection that on the one hand the evidential value if any of P24 standing by itself is slender, whereas the prejudicial effect which its reception might have on the minds of the jurors would potentially be so substantial as seriously to impair the fairness of the trial ".

The trial Judge in his judgment stated that " In this context it is positive that the accused had got a bribe during this period and that possibly could be the source of his funds and accordingly the provisions of sections 9 and 11 of the Evidence Ordinance are relevant ". Apparently he thought that the evidence was admissible under these two sections. This is a wrong approach for, as I have pointed out it was no part of the burden on the prosecution nor of the functions of the trial Judge to trace the source of the funds for the acquisitions. If the appellant had failed to bridge the gap between the acquisitions and the sources of income or receipts which he had disclosed then the presumption operated and he had failed to prove the contrary and would be guilty of the offence. No further evidence would be necessary at all.

If, on the other hand, he had succeeded in bridging the gap with the disclosed sources of income and receipts which are not shown to be bribes then he had proved the contrary and rebutted the presumption. In such an event, where there are such sources of income and receipts to account fully for the acquisitions, one cannot assume that merely because the appellant had received a bribe during the relevant period, he must have acquired the properties with the proceeds of the bribe money rather than with his disclosed sources of income and receipts. It is a fundamental principle of our criminal law that every assumption should be in favour of innocence and against guilt. So that Thaha's evidence would not be relevant under section 9 as supporting the inference that it was with the bribe money that he acquired the impugned properties or to rebut the inference that he acquired them with his

legitimate sources of income or receipts. Nor would it be relevant under section 11 (*a*) or (*b*) as being inconsistent with the fact that he acquired the properties with his legitimate sources or as being consistent with the fact that he acquired them with the bribe money or render it more probable or improbable as the case may be. To permit the prosecution, under the guise of "buttressing" the presumption, to prove obliquely the specific act of a bribe, in regard to which there is no presumption at all, by a standard of proof less than proof beyond reasonable doubt is contrary to all principles of criminal justice. The trial Judge was therefore in error in thinking that the evidence was admissible under sections 9 and/or 11.

The evidence, however, could have been relevant and admissible to rebut a defence which was open to the appellant. In *Karunaratne* (*supra*) Samerawickrema, J. pointed out that "I do not think, however, that there is any reason why in an appropriate case an accused person may not show on the probabilities that the property was not acquired by bribery without disclosing the source from which he obtained the property, if in the particular circumstances of the case he can persuade the Judge of that fact. The learned Deputy Director of Public Prosecutions has also submitted that an accused should not establish such a fact by a bare assertion from the witness box. Whether or not an assertion by an accused on oath should or should not be accepted must depend on the circumstances of each case, credibility which the trial judge is prepared to accord to the witness who gave that evidence and other circumstances".

In other words that it is open to an accused charged under this section to rely on his sworn testimony that he had not accepted any bribes during the relevant period to rebut the presumption in addition to, or without disclosing, his sources of income and receipts. In such a case it would be both relevant and admissible for the prosecution to rebut that evidence by leading evidence to show that the accused had in fact accepted a bribe during the relevant period. Such evidence would come under the second part of the principle stated by Lord Herschel in Makin (*supra*).

However the issue did not arise in the instant case. Neither in his explanation submitted to the Bribery Commissioner nor in his evidence-in-chief in the case did the appellant rely on any such facts. In his examination-in-chief he merely denied that he had accepted a bribe from Thaha. Only in his re-examination he was asked the general question, "Have you ever accepted a gratification or a bribe from anybody as an inducement or a reward for doing any work or helping anybody as a Member

of the Board or as Vice-Chairman ?" and his answer was "No. Never." But this does not mean that it was raised as a general defence in the case that he had not acquired the properties by means of accepting bribes.

As Basnayake, A. C. J. pointed out in *Waidyasekera*, 57 N.L.R. 202 at 212, "It is sufficient to say that under our law too the prosecution may adduce all proper evidence tending to prove the charge against the accused, including evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment without waiting for the accused to set up a specific defence calling for rebuttal". Nevertheless as pointed out by Lord Summer in *Thompson*, (1918) A.C. 221 at 232, "the prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damming piece of evidence".

In the instant case the general defence that he had not accepted bribes and so had not acquired the properties by means of bribes was at no time foreshadowed by the accused in his explanation in the cross-examination of the witnesses for the prosecution or taken up in the course of his evidence except in the isolated question and answer referred to in his re-examination. It never arose for consideration or decision. It was never a live issue in the case. Nor was the evidence of Thaha sought to be led or used by the Judge for this purpose of rebutting this possible defence.

Indeed Mr. Seneviratne submitted that the observations of Samerawickreme, J. were obiter and in any event he argued that it does not set out the law correctly and invited us to say so. I am pointing this out to show that the purpose for which Thaha's evidence was led was not to rebut any possible defence which may have been open to the accused for in the view of Mr. Seneviratne such a defence was not open to the accused. Besides, the decision in Karunaratne's case was delivered in June 1977 nearly two years after to the judgment in the instant case. However, as I have pointed out such a defence was not taken up in the instant case and it is therefore unnecessary for us to say anything about the correctness of the view taken by Samerawickreme, J. in that case.

I hold therefore that the evidence of Thaha was both irrelevant and inadmissible and in view of the express prohibition against the admission of such evidence in section 54 of the Evidence Ordinance and its highly prejudicial nature, should have been excluded by the trial Judge. In *Rajakaruna*, S.C. 31/75—D.C. Colombo 202/B ; S.C. Minutes 27.2.76, where such evidence had been admitted Sirimane, J. with other Judges agreeing, pointed

out that "Fairness in prosecution and the interests of justice (of which fairness is a fundamental part) requires that evidence of a previous similar act, as was led in this case should never be led unless it fell within some provisions of the Evidence Ordinance which clearly made it admissible as such evidence merely tends to deepen suspicion without proving guilt and it is so prejudicial to the accused that it deprives him of the substance of a fair trial."

Another complaint in regard to Thaha's evidence was that Counsel for the accused had not been afforded sufficient time to obtain proper instructions from the appellant for the purposes of cross-examining him so as to amount to a denial of the very right itself to be defended by an attorney-at-law guaranteed to every accused under the law.

As I pointed out the witness was suddenly sprung on the appellant after a notice which had been served on him only on the previous evening at 5 p.m. He said he was unable to contact his Counsel and give him any instructions in regard to the witness that evening. Even Thaha did not know that he had been brought to Court to give evidence till the morning of the day on which he gave evidence. Senior Counsel did not appear on that day for the appellant. At the conclusion of the examination-in-chief, Mr. Bartlett moved for a date to get more instructions from his client. This was refused and Counsel did the best as he could under these circumstances and concluded his cross-examination on that very day itself.

Section 136 of the Administration of Justice Law is as follows :—

> "Every person accused before any Criminal Court may of right be defended by an Attorney-at-Law".

Section 287 of the former Criminal Procedure Code was in identical terms. In *Premaratne* v. *Gunaratne*, 71 N.L.R. 115, T. S. Fernando, J. referring to this right said that it is " .....one now ingrained in the Rule of Law which is recognised in the law of criminal procedure of most civilised countries and is one expressly recognised by section 287 of our Criminal Procedure Code ". In order to comply with this provision it is not sufficient that the accused should in fact be represented by an Attorney-at-Law at the trial. He should have been afforded the time and opportunity to give full instructions and to prepare the case. Where the witness is suddenly sprung on the accused without sufficient notice and he is denied the opportunity to instruct his counsel it is as if had been denied the very right itself.

The only reasons given by the trial judge for the denial of this opportunity are that it had been agreed on 3.10.74 that trial would be held from day to day but that on 4.10.74 Counsel for the accused had stated that the only available date was 9.10.74, that is that very day, and that the case had to be concluded as quickly as possible. It is not clear why this was so. Be that as it may, these are not valid reasons for depriving the appellant of such a fundamental right "now engrained in the rule of law and recognised in the law of criminal procedure of most civilised countries".

How important such a right is, is illustrated by the case of *Jayasinghe v. Munasinghe*, 62 N.L.R. at 527. In that case the application of the accused, who had been in police custody from the time of his arrest on the previous day, was refused as the Magistrate was informed that a postponement of even 24 hours would involve the complainant, who was a foreign tourist, being deprived of the opportunity of leaving Ceylon as arranged by her. Dealing with this reason T. S. Fernando, J. said at page 528 "However understandable this desire may have been, a trial at which the appellant was deprived of one of the most valued legal rights of an accused person in spite of his expressed desire to exercise that right, cannot be said to be a fair trial". The conviction and sentence was set aside even though it involved the accused being allowed to go free, as a fresh trial could not be had on account of the witnesses having left Ceylon. In the instant case the reasons of the trial judge do not even have the merit of being understandable.

In regard to this right Weeramantry, J. observed in *Subramaniam v. Inspector of Police, Kankesanthurai*, 71 N.L.R. 204 at 209, that "It needs little reflection to realise that the right we are considering is a many faceted one, not truly enjoyed unless afforded in its many varied aspects. Thus the right to a pleader means nothing, if it is not associated with the time and opportunity to retain one, nor can there be a true exercise of this right where a pleader has in fact been retained but been clearly afforded insufficient time for the preparation of his case and for obtaining instructions from the accused..... Hence the right does not mean merely that the accused person is entitled in theory to be defended by a pleader but also that he must enjoy all these concomitant privileges without which the right is reduced to a cipher".

In the case of *Peter*, 64 N.L.R. 120, Counsel retained by the accused did not appear on the date of the trial. On that day Counsel was assigned at 11 a.m. and the trial was taken up at 12.30 p.m. and the accused was convicted. In appeal the

Court of Criminal Appeal set aside the conviction on this sole ground and directed a fresh trial, Basnayake, C.J. remarking, "We agree that assigned Counsel should be allowed sufficient time for the preparation of his case and for obtaining instructions from the accused".

Mr. Seneviratne submitted that there was a full cross examination of the witness Thaha on all relevant matters and that there was nothing more that Counsel could have asked even after obtaining further instructions. It is not for us to speculate on what the ingenuity of Counsel could have devised if afforded the opportunity of obtaining full and proper instructions. Quite clearly one of the concomitant privileges of the right to be defended by the Counsel of his choice, referred to by Weeramantry, J. without which it would be reduced to a mere cipher, is the right of the appellant to have been given sufficent time and opportunity to give full and proper instructions to his counsel and to prepare for the cross-examination of the witness. He has been denied this in respect of an important witness on such a gravely prejudicial aspect of the case against him, and thus he has been deprived of the very substance of a fair trial.

A third complaint in respect of the evidence of Thaha was that having regard to the quality of the witness, the nature of his evidence and the circumstances in which it was given, the trial Judge had not sufficiently probed and examined it with that degree of care so necessary in such cases. In regard to the quality of the witness the trial judge himself accepts the defence submission that Thaha was an unreliable witness because he summarises without comment the defence submission as follows:—"It was suggested that Thaha should not have been called to testify on behalf of the prosecution, because he was a disreputable businessman and well known racketeer in foreign exchange. He was a self confessed giver of bribes, and he was also said to be the owner of the famous vice spot known as the Atlanta Club".

The defence also suggested that Thaha's evidence should be disbelieved because he himself would have been an accomplice because he had given a bribe to the accused. In regard to this submission the trial Judge's only comment was that he did not overlook section 79(1) of the Bribery Act, as if that section authorised the acceptance of a bribe giver's evidence without examination or without due and proper consideration of the quality of the witness and nature or the circumstances of the evidence. Section 79(1) of the Bribery Act merely sets out that the giver of a bribe shall not be regarded as an accomplice and that the decision or finding of the court shall not be illegal

merely because it proceeds upon the uncorroborated testimony of such giver. It does not do away with the need to probe such evidence and examine it with due care. As the Privy Council observed in *Moses*, 75 N.L.R. 121 at 126, "Finally it is at least doubtful whether the quality of the prosecution witnesses was properly estimated by the District Judge. If bribery had been established they would have been involved in it as participants and there is nothing in the Bribery Act section 79(1) which of itself enhances their credibility".

Thaha's evidence is also doubtful on three important matters: in regard to when he gave the money, as to whether it was in one lump sum of Rs. 60,000 or in two instalments of Rs. 50,000 first and Rs. 10,000 later, and as to who was present on the second occasion. The trial Judge himself says that Thaha was not sure when these monies were given. In his statement to the police D2 made some time in 1972 he did not mention the payment in two sums or as to who were present at the time he gave the money. He also said that it was Rs. 50 or Rs. 60,000. Thaha was a very sick man when he gave evidence and in fact Court had to give him ten minutes to go to the toilet. He himself said in his evidence "I have absolutely no idea of time or dates since I became worried. When I was in police custody I was not in the present state. While in police custody I had my whisky, I had my chicken and good food. I do not have them now in prison. I am not as fit as when I was in police custody. But I am able to recollect what I have said in my statement". Earlier he said that he was "having heart trouble/diabetes, water in the knee and dermatology".

Despite these deficiencies, to which he gave no consideration whatsoever, the trial Judge accepted Thaha's evidence all too readily and found as a positive fact that the appellant had taken a bribe during this period. This finding is quite obviously vitiated by the fact that, as I have pointed out, the trial Judge had not critically examined and sufficiently probed Thaha's evidence particularly in regard to the deficiencies I have pointed out. Mr. Seneviratne submitted that even if Thaha's evidence is rejected and excluded altogether still there is sufficient evidence for the conviction to be sustained. I regret I am unable to agree. Thaha's evidence so permeates and influences the decision on every single aspect of the case, that it is not possible to disentangle it from the rest of the evidence.

The trial Judge in his judgment states that "this evidence become relevant in the decision ultimately any court had to arrive at". In the circumstances of the instant case the decision that the Court had to arrive at was whether there was a disparity

between the income and acquisitions and if so whether the appellant had proved the contrary of the presumption that they were acquired by him by bribery. The trial Judge's constant refrain in regard to each one of the sources of income and receipts revealed by the appellant is that one should examine the character of the payment. In thus considering the character of these payments the trial Judge would naturally have been considerably influenced by the fact that he had come to the quite definite finding that the appellant had taken a bribe during the relevant period and from the propensity of the appellant towards taking bribes it is but an easy step to find that all these transactions were tainted. Nor where credibility of witnesses is so much involved, is it possible for us now, without the advantage of having heard or seen the witnesses, to say that there is sufficient other evidence to sustain the conviction quite apart from the evidence of Thaha.

It has been suggested that different considerations would apply where irrelevant and inadmissible evidence has been admitted in a trial before a lay jury and where the trial is before a trained lawyer-judge. But this can only be so where it is evident that the trained lawyer-judge has not taken such evidence into consideration in arriving at his decision in regard to the guilt or innocence of the accused. For, as Gratiaen, J. observed in *Peter Singho v. Werapitiya*, 55 N.L.R. 155 at 157, "I do not see how this distinction can be drawn where a Judge of first instance has, in spite of his legal training and experience permitted himself, through an improper appreciation of the law, to allow evidence to be led which is of such a character as to prejudice the chances of a fair trial on the real issues in the case."

"I hold therefore that, on account of the improper reception of this irrelevant and inadmissible evidence, on account of the failure of the Judge to afford the attorney for the appellant sufficient time to obtain proper instructions and prepare for the cross-examination of Thaha and on account of his failure to correctly assess and evaluate the evidence of Thaha the accused has been denied the substance of a fair trial and that for these reasons the conviction and sentence ought to be quashed.

There is another reason why the conviction and sentence should be set aside and that is on account of a grave misdirection in law in regard to the burden on the appellant to prove the contrary of the presumption created by section 23A (1) of the Act. Our Evidence Ordinance applies to civil and criminal proceedings alike and the definition of "proved" and "disproved" contained in it draw no explicit distinction between facts required to be proved by the prosecution in criminal proceedings

and facts required to be proved by a successful party to civil proceedings. Yet it cannot be supposed that the Evidence Ordinance intended by a provision contained in what purports to be a mere definition section to abolish the historic distinction, accepted and acted upon over a very long period of time, and one so fundamental to the administration of justice in our country, between the burden which lies upon the prosecution in criminal proceedings to prove the facts which constitute an offence beyond all reasonable doubt and the burden which lies upon a party in a civil suit to prove the facts which constitute his cause of action or defence upon a balance of probabilities.

The extent of the burden which lies on an accused person to prove the contrary as set out in section 23A (1) has been the subject of decision by this Court in two cases. In *Karunaratne* (*supra*) Samerawickrame, J. referring to this burden said "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." Accepting this as a correct statement of our law Wimalaratne, J. said in *Wanigasekera* (*supra*) "If the tribunal is reasonably satisfied, that is satisfied to the extent that the accused acquired the properties by proceeds other than income or receipts from bribery, then the accused is entitled to an acquittal". In regard to what the degree of proof in a civil case is, Denning, J. said in *Miller v. Minister of Pensions,* (1947) A.E.R. 372 at 374. "The 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."

In the instant case the trial Judge correctly set out the burden on the appellant when he said that the quantum of proof in discharging the burden on the appellant is on a balance of probability. But a careful examination of the judgment shows that in applying this standard to the facts in the case he has imposed on the appellant a very much higher standard than a mere balance of probability. For, in the course of his judgment he said that, beside proving the various sources of his wealth, there was another duty cast on the appellant and that is to prove that the sources are free from suspicion or doubt. In another place in his judgment he was even more categorical. He said that "the burden is on the accused to prove that the money he realised from the acquisitions of land (ought to be money with which he made the acquisitions) is money that he did not accept in contravention of the Bribery Act. He has not

only to prove that alone but he has to prove that these transactions are free from taint and that the character of these payments are above suspicion." And again he stated that the Court had to examine the character of each payment and it is not enough for the accused to leave a doubt in the mind of the court because leaving a doubt alone will not be sufficient. It is in the light of this burden on the appellant that he has examined each of the transactions and come to the conclusion that they are not free from taint or suspicion or doubt.

This necessarily cast on the appellant a very much higher degree of proof than on a mere balance of probability as it required the appellant to remove all doubts and suspicion in respect of each of the transactions in addition to showing that they were not the proceeds of bribery. We are familiar with this in the proof of wills where if there are suspicious circumstances it is for the propounder of the will to remove such suspicion—*Samarakoon v. Public Trustee*, 65 N.L.R. 100 at 115. That is because the conscience of the court must be satisfied. No such considerations apply where a matter has to be proved on a balance of probability only. Even in a criminal case account must be taken of a doubt only if it results in a rational opinion that the contradictory of the issue is more than a remote possibility. For, as Denning, J. said in *Miller v. Minister of Pensions* (*supra*) "if the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible but not in the least probable;' the case is proved beyond reasonable doubt, but nothing short of that will suffice".

Having regard to the definitions of "proved" and "disproved" in our Evidence Ordinance the court must be satisfied on the matters before it in order to rebut the presumption that the acquisitions were not made from the proceeds of bribery or that it considers it so probable that a prudent man ought, in the circumstances of the particular case to act upon the supposition that such is the case. Normally in a civil case account must be taken of a doubt only if it results in a rational opinion that an issue is more likely than not. One may have suspicions or doubts and yet consider the existence or non-existence of a fact in issue as being more probable than not. However as Denning, J. said if the probabilities are equal it cannot be taken as proved.

Thus in *Waniqasekera* (*supra*) the accused had claimed that a loan of Rs. 20,000 from Messrs. Caves Finance and Land Sales Ltd. on a hire purchase agreement was a part of his known

income and receipts during the relevant period. The trial Judge held that it was a bribe in the guise of a loan, because Caves had not taken any steps to get back the money lent until after the accused had ceased to be a director of the Bank of Ceylon and also because the Board of Directors at a meeting in which the accused had participated sanctioned overdraft facilities to the tune of Rs. 500,000. These are undoubtedly suspicious circumstances and even if all the formalities for the grant of the loan had been gone through, the necessary documents signed, and Caves had made attempts to recover the money lent before the accused ceased to be a Director, such a loan may be regarded as a bribe if the circumstances in which was granted were such.

In appeal this Court held that on a balance of probabilities it was a genuine loan. In the course of his judgment Wimalaratne, J. said " 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 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 ". In other words, although there were doubts and suspicious circumstances in regard to the transaction yet it was held on a balance of probabilities that the genuiness of the transaction as a loan had been established.

So that the existence of doubts and suspicions is not the determining factor in deciding whether the appellant had proved the contrary or not. In an ordinary criminal case where there is no burden on the accused then even if he does not prove what he sets out to prove on a balance of probability yet by his evidence he may cast doubt on the prosecution case and so be entitled to an acquittal. That is because by reason of such doubt the prosecution has not proved its case beyond reasonable doubt. It is not open to the prosecution in this sense to cast doubts on the appellant's evidence and say that he has not proved his case on a balance of probability because of this doubt. But where as in this case there is a burden on the appellant he cannot leave the matter in doubt in the sense that the probabilities are equal, for then the balance is not tilted in his favour. However this does not apply to the proof of the basic facts on the proof of which depends the existence of the presumed fact for in regard to them the burden is always on the prosecution to prove them beyond reasonable doubt So that, therefore, the determining factor is on the probabilities, in whose favour is the balance tilted.

Mr. Seneviratne submitted that when the trial Judge states that the transactions are tainted or suspicious what he really means is that the appellant had failed to establish on a balance of probability that it was more likely that it was not a bribe than not. He stated it was the trial Judge's way of putting it and that it was just a question of choice of words and language used than a matter of substance. I regret I am unable to agree with this submission, in view of the categorical statement in the judgment that in addition to proving the various sources of his wealth there was an additional burden on the appellant to remove all suspicion and doubt. It is not a question of weighing the probabilities and arriving at a finding but a requirement that the appellant should remove all suspicion and doubt. On this basis one could not have come to the finding that this Court arrived at in regard to the Cave's loan in the Wanigasekera case.

That the trial Judge by these words did not mean simply that the appellant had not rebutted the presumption is clearly shown by that part of the judgment referred to ealier by me in which he says that the burden on the appellant is not only to prove that the acquisitions were made with money which he did not accept in contravention of the Bribery Act but in addition to prove that these transactions are free from taint and that the character of these payments are above suspicion. If the appellant had proved that the money was not money acquired in contravention of the Bribery Act then he has successfully rebutted the presumption. There is no further burden on him to prove that the transaction was free from taint or that the character of the payments were above suspicion.

The fact that the trial Judge has cast a very much higher burden on the appellant than proof on a balance of probability is clearly illustrated by his finding in regard to the Kotagama transaction. He states "There is another transaction amounting to Rs. 20,000 which the accused says he got from Kotagama for the transfer of a vehicle after the Yelverton transaction. This source of Rs. 20,000 has not been proved and corroborated, when there was evidence available to the accused namely by calling Kotagama. I, therefore, reject that evidence given by the accused". This is all he has to say for rejecting this source of receipt or income. Now, the trial Judge is well entitled to say that the appellant is such an uncreditworthy witness that he was not prepared to act on his evidence unless supported by other evidence.

This is not what he has done. What he has said and done is to reject the evidence because it was not corroborated. In our law of evidence corroboration is a term which has a special

significance. In the conventional sense as used in our Courts it means other independent evidence which confirms or supports or strengthens the evidence which is required to be corroborated. In the case of certain categories of witnesses statutes or judges, as a matter of prudence and caution require that their evidence should be corroborated before it is accepted and acted upon. In the case of the appellant no requirement of law or prudence required his evidence to be corroborated for he does not fall into any of these categories of witnesses.

The term, however, may also be used in a more popular sense to denote evidence which renders other evidence more probable. For example it is in this latter sense that the term is used in section 157 of the Evidence Ordinance which makes admissible any former statement made by a witness relating to the same fact at or about the time when the fact took place or before any authority competent to investigate the fact, in order to corroborate him. In the case of *Ariyadasa v. The Queen*, 70 N.L.R. 3 at 5, T. S. Fernando, J. pointed out "The corroboration that section 157 contemplates is not corroboration in the conventional sense in which the term is used in Courts of law but in a sense of consistency in the conduct of a witness tending to render his testimony more acceptable".

As I have pointed out, however, the trial Judge has not used the term in the latter sense. It is true that in the case of the appellant's evidence in regard to certain specific transactions he has held that the appellant had told a lie and that in giving a particular answer he had shown utter callousness and disregard for honesty and integrity and that no Court could condone this type of answers from a man who had been given such financial responsibility and stature. But nowhere in his judgment has he said that the appellant was an untrustworthy witness whose evidence could not be believed unless it was supported by other reliable evidence. Moreover in regard to the Kotagama car transaction he has rejected the appellant's evidence out of hand and without any consideration merely because it was not corroborated.

This is not the only evidence of the appellant which the trial Judge rejected because there was no corroboration. The appellant had stated that he had received a loan from Shelton Perera. The trial Judge rejected this evidence because as he says "There is absolutely no corroboration on this point. So there is no satisfactory proof....". One consequence of the adoption of this higher standard of proof has been not only that the appellant was found guilty of bribery but also that a whole heap of people and institutions including Bartleet and Co., L. B. Finance, and the Hatton National Bank have been branded as bribe-givers.

I hold therefore that on this ground also namely the casting on the appellant a higher standard of proof than proof on a balance of probability, the conviction and sentence should be set aside. These two grounds set out above are both substantial and each by itself is fatal to the conviction and sentence. It is therefore unnecessary for me to refer to the other grounds urged by Mr. E. R. S. R. Coomaraswamy.

It remains to notice one last submission of Mr. Seneviratne, that despite these defects it was still open to us to sustain the conviction as on a total acceptance of the entirety of the appellant's evidence he had not bridged the gap between his income and the acquisitions. For this purpose he handed over to us a calculation of his of the appellant's income and the expenditure on the acquisitions. I do not think that it is open to us to ignore the other evidence in the case and arrive at a verdict of our own by an arithmetical process of addition and subtraction. This was never the basis on which the trial proceeded in the lower Court or to which the trial Judge had directed his mind in his judgment. If this matter had been agitated in the lower Court the appellant could have had an opportunity to furnish explanations. In the absence of such an opportunity it would not be fair and equitable for us now to adopt this course.

Although Mr. Seneviratne stated that his statement of accounts was made out on the basis of a total acceptance of the entirety of the appellant's evidence, this is not so. It is made out on the basis of selection and exclusion of certain items and contains many errors and omissions. In this connection it is interesting to note that while Mr. Seneviratne's computation shows disparity between acquisitions and receipts, at the lowest of a sum of Rs. 80,182 and at highest of Rs. 141,182, Mr. Coomaraswamy has also given us a calculation of his own covering the entire period according to which there is an excess of Rs. 70,603.54 of income over expenditure. This by itself illustrates the fact that we cannot arrive at a finding by a purely arithmetical process of addition and subtraction but only by examining the facts and circumstances of each transaction and this we cannot do without hearing and seeing the witnesses.

Mr. Seneviratne's computation is not a full and complete accounting over the entire period, but only of a selected portion of it. The period set out in the indictment extends upto 31st

October, 1971 and the last and the biggest of the acquisitions was made on 30.10.71. Yet for some mysterious reason Mr. Seneviratne's computation is only upto 19.8.71. If one is to strike a balance in this way one has to do it over the entire period and not of a selected portion of it as Mr. Seneviratne has done.

The computation also contains glaring errors. Admittedly the appellant obtained a loan of Rs. 45,000 on a post-dated cheque from Thaha out of which he repaid Rs. 23,000 on 14.8.1971 from the proceeds of the sale of car 5 Sri 9728. In item 8 of Mr. Seneviratne's computation he has given credit in respect of this loan of Rs. 45,000 for only Rs. 22,000 after deducting the Rs. 23,000 that was repaid on 14.8.71. Then in item 10 in respect of the sale of the car he has again deducted this sum of Rs. 23,000 and given credit only for Rs. 4,500. In other words this sum of Rs. 23,000 has been deducted twice over instead of once only. There was also another loan of Rs. 15,000 given by Thaha on 27.1.71 to the appellant which has not been included in the computation. This loan was repaid to Thaha on 6.2.71. How the appellant obtained the money to repay this loan has to be considered on an assessment of the evidence. But the fact remains that the money was available to him as a legitimate source of income at the time of the purchase of Mount Hunasgiriya Estate.

Then there are omissions of several items which should have been included if one proceeds on the basis of a total acceptance of the appellant's evidence. The appellant stated that he had saved two to three thousand rupees at the time he became a director at the Insurance Corporation but he has not been given credit in this sum. Then again apart from the loan of Rs. 5,000 shown in the computation the appellant stated that he had overdraft facilities at the Hatton National Bank upto a limit of Rs. 25,000 which was often exceeded. This was confirmed by Mr. Dharmarajah the General Manager of the Bank who stated that the appellant's personal account F007 was overdrawn in August 1971 to the extent of Rs. 42,187.53. Mr. Seneviratne has not given credit for this overdraft in any sum. Besides this there was also overdraft facilities in the estate account which was also in the appellant's personal name up to a limit of Rs. 25,000. This has also not been reflected in the computation.

Two other items, a loan of Rs. 1,500 from Shelton Perera and a payment of Rs. 2,000 from Marshall Exports and Imports have

also not been included. Moreover he has included on the debit side withdrawals from the appellant's bank account amounting to Rs. 59,671. The appellant stated that all of this amount was not used by him for his expenses but both he and his wife had saved some money out of this sum. A total acceptance of the appellant's evidence must necessarily result in giving him credit for some at least of this amount.

If account is taken of all these items and others which a closer scrutiny of the accounts may reveal there may be no disparity at all. However I am of the view that in a case of this nature one cannot completely divorce oneself from the evidence in the case and proceed on the basis of a pure arithmetical addition and substraction, unless of course parties are agreed on the items of income and expenditure.

I have given anxious consideration as to whether I should acquit and discharge the accused altogether or order a fresh trial. I am conscious of the fact that during a short period of ten months he had acquired properties worth Rs. 542,679.97 cts. Corruption in public life is a grave and social evil which is difficult to detect ; for those who take part in it will be at pains to cover their tracks. The section is designed to catch up persons who have acquired money and properties in excess of their known income and receipts and against whom there is no proof of the actual receipt of a gratification except presumptive evidence of bribery. For these reasons I was at one time inclined to the view that there should be a retrial. I have since had the advantage of reading the judgment of my brother Malcom Perera, J. and agree with him that, since nearly seven years have elapsed since the date when the acquisitions were made and that the appellant had to undergo the agony of a long and protracted trial and that it may now be difficult for him to remember the sources of his income, the accused should be acquitted and discharged.

I accordingly allow the appeal and quash all proceedings had on and after 4.9.1974 and set aside the conviction, sentences and penalties imposed on the accused and acquit and discharge him.

Application in Revision by the Hatton National Bank

In this case there is also an application by way of revision by the Hatton National Bank, to expunge and delete certain remarks

made by the District Judge in his judgment which it alleges adversely affect its business integrity, reputation and standing. Before considering the merits of the application the following important questions of law arise for consideration :—

(1) Is it open to a person who is not a party to the case to move this Court in revision ?

(2) Has this Court the power to expunge or delete any part of the record or the judgment ?

(3) If so, in what circumstances will such power be exercised ? and,

(4) Is this such a case in which the power, if it exists, should be exercised and if so, what is the appropriate order that should be made ?

In regard to the first question this Court's power to act by way of revision are of the widest amplitude. It can of its own motion call for and examine the record of any case whether already tried or pending trial in any court for the purpose of satisfying itself as to the legality or propriety of any judgment or order passed therein or as to the regularity of the proceedings of such court. It has often acted under these powers as a result of newspaper reports of proceedings in a Court. It can therefore exercise its powers in revision when a matter is brought to its notice by a person who, though not a party to the case, is adversely affected by any order or proceedings in the case.

In the case of *Appuhamy v. Weeratunga*, 23 N.L.R. 467, which was a partition case this Court exercised its powers in revision at the instance of a person who was not a party to the case but was adversely affected by a decree for sale in the case. Bertram, C.J. with De Sampayo, J agreeing said " We have to consider, in the first place, whether it is open to us to exercise those powers on the application of an aggrieved person not a party to the record. There seems to be no doubt that we may exercise these powers of our own motion. If that is so, I think we may justly exercise them when an aggrieved person brings to our notice the fact that, unless the decree is amended he will suffer injustice ".

It would be a travesty of justice if an injured stranger to a proceeding should have to suffer unheard the damage to his integrity, reputation and business standing if such be the case, as a result of unjustifiable and harmful observations made by a court against him. I hold therefore that it is open to a person who is not a party to the proceedings to move this Court by way of revision in a matter of this nature.

The next question is whether we have the power to expunge or order the deletion of portions of the record in a case. Mr. V. S. A. Pullenayagam who appeared for the petitioner submitted that we had the power to do so under sections 354, 11 and 13 of the Administration of Justice Law, No. 44 of 1973. He referred particularly to section 11 which enables this Court in the exercise of its powers to give directions to any subordinate court. While this is so, I think the appropriate section under which we have the power to give such orders or directions in section 40 of the Law. It is as follows :—

> "The jurisdiction vested in any Court by this Law shall include all ministerial powers and duties incidental to such jurisdiction, and nothing in this Law shall be deemed to limit or affect the power of any court to make such orders as may be necessary to do justice or to prevent the abuse of the process of the court".

The words "any Court", in this section would include the Supreme Court. The section is in two parts. The first deals with ministerial powers and duties incidental to a Court's jurisdiction. The second part preserves the inherent powers of Court to make such orders as may be necessary to do justice or to prevent the abuse of the process of the Court. Mr. Pullenayagam submitted that "such orders" in this part of the section related to orders relating to ministerial powers and duties. I regret I am unable to agree. The words "such orders" in this part of the section relate to such orders as are necessary for the purpose of doing justice and preventing the abuse of the process of court. The use of words "nothing in the Law shall be deemed to affect...." separates this part of the section from the first. It preserved the already existing inherent powers in a Court to do justice and to prevent the abuse of the process of Court.

In India section 561A of the Criminal Procedure Code has similar provision in relation to the High Courts and is as follows :—

> "Nothing in this Code shall be deemed to limit or affect the powers of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent the abuse of the process of any Court or otherwise to secure the ends of justice".

It has been held by the Privy Council in the case of *Jairam Das v. Emperor*, A.I.R. (1945) P. C. 94, that this section did not confer on the High Court any new powers but merely safeguarded all existing inherent powers of the High Court necessary, among others to secure the ends of justice.

It is under this section that the Indian High Court as well as the Supreme Court have dealt with applications for expunging observations from the record of a case. Indeed when this section was introduced into the Code in 1923 the *Joint Committee Report* (Sohoni—Commentary on the Indian Criminal Procedure Code, Vol. IV 3616) which recommended its introduction stated : "We understand that a High Court has recently held that it had no power to direct the expunging of objectionable matter from the record. We think it desirable that it should be made clear that this clause is intended to meet such a case."

Quite recently in the case of *Gunawardena et al v. Inspector of Police, Ragalla*, S.C. 758/70, M.C. Nuwara Eliya 36867—S.C. Minutes 26.1.76, this Court held that it has the power to expunge objectionable matter from a judgment even on the application of persons who were not only not parties to the case but were not even witnesses in the case but about whose conduct adverse remarks had been made by the judge. I hold therefore that acting in revision this Court has the power to direct that objectionable matter be expunged from the record if it is necessary to do so in the interests of justice or to prevent the abuse of the process of Court.

But this is a power which will be exercised only in exceptional circumstances and where the justice of the case clearly requires it to be done. It is a principle of cardinal importance in the administration of justice that the independence of the judiciary

must be maintained and officers administering justice however humble their position may be in the hierarchy of the judiciary should have the proper freedom and independence to perform their functions freely and fearlessly without undue interference by anybody and even by this Court. Sirimanne, J. pointed out in *Goonewardena's case* (supra) that " ..... A Magistrate must have the unfettered right of commenting freely and fearlessly (but fairly) on the evidence and relevant issues before him ".

At the same time it is equally necessary that in expressing their opinions judges and Magistrates must be guided by considerations of justice, fairplay and restraint. This was best expressed by Sansoni, J. in the case *Narthupana Tea and Rubber Estates Ltd. v. Perera*, 66 N.L.R., at 138, where he said " I regret that it should be necessary to remind the learned judge that the parties were entitled to a judgment written without exaggeration or passion. Chief Justice Stone of the Supreme Court of America once said ' precisely because judicial power is unfettered, judicial responsibility should be discharged with finer conscience and humility than that of any other agency of Government '. The ampler the power, the greater the care with which it should be exercised and the very circumstance that absolute privilege attaches to judicial pronouncements imposes a correspondingly high obligation on a judge to be guarded in his comments and to refrain from needless invective ". Judicial pronouncements must be judicial in nature and should not normally depart from sobriety, moderation and reserve.

This Court would more readily expunge objectionable matter from the record where the observations are general and sweeping in their nature, unjustified by the evidence in the record and unnecessary for the decision of the case and are damaging to the character and reputation of the aggrieved person. Thus in the *State of Uttar Pradesh v. Mohamed Naim*, A.I.R. (1964) S.C. 703, the case related to the conduct of one Police Officer but the Judge made general and sweeping observations of a derogatory nature about the entire police force. The State applied for the expunging of these observations and the Supreme Court directed that certain of the offending observations should be expunged. S. K. Das, J. observed at page 707 that " We consider that the remarks made by the learned Judge in respect of the entire

Police force of the State were not justified by the facts of the case nor were they necessary for the disposal of the case before him ".

Where, however, the observations are made in respect of a matter in regard to which the Court had to arrive at a finding for the decision of the case then different considerations would apply. For, in such a case, the observations would be so inextricably woven into the fabric of the judgment that any expunging or deletions of the portion of the judgment would result in the judgment itself falling away unless of course they are severable from the operative part of the judgment. Where they are not so severable if the observations are vituperative or contain unnecessary invective so as to damage the character and reputation of the aggrieved party and is unjustified by the evidence in the case then this court would be justified in expressing its disapproval of such observations or dissociate itself from such remarks..

Thus in *Goonewardena's case* (*supra*) Sirimanne, J. said " As I stated earlier the learned Magistrate's comments were not on completely irrelevant matters as those matters had some bearing on the issues before him and although they were not strictly justified in the circumstances of this case yet I do not think that they are so irrelevant or of such a serious or intemperate nature as to require this court to interfere in the manner applied for ". But he did find that it was not strictly necessary for the Magistrate to come to a finding on those matters or make adverse comments against persons who were neither parties nor heard. So he said " Though we are not disposed to allow this application for the reasons already stated, it should be sufficient satisfaction for the petitioners to know that we do not associate ourselves with the adverse comments made by the learned Magistrate against the petitioners and that those comments which have been made in the circumstances referred to above in the context of that particular case, should not in any way affect or be used against the character and credibility of the petitioners ".

A similar course was adopted by the Privy Council in the case of *Queen v. Murugan Ramasamy*, 66 N.L.R. 265 at 284. In that case in the Court of Criminal Appeal, Basnayake, C. J. had

observed, 64 N.L.R. 433 at 447 and 448, that "Sergeant Jayawardena's evidence when compared with what is recorded in his note book discloses a reprehensible attempt on his part at *suggestio falsi et suppressio veri*" and that "it is difficult to escape the conclusion that the prosecution has not been conducted in the instant case with that fairness and detachment with which prosecutions by the Crown should be conducted". In regard to the remarks about Sergeant Jayawardena the Privy Council stated that there was no need for such a hostile conclusion and in regard to the conduct of the case by the prosecution it said "The learned Chief Justice in the last two paragraphs of his judgment attributed to the prosecution a lack of proper fairness and detachment in the prosecution of the case and even a conscious attempt to mislead Court. The censure which is of the gravest order was not supported in any particular by Counsel for the respondent before the Board. Their Lordships have found no justification for it..... Their Lordships must dissociate themselves from any endorsement of the learned Chief Justice's censure".

The objections to which exception have been taken by the Bank are as follows :—

> "No doubt certain Banks and money lending institutions have advanced brazenly large sums of money to the accused without any principle attached to the payments".
>
> "One has to consider whether the payments made by these institutions were *bona fide* or paid with an ulterior motive, with an idea of getting further help from the accused who was holding such an influential position in the Insurance Corporation. I am firmly of opinion that the payments made by..... the Hatton National Bank to the accused were so tainted that one could hardly see even the basis for these payments".
>
> "After examining all the deposits and withdrawals from his account there is no doubt whatever that ..... Rs. 100,000 from the Hatton National Bank ....were all tainted transactions and which I consider proceeds obtained from bribery".

During the relevant period the appellant's Banker was the Hatton National Bank, the petitioner which had afforded him

various facilities by way of overdrafts and loans including the sum of Rs. 100,000 for the purchase of Yelverton Estate, one of the impugned properties. The appellant had shown this sum as a source of his receipts for the acquisition. It was therefore necessary for the judge to decide whether this sum was the proceeds of bribery for the purpose of deciding whether to exclude it in terms of section 23A (2). The observations were therefore made on an issue which was necessary for the decision of the case.

However in view of the order I have made in regard to the main appeal it is unnecessary for us to decide whether in making these observations the trial Judge had gone beyond what was strictly necessary for the decision of the issue or as to whether he was justified by the evidence in making these remarks. The result of my order quashing all proceedings had on and after 4.9.1974 is to wipe out these remarks as well. It is as if they had never been made at all. In the case of *S. P. Dubey* v. *Narasinghe Bahadur*, A.I.R. (1961), Allahabad, 447 at 450, the orders of the Magistrate were set aside in a revision application. There was also an application to expunge certain remarks made by the Magistrate. Broome, J. observed " Since the entire judgment has been quashed there is no necessity for a separate order expunging the adverse remarks ". I accordingly make no separate order in regard to this application.

Appeal allowed and accused acquitted.