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The Coalition Against Corruption

Cases and Materials Relating to Corruption Issue 2 – February 2003

Editor John Hatchard

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Editorial Contact: Transparency International Centre for Innovation and Research
Unit 27, 49 Atalanta Street, London, SW6 6TU, United Kingdom
Tel.+44 (0)207 610 1400 Fax +44 (0)207 610 1550
Email: stucker@ti-cir.org
Website: www.transparency.org

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ISSUE 2: EDITORIAL REVIEW

This issue of the *Bulletin* focuses largely on cases concerning the Law of Evidence and Criminal Law as well as on a number of constitutional issues. As before, they are drawn from a range of jurisdictions, in this case India, Lesotho, Australia and Hong Kong.

The 2002 decisions from Lesotho of *R v Sole* and *R v Acres International* are of the greatest importance. These relate to corruption offences connected with the Lesotho Highlands Water Project (LHWP): a project that was billed as the biggest construction and engineering scheme in Africa and intended to generate electricity for Lesotho and supply water to South Africa. In a series of decisions in 2001, the High Court of Lesotho ruled on a number of preliminary issues. That on jurisdiction was included in Issue 1 of the *Bulletin*.

In *R v Sole*, the former Chief Executive of the Lesotho Highlands Development Authority was convicted on 13 counts of bribery involving payments received from some of the international contractors involved in the project. There then followed the trial and conviction for bribery of the Canadian firm Acres International Limited. Here the accused company was a member of the international consortium of western construction firms which held contracts for work on the LHWP. The careful judgment of Lehohla J, below, merits detailed study. However, his meticulous analysis of the evidence presented to the court of the manner in which bribes were paid to Sole has been omitted here on grounds of length. The determination and ability of a small, impoverished developing country to mount such a prosecution is in itself noteworthy. More may well follow.

Another aspect of the two cases is the invaluable assistance provided to the prosecution by banks in South Africa and Switzerland, through the production of key banking records. This again emphasises the importance of States having in place appropriate international cooperation mechanisms to facilitate investigations into corruption.

Constitutional issues

The Supreme Court of India had a somewhat novel issue to consider in the case of *Union of India v Association For Democratic Reforms*. Set against a background of growing concern over possible corrupt practices within politics and links between criminal elements and the funding of politicians, the Court was asked to determine whether voters have a right to information about the background of their prospective parliamentary candidates, including their financial assets and liabilities. Further "in order to maintain the purity of elections and in particular to bring transparency in the process of the elections" the Court also examined the power of the Electoral Commission to investigate expenditure incurred by political parties.

Evidence

The task of proving corruption and related offences is often particularly difficult in that, given the "victimless" nature of the crime, direct evidence may well be unavailable. Indeed as the cases of *R v Sole* and *R v Acres International* illustrate, the perpetrators of the offences may well go to extreme lengths in an attempt to cover-up their wrongdoings.

This means that other evidential devices are needed. Cases on the use of presumptions and reversal of the onus of proof were noted in the last issue of the *Bulletin*. In this issue, the cases of *R v Sole* and *R v Acres International* discuss areas such as the use of circumstantial evidence, similar fact evidence and the use that a trier of fact may make of the failure of an accused to give evidence at the trial.

The discussion in *R v Sole* of the admissibility of similar fact evidence highlights the complexity and opaqueness of the subject. This emphasises the need for courts and/or law reformers to examine critically the need for such rules in the 21st century. Certainly courts in, for example, the United Kingdom, have made efforts in recent years to re-visit the rule and it may be time for others to consider following suit.

Criminal Law

In the 2002 case of *Shum Kwok Sher v Hong Kong Special Administrative Region (HKSAR)* the elements of the common law offence of *misconduct in public office* are carefully examined by the Court of Final Appeal of the Hong Kong Special Administrative Region. The case is also notable for its discussion on the constitutionality of the offence and the use made by the Court of comparative jurisprudence (as well as reference to several decisions of the European Court of Human Rights) in helping it reach its decision.

Two further aspects of the *Acres International* case also merit attention. Firstly, the scope of the offence of bribery. Secondly the issue of corporate criminal liability. Here the Court adopts a flexible approach to the effect that "provided that Acre's money was used, the intention of the firm's employees when paying the money to Z M Bam [and thence to Sole] is the intention ascribed to Acres".

Powers of anti-corruption commissions

The first issue of the *Bulletin* included the extraordinary judgment of the High Court of Kenya in *Gachiengo and Kahura v Republic* in which the constitutionality of the Kenya Anti-Corruption Authority was in issue.

The cases of *Parker v Miller* and *Parker v Anti-Corruption Commission* now examine the powers of an anti-corruption commission, in this case that of Western Australia. In *Parker v Miller*, the Supreme Court of Western Australia undertakes a very detailed examination of the functions and powers of the State's Anti-Corruption Commission. This is especially useful given the somewhat similar features of the legislation to that in other Commonwealth jurisdictions. Of additional interest is the discussion in both cases on the use that can be made of statements and other evidence obtained as a result of the far-reaching investigative powers of such commissions as well as what information concerning the investigations must be divulged to those under investigation.

The responsibility of judicial officers

In September 2002, the Kenya Constitutional Review Commission (KCRC) published its Report entitled *The People's Choice*. Its findings and recommendations include some interesting comments on the current state of the Kenyan judiciary (at pages 62-66) and serve to remind judicial officers, court officials and legal practitioners elsewhere of their responsibilities.

Courts and the Legal System

The courts are a very important part of the constitutional set-up of a country. Many institutions and rules which the draft Constitution includes will only have "teeth" if the courts and other mechanisms are unbiased, speedy, honest and accessible to the people....

The judiciary rivals politicians and the police for the most criticised sector of Kenyan public society today. For ordinary Kenyans the issues of delay, expense and corruption are the most worrying. For lawyers there is concern about competence and lack of independence from government.

- *Many people told us that they have lost confidence in the courts and wanted their disputes to be settled by their elders or in other traditional ways ...*
- *The procedure for the appointment of judges should be open, transparent and accountable. Many suggested that the judges should be nominated by an enlarged and independent Judicial Service Commission with representation from the Law Society and law faculties and civil society, and that nominations for appointment as judges should be vetted by Parliament.*
- *A large number said that judges should have a university degree (as opposed to professional training only) or even a master's degree while some said that qualifications for judgeship should include moral and ethical standing of candidates.*
- *Many wanted to reform the procedure for the removal of judges; some suggested that any citizen should have the right to file a complaint with the Judicial Service Commission requesting removal.*
- *Many people and organisations, like the Law Society, recommended that the present judges should be removed.*

It is important to emphasise that the CKRC is not saying that all judges are either incompetent or corrupt. Secondly, it accepts that the judicial system includes many people who are not judges — magistrates, registrars, clerks etc, and that some of these people have their own contribution to the poor repute of the Kenyan legal system. Thirdly — corruption involves two parties, and lawyers and clients who have given bribes or accepted improper deals are also to blame. The same goes for government interference — the Minister who steps in to ask a judge to decide a case in a particular way is as guilty as the judge who gives in to the pressure. Lawyers who do not provide the arguments, evidence and legal authorities for the cases in which they appear have to shoulder responsibility for indefensible decisions. And finally, there is something about the entire legal system - in common with most others - which is remote, mysterious and ultimately alien.

Because of the sensitivity of this issue the Commission invited a Panel of distinguished judges from other Commonwealth countries to make a fact finding visit and recommend some courses of action. The Panel said in its report:

"While many of Kenya's judges continue to fulfil their judicial office faithfully to their judicial oath, public confidence in the independence and impartiality of the Judiciary has virtually collapsed".

A group invited by the Government to advise on the issue of corruption which reported early in 2002 was even more damning, and it said

" there was unanimity amongst all interviewees that the judiciary lacks integrity and is corrupt. This sentiment was expressed across the political divide, the business community, the religious community and other interest groups. The Chief Justice did not share this view."

The Group were also told by a reliable source that when consideration was being given to appointing a judge to head the Kenya Anti-Corruption Commission, only three judges were considered to be untainted by corruption.

The independence of the judiciary is a core value which constitutions always provide for. Provisions in the draft constitution are significantly strengthened, including in the following ways:

- *The Judicial Service Commission which appoints judges is reconstituted so as to be more independent and involve more people who are not part of the legal system*

- *Certain judicial appointments must be confirmed by Parliament*
- *There is a statement that the judiciary shall be independent, expanding on this to say that*
 - *salaries etc shall not be changed during a judge's tenure to his or her disadvantage*
 - *that offices shall not be abolished during a judge's tenure*
 - *that the cost of the judiciary shall be met from the Consolidated Fund*
 - *that salaries and terms of service must be such as to encourage integrity and independence*
 - *providing that judges shall not be liable civilly or criminally for what they do in their capacity as judges (it might be best to make it clear that this does not cover corruption); the purpose of this is so that judges feel free to give their honest views on the law and the case before them*
- *As well as the normal requirements of having been in the legal profession for many years which apply to judges of the higher courts, there should be a statement to the effect judges must be of unimpeachable integrity.*

JOHN HATCHARD
Editor

CONSTITUTIONAL ISSUES

Constitutional right to silence - when the right may be exercised

R v MASUPHA EPHRAIM SOLE

See below

*Right of voters to know the background of parliamentary candidates - Electoral Commission -
Power to order parliamentary candidates to divulge details of their financial assets and liabilities -
Power of the Electoral Commission to investigate expenditure incurred by political parties.*

UNION OF INDIA v ASSOCIATION FOR DEMOCRATIC REFORMS

Supreme Court of India

Shah, Prasad Singh and Sema, JJ
Civil Appeal No 7178 of 2001

May 2, 2002

Cases referred to:

A.C. Josey Sivan Pillai (1984) 2 SCC 656
Attorney General v. Times Newspaper Ltd. [1973] 3 All ER 54
Common Cause (A Registered Society) v. Union of India and others (1996) 2 SCC 752
Delhi Development Authority v. Skipper Construction Co. (P) Ltd. (1996) 4 SCC 622
Delhi Judicial Service Association v. State of Gujarat (Nadiad Case) (1991) 4 SCC 406
Dinesh Trivedi, M.P. v. Union of India (1997) 4 SCC 306
Erach Sam Kanga v. Union of India W.P. No. 2632 of 1978 (unreported)
Indian Express Newspapers (Bombay) Private Ltd, v Union of India (1985) 1 SCC 641
Kanhiya Lal Omar v. R.K Trivedi (1985) 4 SCC 628
Kihoto Hollohan v. Zachillhu 1992 Supp (2) SCC 651
Lakshmi Kant Pandey v. Union of India (1984) 2 SCC 244
Mohinder Singh Gill v. Chief Election Commissioner, New Delhi (1978) 1 SCC 405
P.V. Narasimha Rao v. State (CBI/SPE) (1998) 4 SCC 626
Romesh Thappar v. State of Madras 1950 SCR 594
Secretary Ministry of Information and Broadcasting Government of India v. Cricket Association of Bengal and Others (1995) 2 SCC 161
State of Uttar Pradesh v. Raj Narain (1975) 4 SCC 428
State of W.B v. Sampat Lal (1985) 1 SCC 317,
Supreme Court Advocates-on-Record Association v. Union of India (1993) 4 SCC 441
Union Carbide Corp v. Union of India (1991) 4 SCC 584
K. Veeraswami v. Union of India (1991) 3 SCC 655
Vineet Narayan and Others v. Union of India and Another (1998) 1 SCC 226
Vishaka v. State of Rajasthan (1997) 6 SCC 241

SHAH, J (giving the judgment of the Court)

Short but important question involved in these matters is – in a nation wedded to republican and democratic form of government where election as a Member of Parliament or as a Member of Legislative Assembly is of utmost importance for governance of the country, whether, before casting votes voters have a right to know relevant particulars of their candidates? Further connected question is – whether the High Court had jurisdiction to issue directions as stated below, in a writ petition filed under Article 226 of the Constitution of India?

Before dealing with the aforesaid question, we would refer to the brief facts as alleged by the Petitioner – the Association for Democratic Reforms in Writ Petition No.7257 of 1999 filed before the High Court of Delhi for direction to implement the recommendations made by the Law Commission in its 170th Report and to make necessary changes under Rule 4 of the Conduct of Election Rules, 1961. It has been pointed out that Law Commission of India had at the request of Government of India, undertaken comprehensive study of the measures required to expedite hearing of election petitions and to have a thorough review of the Representation of the People Act 1951 (hereinafter referred to as "the Act") so as to make the electoral process more fair, transparent and equitable and to reduce the distortions and evils that have crept into the Indian electoral system and to identify the areas where the legal provisions required strengthening and improvement. It is pointed out that Law Commission has made recommendation for debarring a candidate from contesting an election if charges have been framed against him by a Court in respect of certain offences and necessity for a candidate seeking to contest election to furnish details regarding criminal cases, if any, pending against him. It has also suggested that true and correct statement of assets owned by the candidate, his/her spouse and dependent relations should also be disclosed. Petitioner has also referred Para 6.2 of the report of the Vohra Committee of the Government of India, Ministry of Home Affairs which reads as follows:-

"6.2 Like the Director CBI, the DIB has also stated that there has been a rapid spread and growth of criminal gangs, armed senas, drug Mafias, smuggling gangs, drug peddlers and economic lobbies in the country which have, over the years, developed and Page 3 of 30 extensive network of contacts with the bureaucrats/Government functionaries at the local levels, politicians, media persons and strategically located individuals in the non-State sector. Some of these Syndicates also have international linkages, including the foreign intelligence agencies. In this context the DIB has given the following examples:-

(i) In certain States, like Bihar, Haryana and UP, these gangs enjoy the patronage of local level politicians, cutting across party lines and the protection of governmental functionaries. Some political leaders become the leaders of these gangs, armed senas and over the years get themselves elected to local bodies, State Assemblies and the national Parliament. Resultantly, such elements have acquired considerable political clout seriously jeopardising the smooth functioning of the administration and the safety of life and property of the common man causing a sense of despair and alienation among the people.

(ii) The big smuggling Syndicates having international linkages have spread into and infected the various economic and financial activities including havala transactions, circulation of black money and operations of a vicious parallel economy causing serious damage to the economic fibre of the country. These Syndicates have acquired substantial financial and muscle power and social respectability and have successfully corrupted the Government machinery at all levels and yield enough influence to make the task of investigating and prosecuting agencies extremely difficult; even the members of the judicial system have not escaped the embrace of the Mafia.

(iii) Certain elements of the Mafia have shifted to narcotics, drugs and weapon smuggling and established narco-terrorism networks specially in the States of Jammu and Kashmir,

Punjab, Gujarat and Maharashtra. The cost of contesting elections has thrown the politician into the lap of these elements and led to a grave compromise by officials of the preventive/detective systems. The virus has spread to almost all the centres in the country, the coastal and the border States have been particularly affected.

(iv) The Bombay bomb blast case and the communal riots in Surat and Ahmedabad have demonstrated how the Indian underworld has been exploited by the Pakistani ISI and the latter's network in UAE to cause sabotage, subversion and communal tension in various parts of the country. The investigations into the Bombay bomb blast cases have revealed extensive linkages of the underworld in the various governmental agencies, political circles, business sector and the film world."

It is also contended that despite the Reports of the Law Commission and Vohra Committee, successive governments have failed to take any action and, therefore, petition was filed for implementation of the said reports and for a direction to the Election Commission to make mandatory for every candidate to provide information by amending Form 2-A to 2-E prescribed under the Conduct of Election Rules, 1961. After hearing the parties, the High Court by judgement and order dated 2nd November, 2000, held that it is the function of the Parliament to make necessary amendments in the Representation of the People Act, 1951 or the Election Rules and, therefore, Court cannot pass any order, as prayed, for amending the Act or the Rules.

However, the Court considered - whether or not an elector, a citizen of the country has a fundamental right to receive the information regarding the criminal activities of a candidate to the Lok Sabha or Legislative Assembly for making an estimate for himself - as to whether the person who is contesting the election has a background making him worthy of his vote, by peeping into the past of the candidate. After considering the relevant submissions and the reports as well as the say of the Election Commission, the High Court held that for making a right choice, it is essential that the past of the candidate should not be kept in the dark as it is not in the interest of democracy and well-being of the country. The Court directed the Election Commission to secure to voters the following information pertaining to each of the candidates contesting election to the Parliament and to the State Legislature and the parties they represent:-

1. Whether the candidate is accused of any offence(s) punishable with imprisonment? If so, the details thereof;
2. Assets possessed by a candidate, his or her spouse and dependent relations;
3. Facts giving insight to candidate's competence, capacity and suitability for acting as parliamentarian or legislator including details of his/her educational qualifications;
4. Information which the election commission considers necessary for judging the capacity and capability of the political party fielding the candidate for election to Parliament or the state legislature.

That order is challenged by Union of India by filing the present appeal.

On behalf of Indian National Congress IA No.2 of 2001 is also filed for impleadment/intervention in the appeal filed by the Union of India by *inter alia* contending that the High Court ought to have directed the writ petitioners to approach the Parliament for appropriate amendments to the Act instead of directing the Election Commission of India to implement the same. I.A. for intervention is granted.

Further, the People's Union for Civil Liberties (PUCL) has filed Writ Petition No.294 of 2001 under Article 32 of the Constitution praying that writ, order or direction be issued to the respondents – (a) to bring in such measures which provide for declaration of assets by the candidate for the elections and for such mandatory declaration every year during the tenure as an elected

representative as MP/MLA; (b) to bring in such measures which provide for declaration by the candidate contesting election whether any charge in respect of any offence has been framed against him/her; and (c) to frame such guidelines under Article 141 of the Constitution by taking into consideration 170th Report of Law Commission of India.

Submissions

We have heard the learned counsel for the parties at length. Mr Harish N. Salve, learned Solicitor General appearing for Union of India submitted that till suitable amendments are made in the Act and rules thereunder, the High Court should not have given any direction to the Election Commission. He referred to various sections of the Act and submitted that section 8 provides for disqualification on conviction for certain offences and section 8A provides for disqualification on the ground of corrupt practices. Section 32 provides for the nomination of a candidate for election if he/she is qualified to be chosen to fill that seat under the provisions of the Constitution and the Act or under the provisions of the Government of Union Territories Act, 1963. Thereafter, an elaborate procedure is prescribed for the presentation of nomination paper and requirements for a valid nomination. Finally, section 36 provides for scrutiny of nominations and empowers the returning officer to reject any nomination on the following grounds

- a. that on the date fixed for the scrutiny of nominations the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely- Articles 84, 102, 173 and 191 Part II of this Act and sections 4 and 14 of the Government of Union Territories Act, 1963 (20 of 1963); or
- b. that there has been a failure to comply with any of the provisions of section 33 or section 34; or
- c. that the signature of the candidate or the proposer on the nomination paper is not genuine.

It is his submission that it is for the political parties to decide whether such amendments should be brought and carried out in the Act and the Rules. He further submitted that as the Act or the Rules nowhere disqualify a candidate for non-disclosure of the assets or pending charge in a criminal case and, therefore, directions given by the High Court would be of no consequence and such directions ought not to have been issued.

Supplementing the aforesaid submission, Mr Ashwini Kumar, learned senior counsel appearing on behalf of intervenor, Indian National Congress, submitted that the Constituent Assembly had discussed and negated any requirement of educational qualification and possession of the assets to contest election. For that purpose, he referred to the Debates in the Constituent Assembly. He submitted that 3/4th of the population is illiterate and providing education as a qualification for contesting election was not accepted by the Constituent Assembly. Similarly, prescribing of property qualification for the candidates to contest election was also negated by the Constituent Assembly. He, therefore, submitted that furnishing of information regarding assets and educational qualification of a candidate is not at all relevant for contesting election and even for casting votes. Voters are not influenced by the educational qualification or by possession of wealth by a contesting candidate. It is his say that the party whom he represents is interested in purity of election and wants to stop entry of criminals in politics or its criminalisation but it is for the Parliament to decide the said question. It is submitted that delicate balance is required to be maintained with regard to the jurisdiction of the Parliament and that of Courts and once the Parliament has not amended the Act or the Rules despite the recommendation made by the Law Commission or the report submitted by the Vohra Committee, there was no question of giving any direction by the High Court to the Election Commission.

Mr K.K.Venugopal, learned senior counsel appearing on behalf of Election Commission exhaustively referred to the counter affidavit filed on behalf Election Commission. At this stage, we would refer to some part from the said affidavit. It is stated that issue of "persons with a criminal background" contesting elections has been engaging the attention of the Election

Commission of India for quite some time; even Parliament in the debates on 50 years of independence and the resolution passed in its special Session in August, 1997 had shown a great concern about the increasing criminalisation of politics; it is widely believed that there is criminal nexus between the political parties and anti-social elements which is leading to criminalisation of politics; the criminals themselves are now joining the election fray and often even getting elected in the process. Some of them have even adorned ministerial berths and, *thus law breakers have become law makers*. The Commission has suggested that candidate should be required to furnish information in respect of:-

- a. all cases in which he has been convicted of any offence and punished with any kind of imprisonment of amount of fine, and whether any appeal or application for review is pending in respect of any such cases of conviction, and
- b. all pending cases in which he is involved before any court of law in any offence, punishable with imprisonment for two years or more, and where the appropriate court has on prima facie satisfaction framed the charges against him for proceeding with the trial.

For declaration of assets, it has been suggested by the Election Commission that a candidate should be asked to disclose his assets, all immovable and movable properties which would include cash, bank balances, fixed deposits and other savings such as shares, stocks, debentures etc. Candidate also should be directed to disclose for voter information not only his assets but his liabilities like overdues to public financial institutions and government dues and charges on his/her properties.

For other directions issued by the High Court, it has been pointed out that it is for the political parties to project the capacity and capability of a candidate and that directions issued by the High Court are to be set aside. Finally, the Election Commission has suggested as under:-

"I. Each candidate for election to Parliament or a state legislature should submit, along with his nomination paper, a duly sworn affidavit, for the truth of which he is liable, as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his candidature:-

- (i) whether the candidate is convicted of any offence in any case in the past, and punished with imprisonment or fine; if so, the details thereof, together with the details of any pending appeals or applications for revision in any such cases of conviction;
- (ii) whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charges have been framed against him by the competent court of law, if so, the details thereof, together with the details of any pending appeals or applications for revision in respect of the charges framed in any such cases;
- (iii) whether the candidate is an income tax and/or wealth tax assessee and has been paying his tax(es) and filing his returns regularly, wherever he is liable, and if so, the financial year for which the last income tax/wealth tax return has been filed;
- (iv) the liabilities of the candidate, his/her spouse and minor children; that is to say, over-dues to any public financial institutions, any government dues and charges on his/her properties;
- (v) the educational qualifications of the candidate

II. The information by each candidate in respect of all the foregoing aspects shall be furnished by the candidate in a format to be prescribed by the Election Commission and shall be supported by a duly sworn affidavit, making him responsible for the correctness of the information so furnished and liable for any false statement.

III. The information so furnished by each candidate in the prescribed format and supported by a duly sworn affidavit shall be disseminated by the Election Commission,

through the respective returning officers by displaying the same on the notice board of the returning officer and making the copies thereof available freely and liberally to all other contesting candidates and the representatives of the print and electronic media. If any rival candidate furnishes information to the contrary, by means of a duly sworn affidavit, then such affidavit of the rival candidate may also be disseminated along with the affidavit of the candidate concerned.

The Court may lay down that it would be mandatory for each candidate for election to Parliament or State Legislature, to file along with his nomination paper, the aforesaid duly sworn affidavit, furnishing therein the information on the aspects detailed above and that the nomination paper of such a candidate who fails or refuses to file the required affidavit or files an incomplete affidavit shall be deemed to be an incomplete nomination paper within the meaning of section 33(1) of the Representation of the People Act, 1951 and shall suffer consequences according to law."

The aforesaid suggestions made by the Election Commission would certainly mean that, except certain modifications, the Commission virtually supports the directions issued by the High Court and that candidates must be directed to furnish necessary information with regard to pending criminal cases as well as assets and educational qualifications.

Mr Rajinder Sachar, learned senior counsel appearing on behalf of the petitioner relied upon the decision rendered by this Court in *Vineet Narayan and Others v. Union of India and Another* (1998) 1 SCC 226 and submitted that considering the widespread illiteracy of the voters and at the same time their overall culture and character if they are well-informed about the candidates contesting election as an MP or MLA they would be in a position to decide independently to cast their votes in favour of a candidate who, according to them, is much more efficient to discharge his functions as an MP or MLA. He therefore submitted that presuming that the High Court has no jurisdiction to pass orders to fill in the gaps, this Court can do so by exercising its powers under Article 142 which have the effect of law.

In *Vineet Narayan's case (supra)*, this Court dealt with the writ petitions under Article 32 of the Constitution of India brought in public interest wherein the allegation was against the Central Bureau of Investigation (CBI) of inertia in matters where accusation made was against high dignitaries. The primary question considered was – whether it was within the domain of judicial review and it could be an effective instrument for activating the investigating process which is under the control of the Executive? While discussing the powers of this Court it was observed:-

"The powers conferred on this Court by the Constitution are ample to remedy this defect and to ensure enforcement of the concept of equality. There are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of Article 141 and therefore is a mandate to all authorities to act in aid of the orders of this Court as provided in Article 144 of the Constitution. In a catena of decisions of this Court, this power has been recognised and exercised, if need be, *by issuing necessary directions to fill the vacuum till such time as the legislature steps in to cover the gap or the Executive discharges its role.*" (emphasis supplied)

In paragraph 51, the Court pointed out previous precedents for exercise of such power:-

"In exercise of the powers of this Court under Article 32 read with Article 142, guidelines and directions have been issued in a large number of cases and a brief reference to a few of them is sufficient. In *Erach Sam Kanga v. Union of India* W.P. No. 2632 of 1978 decided on 20.3.1979 (unreported) the Constitution Bench laid down certain guidelines relating to the Emigration Act. In *Lakshmi Kant Pandey v. Union of India* (1984) 2 SCC 244 guidelines for adoption of minor children by foreigners were laid down. Similarly in *State of W.B v. Sampat Lal* (1985) 1 SCC 317, *K. Veeraswami v. Union of India* (1991) 3 SCC 655, *Union Carbide Corpn v. Union of India* (1991) 4 SCC 584; *Delhi Judicial*

Service Association v. State of Gujarat (Nadiad Case) (1991) 4 SCC 406, *Delhi Development Authority v. Skipper Construction Co. (P) Ltd.* (1996) 4 SCC 622 and *Dinesh Trivedi, M.P. v. Union of India* (1997) 4 SCC 306 guidelines were laid down having the effect of law, requiring rigid compliance. In *Supreme Court Advocates-on-Record Association v. Union of India* (The Indian Judges case) (1993) 4 SCC 441, a nine-judge Bench laid down guidelines and norms for the appointment and transfer of judges which are being rigidly followed in the matter of appointments of High Court and Supreme Court Judges and transfer of High Court Judges. More recently in *Vishaka v. State of Rajasthan* (1997) 6 SCC 241 elaborate guidelines have been laid down for observance in workplaces relating to sexual harassment of working women. In *Vishaka (supra)* it was said (SCC pp.249-50, para 11).

"11. The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of Judiciary in the LAWASIA region. These principles were accepted by the Chief Justices of Asia and the Pacific at Beijing in 1995 (as amended at Manila 28th August, 1997) as those representing the minimum standards necessary to be observed in order to maintain the independence and observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are:

'Objectives of the Judiciary:

(10) The objectives and functions of the Judiciary include the following:

- (a) to ensure that all persons are able to live securely under the rule of law,
- (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
- (c) to administer the law impartially among persons and between persons and the State.'

Thus, an exercise of this kind by the court is now a well-settled practice which has taken firm roots in our constitutional jurisprudence. This exercise is essential to fill the void in the absence of suitable legislation to cover the field."

Ms. Kamini Jaiswal, learned counsel appearing on behalf of respondents in support of the decision rendered by the High Court referred to the decision in *Kihoto Hollohan v. Zachillhu* 1992 Supp (2) SCC 651 wherein while considering the validity of the Tenth Schedule of the Constitution, the court observed "democracy is a part of the basic structure of our Constitution: and the rule of law, and free and fair elections are basic features of democracy. One of the postulates of free and fair elections is provisions for resolution of election disputes as also adjudication of disputes relating to subsequent disqualifications by an independent authority". She, therefore, contended that for free and fair elections and for the survival of democracy, the entire history, background and the antecedents of the candidate are required to be disclosed to the voters so that they can judiciously decide in whose favour they should vote: otherwise, there would not be true reflection of electoral mandate. For interpreting Article 324, she submitted that this provision outlines broad and general principles giving power to the Election Commission and it should be interpreted in a broad perspective as held by this Court in various decisions. [*Editors' Note: Article 324 is set out at the end of the judgment*]

In these matters, the questions requiring considerations are:-

1. Whether Election Commission is empowered to issue directions as ordered by the High Court?

2. Whether a voter – a citizen of this country – has right to get relevant information, such as, assets, qualification and involvement in offence for being educated and informed for judging the suitability of a candidate contesting election as MP or MLA?

For deciding the aforesaid questions, we would proceed on the following accepted legal position.

At the outset, we would say that it is not possible for this court to give any directions for amending the Act or the Statutory Rules. It is for the Parliament to amend the Act and the Rules. It is also established law that no direction can be given, which would be contrary to the Act and the Rules.

However, it is equally settled that in cases when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted.

Further, it is to be stated that – (a) one basic structure of our Constitution is the republican and democratic form of government (b) the election to the House of People and the Legislative Assembly is on the basis of adults suffrage, that is to say, every person who is citizen of India and who is not less than 18 years of age on such date as may be fixed in that behalf by or under any Law made by the appropriate Legislature and is not otherwise disqualified under the Constitution or any law on the ground on non-residence, unsoundness of mind, crime or corrupt or illegal practice shall be entitled to be registered as a voter at any such election (Article 326) and (c) holding of any asset (immovable or movable) or any educational qualification is not the eligibility criteria to contest election, and (d) under Article 324, the superintendence, direction and control of the conduct of all elections to parliament and to the Legislature of every State vests in the Election Commission. The phrase “conduct of elections” is held to be of wide amplitude which would include power to make all necessary provisions for conducting free and fair elections.

Question No.1

Whether the Election Commission is empowered to issue directions as ordered by the High Court

In our opinion, the decision of even an illiterate voter, if properly educated and informed about the contesting candidate, would be based on his own relevant criteria of selecting a candidate. In a democracy, periodical elections are conducted for having efficient governance for the country and for the benefit of citizens – voters. In a democratic form of government, voters are of the utmost importance. They have a right to elect or re-elect on the basis of the antecedents and past performance of the candidate. They have a choice of deciding whether holding of educational qualification or holding of property is relevant for electing or re-electing a person to be their representative. Voters have to decide whether they should cast their vote in favour of a candidate who is involved in a criminal case. For maintaining purity of elections and a healthy democracy, voters are required to be educated and well informed about the contesting candidates. Such information would include assets held by the candidate, his qualification including educational qualifications and antecedents of his life including whether he was involved in a criminal case and if the case is decided – its result, if pending – whether the charge is framed or cognizance is taken by the court. There is no necessity of suppressing the relevant facts from the voters.

The Constitution Bench of this Court in *Mohinder Singh Gill v. Chief Election Commissioner, New Delhi* (1978) 1 SCC 405 while dealing with a contention that the Election Commission has no power to cancel the election and direct a re-poll, referred to the pervasive philosophy of democratic elections which Sir Winston Churchill vivified in the matchless words:-

"At the bottom of all tributes paid to democracy is the little man, walking into a little booth, with a little pencil, making a little cross on a little bit of paper – no amount of rhetoric of voluminous discussion can possible diminish the overwhelming importance of the point".

Further, the Court in (para 23) observed thus:-

"Democracy is government by the people. It is a continual participative operation, not a cataclysmic periodic exercise. The little man, in his multitude, marking his vote at the poll does a social audit of his Parliament plus political choice of this proxy. Although the full flower of participative Government rarely blossoms, the minimum credential of popular government is appeal to the people after every term for a renewal of confidence. So we have adult franchise and general elections as constitutional compulsions. The right of election is the very essence of the Constitution. It needs little argument to hold that the heart of the parliamentary system is free and fair elections periodically held, based on adult franchise, although social and economic democracy may demand much more."

Thereafter, the Court dealt with the scope of Article 324 and observed (in para 39) thus:-

"... Article 324, in our view, operates in areas left unoccupied by legislation and the words 'superintendence', 'direction' and 'control', as well as 'conduct of all elections' are the broadest terms...."

The Court further held:

"Our conclusion on this limb of the contention is that Article 324 is wide enough to supplement the powers under the Act, as here, but subject to the several conditions on its exercise we have set out."

The Court also held (in para 77) thus:-

"We have been told that whether the Parliament has intended a hearing it has said so in the Act and the rules and inferentially where it has not specified it is otiose. There is no such sequitur. The silence of a statute has no exclusionary effect except where it flows from necessary implication. Article 324 vests a wide power and where some direct consequence on candidate emanates from its exercise we must read this functional obligation."

In the concluding portion of Paragraph 92, the court *inter alia* observed thus:-

"1(b) 'Election' in this context, has a very wide connotation commencing from the presidential notification calling upon the electorate to elect and culmination in the declaration of the returned candidate.

2(a) The Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. *This responsibility may cover powers, duties and functions of many sorts, administration or other, depending on the circumstances.*

(b) Two limitations at least are laid on its plenary character in the exercise thereof. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission, shall act in conformity with, not in violation of, such provisions *but where such law is silent, Article 324 is a reservoir of power to act for the avowed purpose of not divorced from, pushing forward a free and fair election with expedition...*". (our emphasis)

In a concurring judgement, Goswami, J with regard to Article 324 observed (in para 113) thus:-

"Since the conduct of all elections to the various legislative bodies and to the offices of the President and the Election Commission, *the framers of the Constitution took care to leave scope for the exercise of residuary power by the Commission in its own right, as a creature of the Constitution, in the infinite variety of situations that may emerge from time*

to time in such a large democracy as ours. Every contingency could not be foreseen, or anticipated with precision. That is why there is no hedging in Article 324. The Commission may be required to cope with some situation which may not be provided for in the enacted laws and the rules” (emphasis supplied)

The aforesaid decision of the Constitution Bench unreservedly lays down that in democracy the little man – the voter - has overwhelming importance on the point and the little - large Indian (voter) should not be hijacked from the course of free and fair elections by subtle perversion of discretion of casting votes. In a continual participative operation of periodical elections, the voter does a social audit of his candidate and for such audit he must be well informed about the past of the candidate. Further, Article 324 operates in areas left unoccupied by legislation and the words ‘superintendence, directions and control’ as well as ‘conduct of all elections’ are the broadest terms. The silence of the statute has no exclusionary effect except where it flows from necessary implication. Therefore in our view, it would be difficult to accept the contention raised by Mr. Salve, learned Solicitor-General and Mr. Kumar, learned Senior Counsel appearing on behalf of the intervenor, that if there is no provision in the Act or the Rules, the High Court ought not to have issued such directions to the Election Commission. It is settled that the power of the Commission is plenary in character in exercise thereof. In statutory provisions or rules, it is known that every contingency could not be foreseen or anticipated with precision, therefore, the Commission can cope with the situation where the field is unoccupied by issuing the necessary orders.

Further, this Court in *Kanhiya Lal Omar v. R.K Trivedi and others* (1985) 4 SCC 628 dealt with the constitutional validity of the Election Symbols (Reservation and Allotment) Order 1968 which was issued by the Election Commission in its plenary exercise of power under Article 324 of the Constitution read with Rules 5 and 10 of the Conduct of Election Rules 1961. The challenge was on the ground that the Symbols Order which is legislative in character could not be issued by the Commission because the Commission is not entrusted by law with the power to issue such an order regarding the specification, reservation and allotment of symbol that may be chosen by the candidates at elections in Parliamentary and Assembly constituencies. It was urged that Article 324 of the Constitution which vests the power of superintendence, directions and control of all elections to Parliament and to the Legislature of a State in the Commission cannot be construed as conferring the power on the Commission to issue the symbols. The Court negated the said contention and pertinently observed that “the word ‘election’ in Article 324 is used in a wide sense so as to include *the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the result of the process.* India is a country which consists of millions of voters. Although they are quite conscious of their duties politically, unfortunately, a large percentage of them are still illiterate.”

The Court in paragraph 16 held:-

Order are not traceable to the Act or the Rules, *the power of the Commission under Article 324 (1) of the Constitution which is plenary in character can encompass all such provisions.* Article 324 of the Constitution operates in areas left unoccupied by legislation and the words ‘superintendence’, ‘directions’ and ‘control’ as well as ‘conduct of all elections’ are the broadcast terms which would include the power to make all such provisions. [See *Mohinder Singh Gill v. Chief Election Commissioner New Delhi* (1978) 1 SCC 405 and *A.C. Josey Sivan Pillai* (1984) 2 SCC 656]. (our emphasis)

The Court further observed:-

“While construing the expression “Superintendence, direction and control” in Article 324 (1) one has to remember that every norm which lays down a rule of conduct cannot possibly be elevated to the position of legislation or delegated legislation. *There are some authorities or persons in certain grey areas who may be sources of rules of conduct and who at the same time cannot be equated to authorities or persons who can make law, in*

the strict sense in which it is understood in jurisprudence. A direction may mean an order issued to a particular individual or a precept, which many may have to follow. It may be a specific or general order. One has also to remember that the source of power in this case is the Constitution, the highest law of the land, which is the repository and source of all legal powers and any power granted by the Constitution for a specific purpose should be construed liberally so that the object for which the power is effectively achieved. Viewed from this angle it cannot be said that any of the provisions of the Symbols Order suffers from want of authority on the part of the Commission, which has issued it.” (our emphasis)

Thereafter, this Court in *Common Cause (A Registered Society) v. Union of India and others* (1996) 2 SCC 752 dealt with election expenses incurred by political parties and submission of return and the scope of Article 324 of the Constitution, where it was contended that the cumulative effect of the three statutory provisions, namely, section 293-A of the Companies Act 1956, section 13-A of the Income Tax, 1961 and section 77 of the Representation of the People Act, 1951, is to bring transparency in election funding and people of India must know the source of expenditure incurred by the political parties and by the candidates in the process of election. It was contended that election in the country are fought with the help of money power which is gathered from black sources and once elected to power, it becomes easy to collect tons of black money, which is used for retaining power and for re-election and that this vicious circle has totally polluted the basic democracy in the country. The Court held that purity of an election is fundamental to democracy and the Commission can ask the candidates about the expenditure incurred by the candidates and by a political party and for this purpose. The Court also held:-

“...The political parties in their quest for power spend more than one thousand crore of rupees on the General Election (Parliament alone), yet nobody accounts for the bulk of the money so spent and there is no accountability anywhere. Nobody discloses the source of the money. There are no proper accounts and no audit. From where does the money come nobody knows. In a democracy where the rule of law prevails this type of naked display of black money, by violating the mandatory provisions of law, cannot be permitted.”

Thereafter, the court observed that under Article 324 the Commission can issue suitable directions to maintain the purity of elections and in particular to bring transparency in the electoral process. The Court also held (paragraph 26) thus:-

“Superintendence and control over the conduct of election by the Election Commission include the scrutiny of all expenses incurred by a political party, a candidate or any other association or body of persons or by any individual in the course of the election. The expression ‘Conduct of election’ is wide enough to include in its sweep, the power to issue directions – in the process of the conduct of an election – to the effect that the political parties shall submit to the Election Commission, for its scrutiny, the details of the expenditure incurred or authorized by the parties in connection with the election of their respective candidates.”

The Court further observed that the Constitution has made comprehensive provision under Article 324 to take care of surprise situations and it operates in areas left unoccupied by legislation.

Question No.2

The right to know about the candidates contesting elections.

Now we would refer to various decisions of this Court dealing with citizens’ right to know which is derived from the concept of ‘freedom of speech and expression’. The people of the country have a right to know every public act, everything that is done in a public way by public functionaries. MPs or MLAs are undoubtedly public functionaries. Public education is essential for the

functioning of the process of popular government and to assist the discovery of truth and strengthening the capacity of an individual in participating in decision making process. The decision-making process of a voter would include his right to know about public functionaries who are required to be elected by him.

In *State of Uttar Pradesh v. Raj Narain and others* (1975) 4 SCC 428, the Constitution Bench considered whether privilege could be claimed by the Government of Uttar Pradesh under section 123 of the Evidence Act in respect of what has been described for the sake of brevity to be the Blue Book summoned from the Government of Uttar Pradesh and certain documents summoned from the Superintendent of Police, Rae Bareilly, Uttar Pradesh. The court observed that “the right to know which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security”. The Court pertinently observed:-

“In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. *The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries.* They are entitled to know the particulars of every public transaction in all its bearing...”. (our emphasis)

In *Indian Express Newspapers (Bombay) Private Ltd, and Others v Union of India and Others* (1985) 1 SCC 641, this Court dealt with the validity of customs duty on the newsprint in context of Article 19(1)(a). The Court observed (in para 32) thus:

“The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic country cannot make responsible judgements....”

The Court further referred (in para 35) to the following observations made by this Court in *Romesh Thappar v. State of Madras* 1950 SCR 594:-

“...(The freedom) lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible. A freedom of such amplitude might involve risks of abuse... (But) it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away to injure the vigour of those yielding the proper fruits”.

Again in paragraph 68, the Court observed:-

“...The public interest in freedom of discussion (of which the freedom of the press is one aspect) stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves.” (*per* Lord Simon of Glaisdale in *Attorney General v. Times Newspaper Ltd.* [1973] 3 All ER 54). Freedom of expression, as learned writers have observed, has four broad social purposes to serve: (i) it helps an individual to attain self-fulfilment, (ii) it assists in the discovery of truth. (iii) it strengthens the capacity of an individual in participating in decision-making and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of society should be able to form their own beliefs and communicate them freely to others. In sum, the fundamental principle involved here is the people’s right to know. Freedom of speech and expression should therefore, receive generous support from all those who believe in the participation of people in the administration....”

From the afore-quoted paragraph, it can be deduced that the members of a democratic society should be sufficiently informed so that they may influence intelligently the decisions which may affect themselves and this would include their decision of casting votes in favour of a particular

candidate. If there is a disclosure by a candidate as sought for then it would strengthen the voters in taking appropriate decision of casting their votes.

In *Secretary Ministry of Information and Broadcasting Government of India and Others v. Cricket Association of Bengal and Others* (1995) 2 SCC 161 this Court considered the question of the right to telecast a sports event. The Court referred to Article 10 of the European Convention on Human Rights which *inter alia* states: "10.1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

Thereafter, the Court summarised the law on the freedom of speech and expression under Article 19(1)(a) as restricted by Article 19(2) thus:-

"The freedom of speech and expression includes the right to acquire information and to disseminate it. Freedom of speech and expression is necessary for self-fulfillment. It enables people to contribute to debate on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts."

The Court deals with the right of telecast and (in paragraph 75) as follows:-

"In a team event such as cricket, football, hockey etc., there is both individual and collective expression. It may be true that what is protected by Article 19(1)(a) is an expression of thought and feeling and not of the physical or intellectual prowess or skill. It is also true that a person desiring to telecast sports events when he is not himself a participant in the game does not seek to exercise his right of self-expression. However, the right to freedom of speech and expression also includes the right to educate, to inform and to entertain and also the right to be educated, informed and entertained. The former is the right of the telecaster and the latter that of the viewers. The right to telecast sporting event will therefore also include the right to educate and inform the present and the prospective sportsmen interested in the particular game and also to inform and entertain the lovers of the game. Hence, when a telecaster desires to telecast a sporting event, it is incorrect to say that the free-speech element is absent from his right."

The Court thereafter (in paragraph 82) held:-

"True democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non-information all equally create an uninformed citizenry which makes democracy a farce when the medium of information is monopolised either by a partisan central authority or by private individuals or oligarchic organisations. This is particularly so in a country like ours where about 65 per cent of the population is illiterate and hardly 1_ percent of the population has an access to the print media which is not subject to pre-censorship."

The Court also observed – "a successful democracy posits an 'aware' citizenry".

If the right to telecast and right to view to sport games and right to impart such information is considered to be part and parcel of Article 19(1)(a), we fail to understand why the right of a citizen/voter – a little man – to know about the antecedents of his candidate cannot be held to be a fundamental right under Article 19(1)(a). In our view, democracy cannot survive without free and fair elections, without free and fairly informed voters. Votes cast by uninformed voters in

favour of X or Y candidate would be meaningless. As stated in the aforesaid passage, one-sided information, disinformation, misinformation and non-information all equally create an uninformed citizenry which makes democracy a farce. Therefore, casting of a vote by misinformed and non-informed voter or a voter having one-sided information only is bound to affect the democracy seriously. Freedom of speech and expression includes right to impart and receive information which includes freedom to hold opinions. Entertainment is implied in freedom of 'speech and expression' and there is no reason to hold that freedom of speech and expression would not cover right to get material information with regard to a candidate who is contesting election for a post which is of utmost importance in the democracy.

In *Dinesh Trivedi. M.P. and Others v. Union of India and Others* (1997) 4 SCC 306, the Court dealt with a petition for disclosure of a report submitted by a Committee established by the Union of India on 9th July 1993 which was chaired by erstwhile Home Secretary Shri N.N.Vohra which subsequently came to be popularly known as Vohra Committee. During July 1995, a known political activist Naina Sahni was murdered and one of the persons arrested happened to be an active politician who had held important political posts and newspaper published a series of articles on the criminalisation of politics within the country and the growing links between political leaders and mafia members. The attention of the masses was drawn towards the existence of the Vohra Committee Report. It was suspected that the contents of the Report were such that the Union Government was reluctant to make it public.

In the said case, the Court dealt with citizen's rights to freedom of information and observed "in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the Government which, having been elected by them, seek to formulate sound policies of governance aimed at their welfare". The Court also observed "democracy expects openness and openness is concomitant of a free society...".

Mr Kumar on behalf of the intervenor submitted that the aforesaid observations are with regard to the citizen's right to know about the affairs of the Government, but this would not mean that citizens have a right to know the personal affairs of MPs or MLAs. In our view, this submission is totally misconceived. There is no question of knowing personal affairs of MPs or MLAs. The limited information is to help voters decide whether the person who is contesting election is involved in any criminal case and if involved what is the result. Further there are widespread allegations of corruption against the persons holding positions of power. In such a situation, the question is not of knowing personal affairs but to have openness in democracy for attempting to cure the cancerous growth of corruption by few rays of light. Hence, citizens who elect MPs or MLAs are entitled to know that their representative has not misconducted himself in collecting wealth after being elected. This information could be easily gathered only if prior to election, the assets of such person are disclosed. For this purpose, learned counsel Mr. Muralidhar referred to the practice followed in the United States and the form which is required to be filled in by a candidate for election to the Senate which provides that such candidate is required to disclose all his assets and that of his spouse and dependants. The form is required to be re-filled every year. Penalties are also prescribed which include removal from ballot.

Mrs Jaiswal referred to the All India Service (Conduct) Rules, 1968 and pointed out that a member of the All India Service is required to disclose his/her assets including that of spouse and dependant children. She referred to Rule 16 of the said Rules, which provides for declaration of movable, immovable and valuable property by a person who becomes a member of the Service. The relevant part of Rule 16 states:-

"16. (1) Every person shall, where such person is a member of the Service at the commencement of these rules, before such date after such commencement as may be specified by the Government in this behalf, or, where such person becomes a member of the Service after commencement, on his first appointment to the service submit a return of his assets and liabilities in such form as may be prescribed by the Government giving the full particulars regarding:-

- (a) the immovable property owned by him, or inherited or acquired by him or held by him on lease or mortgage, either in his own name or in the name of any member of his family or in the name of the other person.
- (b) Shares, debentures, postal Cumulative Time Deposits and cash including bank deposits inherited by him or similarly owned, acquired or held by him;
- (c) other movable property inherited by him or similarly owned, acquired or held by him; and
- (d) debts and other liabilities incurred by him directly or indirectly".

Such officer is also required to submit an annual return giving full particulars regarding the immovable and movable property inherited by him or owned or acquired or held by him on lease or mortgage either in his own name or in the name of any member of his family or in the name of any other person.

It is also submitted that even the Gazetted Officers in all government services are required to disclose their assets and thereafter to furnish details of any acquisition of property annually. In our view, it is rightly submitted that in a democratic form of government, an MP or MLA enjoys a higher status and duty to the public. In *P.V. Narasimha Rao v. State (CBI/SPE)* (1998) 4 SCC 626 the Court *inter alia* considered whether Member of Parliament is a public servant. The Court [in para 162] held thus:-

"A public servant is 'any person who holds an office by virtue of which he is authorised or required to perform any public duty'. Not only, therefore, must the person hold an office but he must be authorised or required by virtue of that office to perform a public duty. Public duty is defined by Section 2(b) of the said Act to mean 'a duty in the discharge of which the State, the public or that community at large has an interest'. In a democratic form of government it is the Member of Parliament or a State Legislature who represents the people of his constituency in the highest lawmaking bodies at the Centre and the State respectively. Not only is he the representative of the people in the process of making the laws that will regulate their society, he is their representative in deciding how the funds of the Centre and the State shall be spent and in exercising control over the executive. *It is difficult to conceive of a duty more public than this or of a duty in which the State, the public and the community at large would have greater interest....*" (our emphasis)

The words emphasised highlight the important status of parliamentarians.

Finally, in our view this Court would have ample power to direct the Commission to fill the void, in the absence of suitable legislation covering the field and the voters are required to be well-informed and educated about contesting candidates so that they can elect proper candidate by their own assessment. It is the duty of the executive to fill the vacuum by executive orders because its field is conterminous with that of the legislature and where there is inaction by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations to provide a solution till such time the legislature acts to perform its role by enacting proper legislation to cover the field. The adverse impact of a lack of probity in public life leading to a high degree of corruption is manifold. Therefore, if the candidate is directed to declare his/her spouse's and dependants' assets immovable, moveable and valuable articles it would have its own effect. This Court in *Vishaka v. State of Rajasthan* (1997) 6 SCC 241 dealt with the sexual harassment of women at the work place which resulted in violation of fundamental right of gender equality and the right to life and liberty and laid down that in absence of legislation, it must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of Independence of the Judiciary in the LAWASIA region. The decision has laid down the guidelines and prescribed the norms to be strictly observed in all work places until suitable legislation is enacted to occupy the field. In the present case also, there is no legislation or rules providing for giving necessary information to the voters. As stated earlier, this case was relied upon in *Vineet Narayan* where the Court issued necessary guidelines to the CBI and the Central Vigilance

Commission (CVC) as there was no legislation covering the said field to ensure proper implementation of rule of law:

To sum up the legal and constitutional position which emerges from the aforesaid discussion, it can be stated that:-

1. The jurisdiction of the Election Commission is wide enough to include all powers necessary for the smooth conduct of elections and the word 'elections' is used in a wide sense to include the entire process of election which consists of several stages and embraces many steps.
2. The limitation on plenary exercise of power is when the Parliament or State Legislature has made a valid law relating to or in connection with elections. Here the Commission is required to act in conformity with the said provisions. In cases where the law is silent, Article 324 is a reservoir of power to act for the avowed purpose of having free and fair elections. The Constitution has taken care of leaving scope for the exercise of residuary power by the Commission in its own right as a creature of the Constitution in the infinite variety of situations that may emerge from time to time in a large democracy, as every contingency could not be foreseen or anticipated by the enacted laws or the rules. By issuing the necessary directions, the Commission can fill the vacuum till there is legislation on the subject. *In Kunhiya Lal Omar's case*, the Court construed the expressions "superintendence, direction and control" in Article 324(1) and held that a direction may mean an order issued to a particular individual or a precept which may have to follow and it may be a specific or a general order and such phrase should be construed liberally empowering the election commission to issue such orders.
3. The word "elections" includes the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the process of choosing a candidate. Fair election contemplates disclosure by the candidate of his past including the assets held by him so as to give a proper choice to the candidate according to his thinking and opinion. As stated earlier, in the *Common Cause case (supra)*, the court dealt with a contention that elections in the country are fought with the help of money power which is gathered from black sources and once elected to power it becomes easy to collect tons of black money, which is used for retaining power and for re-election. If on affidavit a candidate is required to disclose the assets held by him at the time of election, voters can decide whether he could be re-elected even in case where he has collected tons of money.
4. To maintain the purity of elections and in particular to bring transparency in the process of elections, the Commission can ask the candidates about the expenditure incurred by the political parties and this transparency in the process of election would include transparency of a candidate who seeks election or re-election. In a democracy, the electoral process has a strategic role. The "little" man of this country would have the basic elementary right to know full particulars of a candidate who is to represent him in Parliament where laws to bind his liberty and property may be enacted.
5. The right to information in a democracy is universally recognised and it is a natural right flowing from the concept of democracy. At this stage, we would refer to Article 19(1) and (2) of the International Covenant of Civil and Political Rights which is as under:-

"(1) Everyone shall have the right to hold opinions without interference.
(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."
6. A cumulative reading of the plethora of decisions of this Court as referred to above, makes it clear that if the field meant for legislature and executive is left unoccupied to the detriment of the public interest, this Court has ample jurisdiction under Article 32 read with Articles 141

and 142 of the Constitution to issue the necessary directions to the Executive to subserve the public interest.

7. Under our Constitution, Article 19(1)(a) provides for freedom of speech and expression. Voters' right to freedom of speech or expression in case of election would include casting of votes, that is to say, speaking out or expressing themselves by casting their vote. For this purpose, information about the candidate to be selected is a must. The voters' right to know the antecedents including criminal past of candidates contesting election for MP or MLA is much more fundamental and basic for the survival of democracy.

In this view of the matter, it cannot be said that the directions issued by the High Court are unjustified or beyond its jurisdiction. However, considering the submissions made by the learned counsel for the parties at the time of hearing of this matter, the said directions are modified as stated below.

The Election Commission is directed to call for information on affidavit by issuing the necessary order in exercise of its power under Article 324 of the Constitution of India from each candidate considering seeking election to Parliament or a state legislature as a necessary part of his nomination paper, furnishing therein, information on the following aspects in relation to his/her candidature:-

1. Whether the candidate is convicted/acquitted/discharged of any criminal offence in the past-- if any, and whether he was punished with imprisonment or a fine
2. Six months prior to the filing of nomination papers, whether the candidate is accused in any pending case, of any offence punishable with imprisonment for two years or more, and in which charge is framed or cognizance is taken by a court of law, If so, the details thereof.
3. The assets (immovable, movable, bank balances etc.) of a candidate and of his/her spouse and that of dependents
4. Liabilities, if any, particularly whether there are any over dues [to] any public financial institution or Government dues.
5. The educational qualifications of the candidate.

It is to be stated that the Election Commission has from time to time issued instructions and orders to meet with the situation where the field is unoccupied by legislation. Hence, the norms and modalities to carry out and give effect to the aforesaid directions should be drawn up properly by the Election Commission as early as possible and in any case within two months.

In the result Civil Appeal No.7178 of 2001 is partly allowed and the directions issued by the High Court are modified as stated above. Appeal stands disposed of accordingly Writ Petition (C) No. 294 of 2001 is allowed to the aforesaid extent.

There shall be no order as to costs.

[Editor's Note:

Article 324 of the Constitution of India provides as follows:

324. Superintendence, direction and control of elections to be vested in an Election Commission.

- (1) *The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission).*
- (2) *The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.*
- (3) *When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission.*
- (4) *Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appointment after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1).*
- (5) *Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine*

Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the Conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment:

*Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.
....]*

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R v MASUPHA EPHRAIM SOLE

High Court of Lesotho

Mr Acting Justice B. P. Cullinan

20 May 2002

For the Director of Public Prosecutions: Mr G. H. Penzhorn, S.C., Mr H.H.T. Woker.
For the Accused: Mr E. H. Phoofolo.

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- (9) *Tsekoa and Others v General Manager Lesotho Flour Mills and Others* (1989) LAC (1985-1989) 330 (CA)
- (10) *Sekhonyana v Ketso and Others* Unreported 1998, (HC)
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- (50) *R v Mpanza* 1915 AD 348
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- (54) *R v Barlin* 1926 AD 459
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- (93) *S v Khomo* 1975 (1) SA 344 (D & CLD)
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- (98) *S v Brown en 'n Ander* 1996 (2) SACR 49; 1996 (11) BCLR 1480 (NC)
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CULLINAN, AJ

THE INDICTMENT

The Indictment reads as follows:

“Particulars of the Accused:

1. The Accused is Masupha Ephraim Sole an adult Mosotho male of 123 Lower Thetsane, Europa, Maseru.

Preamble to the Charges:

2. The Lesotho Highlands Water Project (“LHWP”) is one of the biggest dam projects in the world. The Lesotho Highlands Development Authority (“the LHDA”) was created by statute to supervise this project and the Accused was appointed as its first Chief Executive with effect from October 1986. In his position as Chief Executive the Accused was closely involved with the evaluation and awarding of contracts in this project, as well as variation orders and contractors claims. As Chief Executive he was in a position of trust vis-a-vis the LHDA and also his employer, the Lesotho Government, which had seconded him to LHDA.

3. The consortium/partnership Highlands Water Venture (“HWV”), Sogreah, Spie Batignolles, the consortium/partnership Lesotho Highlands Project Contractors (“LHPC”), Asea Brown Boveri Schaltanlagen GmbH, Germany, (“ABB, Germany”), Asea Brown Boveri Generation AG, Sweden (“ABB, Sweden”), Lahmeyer International GmbH (“Lahmeyer”), Acres International Limited (“Acres”), Dumez International (“Dumez”), Sir Alexander Gibb & Partners Ltd (“Gibb”), Cegelec and Coyne et Bellier (“Coyne”) are/were contractors and/or consultants who were awarded contracts in respect of the project. Sogreah, Gibb and Coyne were members of the engineering consultancy, Lesotho Highlands Consultants, a consortium/partnership similarly engaged on the LHWP.

WHEREAS at all relevant times to the charges set out below:

4. The Accused was a civil servant in the employ of the Lesotho Government and as such a State or public official.

5. While retaining his status as a civil servant the Accused was seconded to the LHDA as Chief Executive Officer.

6. The LHDA was a statutory body established in terms of section 4 of the Lesotho Highlands Developments Authority Order No.23 of 1986.

7. The LHDA was the authority entrusted with the responsibility for the implementation, operation and maintenance of the LHWP, which is a water project being built on the rivers in the mountains of eastern and central Lesotho, which project entails the building of dams, tunnels and hydro-electric power facilities in Lesotho for the transfer of water to South Africa and for the generation of electricity for consumption in Lesotho and the eastern Free State, a province of South Africa.

8. The LHWP is the product of a treaty between the Kingdom of Lesotho and the Republic of South Africa, which treaty was concluded between the two governments in October 1986.

9. At all relevant times the governing body of the LHDA was its Board of Directors, but the day to day affairs of the LHDA were the responsibility of its Chief Executive, the Accused, who in terms of section 8 of the Lesotho Highlands Development Authority Order of 1986 was responsible for

the execution of the policy of the LHDA and the transaction of its day to day business. As such he was in a position to make or influence decisions relating to the LHWP.

10. For purposes of the LHWP the LHDA concluded contracts with various contractors and consultants who, in terms of the contract so concluded, would be responsible for building or supervising aspects of the LHWP.

11. HWV, Sogreah, Spie Batignolles, LHPC, ABB Germany, ABB Sweden, Lahmeyer, Acres, Dumez, Gibb, Cegelec and Coyne were contractors and/or consultants who were involved, through contracts concluded by them with the LHDA, in the building of the LHWP.

12. The counts of bribery referred to hereinafter relate to:

12.1 payments made by the mentioned contractors/consultants-

12.1.1 to the Accused into his Swiss bank account(s), either directly or through intermediaries:

12.1.2 which monies were destined/intended for the benefit of the Accused in Lesotho; and

12.1.3 which monies or part thereof were transmitted by the Accused to either directly or through South Africa;

12.2 contracts which were-

12.2.1 to be executed in Lesotho by the said contractors /consultants; and/or

12.2.2 were negotiated by or on behalf of the said contractors/consultants with the LHDA in Lesotho; and /or

12.2.3 were concluded by or on behalf of the said contractors/consultants with the LHDA in Lesotho; and/or

12.2.4 contracts in respect of which the said contractors/consultants were to benefit either in Lesotho or from the work they were to perform in Lesotho; and /or

12.3 variation orders and/or contractors' claims arising out of contracts referred to in paragraph 12.2 above; and /or

12.4 payments which were made or were to be made by the LHDA to the said contractors/consultants pursuant to contracts between the LHDA and the said contractors and/or other contractors, such payments being made or initiated or authorised in Lesotho.

13. By reason of the facts set out in the foregoing paragraphs, together with the facts alleged in the indictment as a whole, this Honourable Court has jurisdiction in respect of the bribery charges referred to below.

NOW THEREFORE the Accused is guilty of the charges set out below.

The Charges

Count 1:- Bribery

14.1 Prior to February 1991 and on a date to the Crown unknown and in Lesotho alternatively at a place to the Crown unknown HWV and/or one or more or all of its constituent members corruptly offered payment(s) to the Accused in return for the Accused exercising his influence/powers in his official capacity for the benefit of HWV and/or one or other of its constituent members, to wit in return for the Accused using his opportunities or powers as Chief Executive of the LHDA to further the private interests of HWV or one or other of its constituent members in their involvement in the LHWP, which offer the Accused unlawfully intentionally and corruptly accepted.

14.2 Pursuant to the agreement so reached, which agreement endured at least over the period hereinafter mentioned, to wit during or about the period February 1991 to May 1993 during which period payments were made, HWV and/or one or more or all of its constituent members paid at least USD375 000 to the Accused.

Count 2:- Bribery

15.1 Prior to 5 February 1988 and on a date to the Crown unknown and in Lesotho alternatively at a place to the Crown unknown Sogreah, alternatively Coyne, alternatively Cegelec, alternatively one or more of them, corruptly offered payment(s) to the Accused in return for the Accused exercising his influence/powers in his official capacity for the benefit of Sogreah, alternatively Coyne, alternatively Cegelec, alternatively one or more of them, to wit in return for the Accused using his opportunities or powers as Chief Executive of the LHDA to further the private interests of Sogreah, alternatively Coyne, alternatively Cegelec, alternatively one or more of them, in its involvement in the LHWP, which offer the Accused unlawfully intentionally and corruptly accepted.

15.2 Pursuant to the agreement so reached, which agreement endured at least over the period hereinafter mentioned, to wit during or about the period 5 February 1988 to 19 September 1994 during which period payments were made, Sogreah, alternatively Coyne, alternatively Cegelec, alternatively one or more of them, paid FF808 270.37 to the Accused.

Count 3:- Bribery

16.1 Prior to 27 May 1988 and on a date to the Crown unknown and in Lesotho alternatively at a place to the Crown unknown Spie Batignolles corruptly offered payment(s) to the Accused in return for the Accused exercising his influence/powers in his official capacity for the benefit of Spie Batignolles, to wit in return for the Accused using his opportunities or powers as Chief Executive of the LHDA to further the private interests of Spie Batignolles in its involvement in the LHWP, which offer the Accused unlawfully intentionally and corruptly accepted.

16.2 Pursuant to the agreement so reached, which agreement endured at least over the period hereinafter mentioned, to wit during or about the period 27 May 1988 to 8 January 1991 during which period payments were made, Spie Batignolles paid FF941 882.62 to the Accused.

Count 4:- Bribery

17.1 Prior to March 1991 and on a date to the Crown unknown and in Lesotho alternatively at a place to the Crown unknown LHPC and/or one or more or all of its constituent members corruptly offered payment(s) to the Accused in return for the Accused exercising his influence/powers in his official capacity for the benefit of LHPC and /or one or other of its constituent members, to wit in return for the Accused using his opportunities or powers as Chief Executive of the LHDA to further the private interests of LHPC or one or other of its constituent members in their involvement in the LHWP, which offer the Accused unlawfully intentionally and corruptly accepted.

17.2 Pursuant to the agreement so reached, which agreement endured at least during the period hereinafter mentioned, to wit during or about the period March 1991 to August 1994 during which period payments were made, LHPC or one or more of its constituent members paid FF4,638 594.62 and GB£139,102.95 and DM1,221.016.58 to the Accused.

Count 5:- Bribery

18.1 Prior to 13 May 1994 and on a date to the Crown unknown and in Lesotho alternatively at a place to the Crown unknown ABB, Germany corruptly offered payment(s) to the Accused in return for the Accused exercising his influence/powers in his official capacity for the benefit of ABB, Germany, to wit in return for the Accused using his opportunities or powers as Chief Executive of the LHDA to further the private interests of ABB, Germany in its involvement in the LHWP, which offer the Accused unlawfully intentionally and corruptly accepted.

18.2 Pursuant to the agreement so reached, and whilst the agreement endured, to wit on or about 13 May 1994, ABB, Germany paid USD7 978.55 to the Accused.

Count 6:- Bribery

19.1 Prior to June/July 1994 and on a date to the Crown unknown and in Lesotho alternatively at a place to the Crown unknown ABB, Sweden, alternatively Spartak Trading Limited for and on behalf of ABB, Sweden, alternatively on behalf of a contractor/consultant involved in the LHWP to the Crown unknown, corruptly offered payment(s) to the Accused in return for the Accused exercising his influence/powers in his official capacity for the benefit of ABB, Sweden, alternatively a contractor/consultant involved in the LHWP to the Crown unknown, to wit in return for the Accused using his opportunities or powers as Chief Executive of the LHDA to further the private interests of ABB, Sweden, alternatively a contractor/consultant involved in the LHWP to the Crown unknown, in its involvement in the LHWP, which offer the Accused unlawfully intentionally and corruptly accepted.

19.2 Pursuant to the agreement so reached, which agreement endured at least during the period hereinafter mentioned, to wit during or about the period June 1994 to July 1994 during which period payments were made, ABB, Sweden, alternatively Spartak Trading for and on behalf of ABB, Sweden, alternatively on behalf of a contractor/consultant involved in the LHWP to the Crown unknown, paid USD 181 760 to the Accused.

Count 7:- Bribery

20.1 Prior to April 1992 and on a date to the Crown unknown and in Lesotho alternatively at a place to the Crown unknown Lahmeyer and/or Lahmeyer MacDonald Consortium, corruptly offered payment(s) to the Accused in return for the Accused exercising his influence/powers in his official capacity for the benefit of Lahmeyer and/or Lahmeyer MacDonald Consortium, to wit in return for the Accused using his opportunities or powers as Chief Executive of the LHDA to further the private interests of Lahmeyer and/or Lahmeyer MacDonald Consortium, in its involvement in the LHWP, which offer the accused unlawfully intentionally and corruptly accepted.

20.2 Pursuant to the agreement so reached, which agreement endured at least during the period hereinafter mentioned, to wit during or about the period April 1992 to April 1997 during which period payments were made, Lahmeyer and/or Lahmeyer MacDonald Consortium, paid DM261 747.64 and SAR 184 774.20 to the Accused.

Count 8:- Bribery

21.1 Prior to 8 February 1991 and on a date to the Crown unknown and in Lesotho alternatively at a place to the Crown unknown Lahmeyer, alternatively Dumez, alternatively Dumez Nigeria Limited for and on behalf of Dumez, alternatively one or more of them, corruptly offered payment(s) to the Accused in return for the Accused exercising his influence/powers in his official capacity for the benefit of Lahmeyer, alternatively Dumez, alternatively one or both of them, to wit in return for the Accused using his opportunities or powers as Chief Executive of the LHDA to further the private interests of Lahmeyer, alternatively Dumez, alternatively one or both of them, in its involvement in the LHWP, which offer the Accused unlawfully intentionally and corruptly accepted.

21.2 Pursuant to the agreement so reached, and whilst the agreement endured, to wit on or about 8 February 1991, Lahmeyer, alternatively Dumez, alternatively Dumez Nigeria Limited for and on behalf of Dumez, alternatively one or more of them, paid FF135 760.00 to the Accused.

Count 9:- Bribery

22.1 Prior to June 1991 and on a date to the Crown unknown and in Lesotho alternatively at a place to the Crown unknown Acres corruptly offered payment(s) to the Accused in return for the Accused exercising his influence/powers in his official capacity for the benefit of Acres, to wit in return for the Accused using his opportunities or powers as Chief Executive of the LHDA to

further the private interests of Acres in its involvement in the LHWP, which offer the Accused unlawfully intentionally and corruptly accepted.

22.2 Pursuant to the agreement so reached, which agreement endured at least during the period hereinafter mentioned, to wit during or about the period June 1991 to January 1998 during which period payments were made, Acres paid CAD 493 168.28 to the Accused.

Count 10:- Bribery

23.1 Prior to 31 January 1991 and on a date to the Crown unknown and in Lesotho alternatively at a place to the Crown unknown Acres corruptly offered payment(s) to the Accused in return for the Accused exercising his influence/powers in his official capacity for the benefit of Acres, to wit in return for the Accused using his opportunities or powers as Chief Executive of the LHDA to further the private interests of Acres in its involvement in the LHWP, which offer the Accused unlawfully intentionally and corruptly accepted.

23.2 Pursuant to the agreement so reached, which agreement endured at least during the period hereinafter mentioned, to wit during or about the period 31 January 1991 to 3 April 1991 during which period payments were made, Acres paid CAD188 255.48 to the Accused.

Count 11:- Bribery

24.1 Prior to 19 December 1991 and on a date to the Crown unknown and in Lesotho alternatively at a place to the Crown unknown Dumez, alternatively Dumez Nigeria Limited for and on behalf of Dumez, alternatively Lahmeyer, alternatively one or more of them, corruptly offered payment(s) to the Accused in return for the Accused exercising his influence/powers in his official capacity for the benefit of Dumez, alternatively Lahmeyer, to wit in return for the Accused using his opportunities or powers as Chief Executive of the LHDA to further the private interests of Dumez, alternatively Lahmeyer, in its involvement in the LHWP, which offer the Accused unlawfully intentionally and corruptly accepted.

24.2 Pursuant to the agreement so reached, which agreement endured at least during the period hereinafter mentioned, to wit during or about the period 19 December 1991 to 24 June 1992 during which period payments were made, Dumez, alternatively Dumez Nigeria Limited for and on behalf of Dumez, alternatively Lahmeyer, alternatively one or more of them, paid FF230 480.00 to the Accused.

Count 12:- Bribery

25.1 Prior to 11 October 1989 and on a date to the Crown unknown and in Lesotho alternatively at a place to the Crown unknown Dumez, alternatively Dumez Nigeria Limited for and on behalf of Dumez, corruptly offered payment(s) to the Accused in return for the Accused exercising his influence/powers in his official capacity for the benefit of Dumez, to wit in return for the Accused using his opportunities or powers as Chief Executive of the LHDA to further the private interests of Dumez in its involvement in the LHWP, which offer the Accused unlawfully intentionally and corruptly accepted.

25.2 Pursuant to the agreement so reached, which agreement endured at least during the period hereinafter mentioned, to wit during or about the period 11 October 1989 to 21 June 1990 during which period payments were made, Dumez, alternatively Dumez Nigeria Limited for and on behalf of Dumez, paid FF509 905.62 to the Accused.

Count 13:- Bribery

26.1 Prior to 19 December 1990 and on a date to the Crown unknown and in Lesotho alternatively at a place to the Crown unknown Dumez, alternatively Dumez Nigeria Limited for and on behalf of Dumez, alternatively Lahmeyer, alternatively one or more of them, corruptly offered payment(s) to the Accused in return for the Accused exercising his influence/powers in his official capacity for the benefit of Dumez, alternatively Lahmeyer, to wit in return for the Accused using his opportunities or powers as Chief Executives of the LHDA to further the private interests

of Dumez, alternatively Lahmeyer, in its involvement in the LHWP, which offer the Accused unlawfully intentionally and corruptly accepted.

26.2 Pursuant to the agreement so reached, and whilst the agreement endured, to wit on or about 19 December 1990, Dumez, alternatively Dumez Nigeria Limited for and on behalf of Dumez, alternatively Lahmeyer, alternatively one or more of them, paid FF194 370.00 to the Accused.

Count 14:- Bribery

27.1 Prior to December 1990 and on a date to the Crown unknown and in Lesotho alternatively at a place to the Crown unknown Gibb corruptly offered payment(s) to the Accused in return for the Accused exercising his influence/powers in his official capacity for the benefit of Gibb, to wit in return for the Accused using his opportunities or powers as Chief Executive of the LHDA to further the private interests of Gibb in its involvement in the LHWP, which offer the Accused unlawfully intentionally and corruptly accepted.

27.2 Pursuant to the agreement so reached, which agreement endured at least during the period hereinafter mentioned, to wit during or about the period December 1990 to September 1994 during which period payments were made, Gibb paid GBP51 478.01 to the Accused.

Count 15:- Bribery

28.1 Prior to 14 February 1990 and on a date to the Crown unknown and in Lesotho alternatively at a place to the Crown unknown Cegelec, alternatively Sogreah, alternatively Coyne, alternatively one or more of them, corruptly offered payment(s) to the Accused in return for the Accused exercising his influence/powers in his official capacity for the benefit of Cegelec, alternatively Sogreah, alternatively Coyne, alternatively one or more of them, to wit in return for the Accused using his opportunities or powers as Chief Executive of the LHDA to further the private interests of Cegelec, alternatively Sogreah, alternatively Coyne, alternatively one or more of them, in its involvement in the LHWP, which offer the Accused unlawfully intentionally and corruptly accepted.

28.2 Pursuant to the agreement so reached, which agreement endured at least during the period hereinafter mentioned, to wit during or about the period 14 February 1990 to 22 May 1995 during which period payments were made, Cegelec, alternatively Sogreah, alternatively Coyne, alternatively one or more of them, paid FF6 538 840 to the Accused.

Count 16:- Bribery

29.1 Prior to 22 April 1988 and on a date to the Crown unknown and in Lesotho alternatively at a place to the Crown unknown Coyne, alternatively Sogreah, alternatively Cegelec, alternatively one or more of them, corruptly offered payment(s) to the Accused in return for the Accused exercising his influence/powers in his official capacity for the benefit of Coyne, alternatively Sogreah, alternatively Cegelec, alternatively one or more of them, to wit in return for the Accused using his opportunities or powers as Chief Executive of the LHDA to further the private interests of Coyne, alternatively Sogreah, alternatively Cegelec, alternatively one or more of them, in its involvement in the LHWP, which offer the Accused unlawfully intentionally and corruptly accepted.

29.2 Pursuant to the agreement so reached, which agreement endured at least during the period hereinafter mentioned, to wit during or about the period 22 April 1988 to 21 September 1994 during which period payments were made, Coyne, alternatively Sogreah, alternatively Cegelec, alternatively one or more of them, paid FF 353 394 to the Accused.

Count 17:- Fraud

30. The Accused is charged with the crime of fraud in that on or about 11 June 1991 and at or near Maseru in the district of Maseru, the said Accused did unlawfully and with intent to defraud, misrepresent to the LHDA that he, in June/July 1991, would be attending the International Conference on Large Dams ("the ICOLD conference") in Vienna, Austria for its duration on behalf

of the LHDA and that by reason thereof he required the LHDA to pay all his travel costs associated therewith, and did by means of the said misrepresentation induce the LHDA, to its prejudice, actual or potential, to pay for the said costs in the amount of M17 110.50 and to authorise him to attend the said ICOLD conference whereas, at the time the Accused made the aforesaid misrepresentation, he well knew that he did not intend to attend the ICOLD conference for its entire duration, but that he would travel to, inter alia, Paris and Moscow, either on personal business or on holiday or on business unconnected to that of the ICOLD conference.

Count 18:- Fraud

31. The Accused is guilty of the crime of fraud, in that upon or about 18 July 1991, and at or near Maseru in the district of Maseru, the said Accused, did unlawfully and with intent to defraud, misrepresent to the LHDA that he, in June/July 1991, had incurred expenditure in the amount of M18,874.42 and that he incurred such expenditure in attending to the affairs of the LHDA, and did by means of the said misrepresentation induce the LHDA, to its prejudice, actual or potential, to pay such amount to him, whereas at the time the Accused made the representation, he well knew that he had not incurred such expenditure, alternatively, that he had incurred such expenditure otherwise than attending to the affairs of the LHDA.

THE COMMON LAW OFFENCE OF BRIBERY

At this stage I wish to express my appreciation of the wide body of authority placed before by the Crown and the defence. Their closing submissions have been of great assistance to me and have rendered my task lighter. The contents of the Court's ruling of 13th March, 2001, are relevant. Therein I referred at page 6 to the following definition in *South African Criminal Law and Procedure* Vol II (Common Law Crimes) Revised 2nd Ed (1982) (2nd Ed by Professor Milton) (Reprint 1992) at p227:

“Bribery (as a bribee) is committed by a State official who unlawfully and intentionally agrees to take any consideration in return for action or inaction by him in an official capacity.”

It proves convenient to reproduce certain extracts of the Court's ruling of 13th March, 2001, the first of those being at page 10:

“As I see it, therefore, there is no need for the Crown to allege that any of the contractor/consultant accused 'improperly' benefitted from any action or inaction by the accused, that is, in the sense that the award of any contract etc. was not fully deserving. Secondly, there is no need, as *Hunt and Milton* indicate, for the Crown to allege that any action or inaction by the accused was 'in his official capacity'; it is sufficient if it was in an official capacity. Thirdly, it is necessary for the Crown to allege that the accused acted unlawfully and intentionally.”

The Court went on to observe at p11 that the time-honoured formula is,

“unlawfully, intentionally and corruptly.”

And at pages 14/15

“[T]he crime of bribery by briber and bribee is complete upon agreement (*R v Kutboodien* [1] at p192/193, *R v Visser* [2] per de Wet J at pp298/299 and *R v Ingham* [3] per Rosenow AJ at p48B). It is not necessary that the consideration should be paid and accepted. The action or inaction sought may actually be in accordance with the bribee's duty; nonetheless, of course, it is bribery, as earlier said, 'to bribe an official to do his duty' (*R v Lavenstein* [4] at p352, *R v Patel* [5] at p522, *S v Van der Westhuizen* [6] at p63 E). It is immaterial that the solicited action or inaction is in the public interest (*R v Lavenstein* [4] at p353). Indeed it is also immaterial (to the briber) that the briber's goal is

not achieved (*R v Sacks* [7] per Tindall JA at p427 and *R v Kutboodien* [1] per Gardiner JP at p297 and de Wet J at p298).”

Ultimately the Court went on to hold at page 19 that:

“[T]he Crown is not obliged to plead any specific alleged action or inaction in an official capacity by the ... accused, which is *unknown* to the Crown.”

To prove any of the counts of bribery therefore, the Crown must prove that the accused

- (1) as a State official
- (2) unlawfully, intentionally and corruptly,
- (3) agreed to take any consideration,
- (4) in return for action or inaction by him in an official capacity.

STATE OFFICIAL

The accused was appointed to the public service in the permanent and pensionable establishment on 3rd August, 1972. On 1st November, 1986 he held the position of Senior Engineer, Water Affairs. On that date he was seconded to the Lesotho Highlands Development Authority (“LHDA” or “the Authority”) as Chief Executive thereof, which post he held until he was suspended therefrom in October, 1994 and ultimately, after a disciplinary hearing, was removed therefrom in November 1995. Some delay was experienced in his re-absorption into the public service, that is, into the Ministry of Natural Resources, the Principal Secretary of that Ministry observing on 3rd September, 1996 that “we do not have a suitable position for Mr Sole.” Ultimately the accused was transferred from the Ministry of Natural Resources to the Ministry of Works on 1st November, 1996, that is, as Principal Engineer apparently in the Labour Construction Unit of the latter Ministry. Finally, on 21st December 1998 the accused wrote to the Principal Secretary Ministry of Public Service stating that he wished to avail of the provisions (section 30(3)) of the Public Service Act, No 13 of 1995 and to take early retirement from the public service, having reached the age of forty-five years (that is, in 1993). The accused also subsequently indicated that, instead of receiving full pension, he wished to avail of the option of receiving a reduced pension and a gratuity upon retirement. On the 30th December, 1999 the accused received payment (in arrears) of such reduced pension, that is, in respect of the period 22nd December, 1998 to 31st December 1999. He also received payment on the latter date in respect of his terminal gratuity.....

The Pensions Proclamation, No 4 of 1964, was obviously drafted at a time when the aspect of secondment was not a familiar concept. Suffice it to say, that, having been drafted in the colonial era, it provides for service under Government and also “other public service”, that is, briefly, service elsewhere in the Commonwealth. There is no specific reference to service on secondment within the Kingdom, however. Nonetheless section 2, the interpretation section of the Proclamation, provides that “public service” *inter alia* means “any other service ... that the Minister ... has determined to be public service for the purpose of this Proclamation”. Again regulations 14 and 15 (1) of the Pensions Regulations, 1964, scheduled to the Proclamation read thus”

“14 (1) Subject to the provisions of these regulations, qualifying service shall be the inclusive period between the date on which an officer begins to draw salary in respect of public service and the date of his leaving the public service without deduction of any period during which he has been absent on leave.

(2) No period which is not qualifying service by virtue of paragraph (1) of this regulation shall be taken into account as pensionable service.

(3) No period during which the officer was not in public service shall be taken into account as qualifying service or as pensionable service.

15 (1) Except as otherwise provided in these regulations, only continuous public service shall be taken into account as qualifying service or as pensionable service:

Provided that any break in service caused by temporary suspension of employment in the public service not arising from misconduct or voluntary resignation shall be disregarded for the purposes of this paragraph.”

As to regulation 14 (1) it might be said that the accused’s date of “leaving the public service” was the 22nd December 1998 and not before then. As against that, it can be said, with regard to regulation 14 (3) that the accused “was not in public service” while he was on secondment: that again would depend upon any determination by the Minister under section 2 of the Proclamation. Further, it can obviously be said that the break (if it can be called that) in the accused’s service in the public service was “caused by temporary suspension of employment in the public service not arising from misconduct or voluntary resignation”: that being the case, it can be said, for the purposes of regulation 15(1), that the accused’s service in the public service was continuous.

I do not know the basis upon which the payment of gratuity or pension to the accused was computed.... As far as this trial goes, in the accused’s interests, it is safer to assume that he was not paid pension in respect of the period spent on secondment. But I do not see that that affects the situation.

The word, “second” is defined in the *Concise Oxford Dictionary* 7 Ed (1982, Reprint 1998) thus: “... transfer (official) temporarily to another department; hence ~ MENT”

Mr Phoofolo refers to the following dicta of the late Kotze JA (Browde and Leon JJ A concurring) in the case of *National University of Lesotho v Moeketsi* (8) at pp102/103:

“The word secondment means transference of a person from one post of employment to another or to render available the services of a person from one department to another. Implicit in a contract of secondment is that when it terminates the *contract of employment* between the seconder and the person seconded *resumes*.” (Italics added)

The fact that the contract of employment *resumed*, indicates that during the period of secondment the main contract of employment was in a state of suspension. In brief, the seconded officer remained an employee of the seconding or main employer.

In the accused’s case, while he could no longer, while on secondment, identify with a particular post in the public service, he nonetheless remained a public officer, whose pension rights, if they did not accumulate during secondment, were at least preserved, so that they renewed upon return to the public service. Indeed, Mrs Makoko testified that the accused’s salary rights were also preserved, so that on return from secondment he was entitled to salary at the particular increment he would have attained to, had he not been seconded. As will be seen, the tenure of the incumbent in the post of Chief Executive of the LHDA was that of five years, which term was renewable. The post was not, compared to the accused’s tenure of office in the public service (wherein he had 14 years service before secondment), what I would describe as “permanent and pensionable”, though no doubt a superannuation scheme was applicable thereto. In all the circumstances, I consider that the accused’s substantive post was that of public officer, (at a grade of no less than Senior Engineer), whilst he temporarily held the post of Chief Executive of the LHDA. I have little doubt that, in terms of responsibility, the latter post represented the accused’s main indeed sole concern. Nonetheless, the title of Chief Executive of the LHDA did not fully represent the accused’s status: he was in fact a public officer holding the post of Chief Executive of the LHDA. He was, however, first and foremost, a public officer, and so remained until he eventually resigned from public service with effect from 22nd December, 1998. He was then at all relevant times a state official, for the purposes of the common law offence of bribery.

In any event, the question arises whether, in his capacity as Chief Executive of the LHDA, he was also a state official for such purposes. Mr Phoofole has referred me to the cases of *Tsekoa and Others v General Manager, Lesotho Flour Mills and Others* (9) and *Sekhonyana v Ketso and Others* (10). In the *Tsekoa* case, Aaron JA (the late Mahomed JA (as he then was) and Plewman JA concurring) held that employees of the Lesotho Flour Mills (a Government enterprise) were not public officers holding offices of emolument within the public service. In the *Sekhonyana* case, Ramodibedi J (Maqutu and Peete JJ concurring) held that a Lecturer in the University of Lesotho (which is funded by Government) was not the holder of a “public office”. I respectfully agree with those decisions but I do not see that they advance the position of the accused in the matter. Firstly, as I have found, the accused, during his secondment, remained a public officer. Secondly, for the purposes of the common law offence of bribery, the term “state official” is not necessarily synonymous with the term “public officer”, as defined in the Constitution and the Interpretation Act, 1977.

In the old case of *R v Whitaker* (11) the accused was a Lt. Colonel and a Battalion Commander in the British Army. He was convicted of bribery and conspiracy to bribe in respect of catering contracts, as to which it was alleged that, “being a public and ministerial officer”, he had accepted bribes as an inducement “to shew favour and to forbear to shew disfavour” to certain caterers, in relation to the said catering contracts. In an appeal against conviction the Court of Criminal Appeal (Lawrence, Lush and Atkin JJ) observed (per Lawrence J) at pp1296/1297:

“Then it was argued that the appellant was not 'a public and ministerial officer'. A public officer is an officer who discharges any duty in the discharge of which *the public are interested*, more clearly so if he is *paid out of a fund provided by the public*. *If taxes go to supply his payment* and the public have an interest in the duties he discharges, he is a public officer. The addition of the words 'and ministerial' does not affect the matter. In our view he is also a ministerial officer. The Attorney-General was right in his contention that the word 'ministerial' is here used in contrast with “judicial”; every officer who is not a judicial is a ministerial officer. No other word would aptly qualify the position of the appellant as a public officer, and it is clear that the colonel of a regiment is a public ministerial officer.”(Italics added)

In the case of *R v Muller* (12) the accused had been convicted of bribery. Matthews AJP (Lansdown J (as he then was) concurring) observed at p143:

“The accused is an assistant stock inspector employed in the Department of Agriculture under a Government veterinary officer. It is in respect of his conduct as assistant stock inspector that the charge on each of the five counts is framed. The functions which he exercises as assistant stock inspector arise out of the provisions of the Diseases of Stock Acts and the regulations made thereunder. Though apparently *he was not an officer in the public service and had apparently no rights or privileges under the Public Service Acts, his remuneration is derived from State funds*. The principal Diseases of Stock Act, (Act No.14 of 1911), however expressly contemplates the existence of officers of the Department of Agriculture with powers conferred and duties imposed upon them by that Act and the regulations made thereunder. Moreover in at least one Act of Parliament (No. 5 of 1930) “an assistant stock inspector” is mentioned in company with persons having designations which undoubtedly imply that they are State officials. The Legislature seems thus to have recognised an assistant stock inspector as a State official. In view of this Act I regard it as unnecessary to discuss the authorities to which Mr *von Gerard* has referred the Court or to attempt a definition of 'State official' for the purposes of bribery at common law. It is sufficient to say (1) that since an assistant stock inspector is a person recognised by law as holding an office and has authority by virtue of that office to act on behalf of the Executive Government in a defined matter or manner, he is for this purpose a State official; and (2) that he may commit the offence of bribery at common law if, when exercising or purporting to exercise such authority, he, in conflict with his official duty, receives in respect of an act or omission any benefit or advantage. It seems to follow,

though it is perhaps unnecessary to express a definite opinion, that *it is immaterial whether or not the duration of such person's appointment is regulated by law or whether or not he is remunerated for his services and, if so, whether or not such remuneration is derived from State funds. The sole test is authority recognised by law and misuse of that authority in return for material advantage.*" (Italics added)

The issue came before the Appellate Division in 1943 in the case of *R v Sacks and Another* (7). The two appellants had been convicted of bribery in respect of a payment made to an Army Officer, an Acting Major, the Officer Commanding the Salvage Unit, Quartermaster's Stores, of the Defence Forces at Pretoria. The trial Judge reserved a question of law for the decision of the Appellate Division, that is, as to whether the Officer, Major Hart, was a State official for the purposes of the common law offence of bribery. Tindall JA (Watermeyer ACJ and Centlivres JA (as they then were) concurring) observed at pp423/424:

"The Placaat [of 1715] does not define the word *beampten* [officials] and so far as I am aware no South African court has attempted to give an exhaustive definition of the term. Obviously it cannot be confined to members of the 'public service', as defined in Act 27 of 1923, a statute which includes certain officials in the 'public service' (a term of limited signification) for special purposes, e.g. organisation, discipline and pensions, and excludes persons in respect of whom the common law of bribery must obviously be applicable, e.g. private secretaries to Ministers and persons employed in the railway administration. In ascertaining the scope of the term official, some guidance may be derived from a consideration of the various classes of officials in respect of whom the common law has been applied in the decisions of South African courts. They are the following: The acting mining commissioner of Johannesburg and a commissioner appointed by the Government as a member of the health Committee of Johannesburg (*Bensons Aaron's case* [13]), a sergeant of police (*dictum in Rex v Charteris* [14]), an assizer appointed by the Minister under Act 32 of 1922 (*Rex v Kutboodien* [1]) an assistant stock inspector *R v Muller* [12], an assistant in the office of the Government Printer, Pretoria (*Rex v Visser*, [2]). In *R v Muller* [12] the stock inspector had no rights or privileges under the statutes dealing with the Public Service but his remuneration was derived from State funds, and Matthews, A.J.P., laid stress on the fact that in Act 5 of 1930 an assistant stock inspector is mentioned in the company of persons having designations which imply that they are State officials and stated that since an assistant stock inspector is a person recognised by law as holding an office and has authority by virtue of that office to act on behalf of the executive Government in a defined matter or manner, he is for this purpose a State official",

and at pages 424/425:

"In the *King v Whitaker*, in a judgment of the Court of Criminal Appeal, it is stated that 'a public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is a public officer'. While it is not necessary to express any opinion on the question whether that definition adequately defines the term official used in our common law relating to bribery, it is obvious that the nature of the duties entrusted to the person bribed and the fact that the State employs him and pays his salary are important factors in determining whether he is an official."

At page 426 Tindall JA observed that "Major Hart's immediate superior was Colonel Naude, the Director of Quartermaster Services". The learned Judge of Appeal went on to observe:

"Assuming (as was contended by the defence at the trial) that it was not part of Hart's functions to recommend the sale of goods, to receive tenders or to recommend the acceptance of any tender, the evidence which I have summarised shows that he was in

the employ of the State, paid by the State and entrusted with responsible duties in the preservation of goods of great value belonging to the State. It is true that there is no evidence to show that his employment was permanent, and I am prepared to assume that he could be dismissed at will. But this consideration does not seem to me to affect the question whether he was an official while he was in the employ of the State. There must be many persons temporarily employed by the State at the present time who are discharging important duties which in ordinary times devolve on permanent officials. The fact that Hart held military rank also does not militate against the view that he was an official. I do not think it desirable to attempt to give a comprehensive definition of the term official. On the facts proved it is clear that Major Mart was an official of the State at the time of the alleged bribe.”

In the case of *Manilall v R* (15) the appellant was convicted of bribing a police constable of the City Police Durban. Carlisle J (Broome J (as he then was) concurring), in dismissing the appeal, observed at p33:

“Now it is true that the constable was a member of the Durban City Police and had been appointed as such by the Council pursuant to the provisions of section 83 of Law No. 19 of 1872. But it is also the case that he was both a police officer and a traffic inspector within the definition of those terms given in section 92 of the Road Traffic Ordinance, No. 10 of 1937. It is also the case that in terms of Regulation 8 passed under that ordinance, it was his duty to perform the duties and exercise the powers imposed or conferred upon him by the ordinance and the regulations. It is further plain that he could detain and question the driver of the taxi under section 75(1)(a), (b) or (c) or under section 76(1) of the Ordinance. Moreover, he was a “peace officer” as defined in section 390 of Act No. 31 of 1917 and as such was authorised by section 26(a) of that Act to arrest the driver of this taxi on a charge of overloading. Lastly, it is clear that in carrying out such statutory duties, the constable was not acting in any way as agent or servant of the City Council.”

Carlisle J referred to the above dicta of Tindall JA in the *Sacks* case (7). Then, referring to the *Charteris* case (14) where a police sergeant was involved in bribery, Carlisle J observed at p34:

“Now the constable in the present case was an official charged with similar powers against offenders under the Road Traffic Ordinance. It appears to me to be obvious that to offer him money to induce him to perform his duty must constitute the offence of bribery. It is true that this constable was *not paid from State funds* but was paid by the Council out of its own funds. But that aspect of the matter seems to me to be *immaterial*. In *R v Muller*, Matthews, A.J.P., thought that it was immaterial whether the official was remunerated or not and if he were remunerated whether his remuneration was derived from State funds. The sole test, said the learned Judge, is *authority recognised by law* and misuse of that authority in return for material advantage. That judgment was concurred in by Lansdown, J., and I respectfully agree with the view therein expressed. There is much to be said for the view that if Burgess had been acting solely in his capacity as a Borough Constable and had been bribed to misuse his authority in breach of his duty the offence of bribery at common law would have been established. It is not necessary to decide that question in the present case but it is difficult to appreciate the difference between a police officer lawfully appointed by a local authority and one appointed by the State in considering the essentials of the common law offence of bribery.” (Italics added)

In the case of *R v Libala* (16) where an acting headman was convicted of bribery, it was accepted by van der Riet and Wynne JJ that as the acting headman had been appointed by Government he was thus “occupying a public office.”

Again, in the case of *S v Gouws* (17) the Appellate Division (per Rabie JA, Rumpff CJ, concurring, and Wessels JA concurring on the point) regarded the manager of the Motor Vehicle

Insurance Fund as a State official. The report of the case is in Afrikaans but see the SALR official Translation (1975 (1) SA 1). Rabie JA (as he then was) observed at page 6 that the “[a]ppellant was at all material times a civil servant, i.e. head of the section for compulsory motor vehicle insurance of the Department of Transport.” The Motor Vehicle Insurance Fund was incorporated in terms of the Companies Act, 46 of 1926, and the appellant, as nominee for the State, became one of the Fund’s directors, in which capacity the offences of bribery were committed. It seems to me, however, upon a reading of the report, that the aspect of the appellant’s position as a civil servant was not necessarily critical. Indeed, Rabie JA at page 12 observed:

“In the preamble to the ... Placaat of 1715, it is *inter alia*, stated that it is in the country’s interest ‘that all those persons to whom the government and policy of the state have been entrusted and *those who are in public employ*, whether they occupy high or lesser positions’, should comply with their duties with the necessary ‘circumspection and integrity’”. (Italics added)

In the case of *S v Makhunga* (18) the appellant was convicted of bribing one Scheepers, a duly appointed member of the Divisional Council of Cape Town and an “administration and registering official for Nyanga Location and as such occupying a public office”. Steyn J (van Winsen J concurring) in dismissing the appeal, at page 514 considered the case of *Whitaker* (11). He went on at pages 514/515 to consider the cases of *Muller* (12) and *Manilall* (15) and observed at pages 515/516:

“Mr Burger, who appeared for the appellant in this matter, criticised both these latter decisions. He argued that a distinction must be drawn between the term a ‘State official’ as used in the common law definition and a ‘public official’ as the term is used and defined in *R v Whitaker* [11]. The term State official, so he contended, has a narrow meaning. It should be limited to persons in the employ of the State and remunerated by the State. It is not necessary for the Court in this case to express any views upon the correctness or otherwise of the contention advanced by counsel for the appellant as to the difference between a ‘public officer’, ‘an official’ and a ‘State official’. I am prepared for the purposes of this case (but for those purposes only) to assume in favour of the appellant that the word ‘State official’ imports *an association between the official and the State* akin to or at least in important respects similar to that of master and servant. It is in that light that I proceed to examine the position of Scheepers, the official in question. Scheepers was an employee of the Divisional Council of the Cape. This authority was in the first place responsible for his appointment and dismissal, the payment of his remuneration, the determination of his conditions of service and would generally be the body in control of his employment. It does not follow that he is by reason of these facts precluded from being an official of the State. It can occur that a person who is *an employee of e.g., a local authority, exercises powers and duties entrusted to him by the State, the nature whereof and the manner in which such powers and duties are exercised and the control which the state exercises over his appointment and dismissal and over the manner in which he carries out the functions entrusted to him would render him an official of the State.*

Scheepers could not assume office until he had been licensed by the appropriate Minister. He could be compelled by the Minister, through the withdrawal of his licence, to cease the performance of the duties to which he was appointed or assigned. (See the provisions of sec. 22(1) of Act 25 of 1945). Moreover, his position is entrenched, inasmuch as his employer (the Divisional Council) may not remove him from office, or reduce his salary or emoluments without Ministerial approval. (See sec. 22(2)). Sec. 22(3) of the said Act provides that any official exercising the duties entrusted to Scheepers, shall exercise the said duties subject to the control of the State. Perhaps more important is the fact that such official is vested with authority and is directed to carry out the dictates of the State in relation to the urban Bantu in accordance with the State

policy. See e.g. the provisions of secs. 22(4), 22(6), 23, 26, 28, 29 of the Act, and the regulations proclaimed in accordance with the provisions of the Act.

It is true that an official holding the office held by Scheepers is not remunerated by the State. Without going so far as was done in the decision in *Manilall v Rex* [15], according to some weight in the scale of factors determining the position of this official, I am of the opinion that, *in view of the role played by the Executive in Scheepers' assumption of duties and the termination of his office, in view further of the nature of the duties entrusted to him and the control subject to which those duties are to be carried out*, Scheepers is an official of the State.”(Italics added)

In the case of *S v Mzizi and Another* (19) Alexander J (the late Didcott J (as he then was) concurring) had occasion, upon review, to consider the above decisions. The facts of *Mzizi* (19) were on all fours with those of *Manilall* (15). The officer bribed was a security guard employed by the Natal Provincial Administration at Addington Hospital, Durban. He was not, as alleged in the charge sheet, a member of the South African Police, Alexander J observed at p506:

“It is apparent from a review of the many cases called on to decide who is a ‘State official’ that the Courts have declined to offer an all-embracing definition and have opted rather for an *ad hoc* approach to the given facts. Cf *R v Kutboodien* [1]; *R v Muller* [12]; *R v Myataza* [20]; *R v Visser* [2]; *R v Chorle* [21]; *R v Christopher* [22]; *R v Capita* [23]; *S v Makhunga* [18]; *R v Libala* [16]; *S v Jack* [24]. Nevertheless, a recurring feature is to be gleaned from these judgments which can be summarised thus: that the person in question should have been engaged to perform *some official as opposed to a purely private function*. Linked with this consideration is the question of *who pays for his services*, which is but another way of determining whether it is the *fisc* which is responsible for his services and *not the private sector*. (See *R v Sacks and Another* [7] at 423, 426.) The concept of ‘State official’ has accordingly been expanded by placing the emphasis on government duties in the broadest sense of the word, and not restricting it to the definition of a ‘state official’ as would be found in the Public Service Act 54 of 1977 (cf *R v Sacks* at 423).” (Italics added)

Alexander J at page 507 considered the function of the security guard, *inter alia* to prevent theft, in respect of which indeed the bribe had been offered. The learned Judge continued:

“The witness was performing an official duty which is an obvious inference from his engagement as a security guard at a public hospital. Furthermore, he derived both his authority and his employment from a provincial administration. It would, to my mind, be an artificial distinction to draw simply because the official in question is not employed by the central Government in the sense of making him something less than a State official. To my mind the concept of ‘state official’ is to be construed as an omnibus *definition including within its parameters all officials who derive their authority from the public sector, whether it be at the one level or the other*. So it was in *R v Manilall* [15] when a police constable of the Durban City Police was held to be such an official for the purpose of a bribery charge. As Carlisle J remarked at 34: ‘...(I)t is difficult to appreciate the difference between a police officer lawfully appointed by a local authority and one appointed by the State in considering the essentials of the common law offence of bribing.’” (Italics added)

The Supreme Court of Zimbabwe, per Gubbay CJ (McNally and Korsah JJ A concurring) in the case of *S v Mukwezva* (25), adopted the decision in *Mzizi* (19), in particular quoting with approval the dicta in part of Alexander J at page 507 c-d, last reproduced *supra*, In the *Mukwezva* case (25) the appellant had been convicted of bribing an official (named Jieman), who was an employee of the Posts and Telecommunications Corporation. The sole ground of appeal was that Jieman was not a State official. Gubbay CJ cited numerous authorities as examples where officials had been held to be State officials. He observed *inter alia* that the particular Corporation

was a Statutory body, a Parastatal Commission; appointments to the board of the Corporation were made by the Minister, who could give directions to the Corporation in the national interest; the funding of the Corporation was partly derived from monies appropriated to it by Parliament. The learned Chief Justice then observed at page 697:

“Against this legislative backdrop it seems to me somewhat idle to contend that Jieman was not an official of the State for the purpose of the crime of common law bribery. He was employed by a parastatal effectively headed by a Minister of the State and under the control of the Parastatals Commission, a Governmental body. His remuneration was derived at least partly from State funding, and his conditions of service were subject to the approval of the Parastatals Commission. He was not engaged to perform a purely private function, but an *official* one, being responsible for awarding contracts for maintenance work relating to public institutions, such as post offices and other properties which vested in the corporation. He *derived his authority from the public sector*. In sum, the *nexus* between Jieman and the Central Government was shown to be very much closer than that in many of the examples cited above.”(Italics added)

A convenient summary of the authorities relevant to the issue is to be found in Milton *op. cit.* at pages 222/223. The learned author states the following “somewhat negative propositions enunciated in the cases”:

- “(i) The bribee need not be a *judicial* official [*S v Benson Aaron* (13) at 131].
- (ii) The term ‘state official’ cannot be confined to members of the ‘public service’ as defined in the Public Service Act [*R v Sacks* [7] at 423].
- (iii) A person may be a State official even though his employment is not permanent. It may be temporary and even terminable at the will of the State [*R v Sacks* (7) at 426].
- (iv) A ‘person recognised by law as holding an office and [who] has authority by virtue of that office to act on behalf of the Executive Government in a defined matter or manner’ is a ‘State official’ even if he is not remunerated at all or if he is remunerated from some source other than State funds [*R v Muller* (12), *Manilall v R* (15) and *S v Makhunga* (18)].

In the present case the accused’s terms and conditions of service were determined by the Lesotho Highlands Authority Order, 1986 (No.23 of 1986) (“the LHDA Order” or “the Order”). The enactment of the Order was a direct consequence of the *Treaty on the Lesotho Highlands Water Project Between the Government of the Republic of South Africa and the Government of the Kingdom of Lesotho*, signed on the 24th October, 1986. The Preamble to the Treaty *inter alia* recognised “the advantages of regional development and that co-operation between the Parties with regard to the development of mutual water resources can significantly contribute towards the peace and prosperity of the Southern African region and the welfare of its peoples.” The purpose of the Treaty was “to provide for the establishment, implementation, operation and maintenance of the Project” (the Lesotho Highlands Water Project (“the Project” or “LHWP”). The purpose of the Project was stated (Article 4(1)) to be, “to enhance the use of the water of the Senqu/Orange River by storing,regulating, diverting and controlling the flow of the Senqu/Orange River and its affluents in order to effect the delivery of specified quantities of water to the Designated Outlet Point in the Republic of South Africa and by utilizing such delivery system to generate hydro-electric power in the Kingdom of Lesotho”.

Article 6(2) and (3) of the Treaty provided that Lesotho and South Africa would each have the overall responsibility for that part of the Project situated in the Kingdom and the Republic respectively and the security thereof. Article 6(4) and (5) provided that Lesotho would establish the Lesotho Highlands Development Authority and South Africa the Trans-Caledon Tunnel Authority. Under Article 6(6) the parties thereby established the Joint Permanent Technical Commission. Article 7(1) of the Treaty provided thus:

“The Lesotho Highlands Development Authority shall have the responsibility for the implementation, operation and maintenance of that part of the Project situated in the

Kingdom of Lesotho, in accordance with the provisions of this Treaty, and shall be vested with all powers necessary for the discharge of such responsibilities.”

The Joint Permanent Technical Commission is now called the Lesotho Highlands Water Commission (see Lesotho Highlands Development Authority (Amendment) Act No 12 of 2000). There have been changes in the legislation and I shall deal with that prevailing at the relevant time. I shall then refer to the Commission as “the JPTC” or “the Commission”. The Commission is composed (Article 9(1)) of two delegations each of three members (or alternates) from each Party to the Treaty, each delegation alternately nominating a chairman for meetings of the Commission. The Commission (Article 9) has “monitoring and advisory powers” over the activities of the LHDA, “in so far as such activities may have an effect on the delivery of water to South Africa”, and the right “to subject to management audit, all those aspects of the management, organization and accounts of the Authority relating to the delivery of water to South Africa”, that is, excluding any matters affecting only the generation of hydro-electric power in Lesotho. The Authority is obliged (Article 9(11)) to consult the Commission “on a continuous basis”, the approval of the Commission being required for the Authority’s decision to take effect in such matters as, “(b) all budgets.”...

The Treaty, as I have said, was signed on the 24th October, 1986. On the same date the Lesotho Highlands Development Authority Order, 1986 (No.23 of 1986) took effect, establishing the Authority, a body corporate with perpetual succession. While generally, and very briefly the Authority was given the function of undertaking and operating water storage and supply and hydro-electric schemes, section 20 of the Order made provision for a specific function, thus:

“The Authority is entrusted with the responsibility for the implementation, operation and maintenance of the Lesotho Highlands Water Project as defined in the Treaty on the Lesotho Highlands Water Project between the Government of the Kingdom of Lesotho and the Government of the Republic of South Africa, and shall give full effect to the rights and duties of the Joint Permanent Technical Commission provided for in the Treaty.”

Sections 7 and 8 of the Order provided for the appointment of a Chief Executive thus:

- “7(1) There shall be a Chief Executive of the Authority who shall be appointed by the Minister on such terms and conditions as the Minister may determine.
- (2) The Chief Executive shall hold office for a period of five years and shall be eligible for re-appointment.
- (3) The Chief Executive shall be responsible for the execution of the policy of the Authority and the transaction of its day to day business”.

The Order initially provided (section 9) for a governing body of a Board of Directors chaired by the appropriate Principal Secretary, the members being the Chief Executive (*ex-officio*) and five other members appointed by the Minister for a term of three years on such terms and conditions as the Minister might determine. The Order was amended by Order No.3 of 1989 (and see now Act 12 of 2000), however, under which the Board consisted of the Minister as Chairman, the Chief Executive as an *ex-officio* member, no less than eight Principal Secretaries as members, with a further member appointed by the Minister “from the Private Sector”. In 1991, under Order 3 of 1991, the Minister ceased to be a member of the Board, it being chaired by the Principal Secretary for the Ministry of Highlands Water and Energy Affairs, when a further Principal Secretary was appointed a member. The Board then consisted, in the statutory sequence, of the Principal Secretary of the relevant Ministry as Chairman, the Chief Executive as an *ex-officio* member, eight Principal Secretaries as members and one other member “from the Private Sector.”

It is significant that the Order made no provision for the appointment of the Chief Executive “from the Private Sector”, though the Order could be construed to indicate that it did not militate against any such appointment. Nonetheless, apart from the importance of the post of Chief Executive,

reflected in the sequence in which the post is placed in the membership of the Board, the very constitution of the Board, with nine Principal Secretaries as members and only one member from the private sector, reflected the overall control of Central Government in the matter. That is indirectly emphasised in section 25 of the Order dealing, with the funds of the Authority, which, *inter alia*, consisted of “all monies or property that may, from time to time, be donated, lent or granted to the Authority; (i) by the Government of Lesotho or by a Ministry Department or other agency of the Government of Lesotho pursuant to any powers lawfully vested in it by an Appropriation Order, or otherwise; or (ii) by the Government of another country or by a person or by an international organisation;.”

While section 25 indicates other sources of funds, it can be said, in the least, that the source of the Chief Executives’ emoluments was in part public funds, an aspect which is emphasised by the provisions of section 29 which exempted the Authority from the payment of sales tax, income tax, transfer duties, stamp duties and any fees payable under the Deeds Registry Act, 1967.

The control of central Government is also reflected in the powers of the Minister, the agent of Government. Section 13 of the Order provided that the Minister might determine the “remuneration fees and allowances for expenses” to be paid to members. The Minister exercised an overriding supervisory control, in the matter of loans raised by the Authority (section 30), the submission of an annual audit (section 33), the submission of a scheme (section 35 - see Validation Order No 9 of 1991 and Validation Act No 6 of 1995), approval or otherwise of such Scheme as submitted or as amended (sections 35 and 36), the acquisition of mineral rights (involving the Minister responsible for mining) (sections 19(1) and 38A), the protection of fisheries (section 42), the prohibition of water navigation (section 43), assessment of compensation to persons affected by an approved Scheme (section 44), interference with public roads or bridges (section 48), and irrigation and drainage (section 53).

The above summary is by no means exhaustive. Further, the Minister’s overriding power is accentuated by the fact that under section 59 of the Order he is empowered to make regulations, *inter alia*, “conferring powers and imposing duties [upon] the Authority ... and ... generally for carrying into effect the principles and purposes of [the] Order” (see e.g. LN 50 of 1990, LN 17 of 1991 and LN 18 of 1991).

Under section 24 of the Order the Authority is obliged to “consult with Ministries, departments and other statutory bodies likely to be affected by its operations”. Part XII of the Order (sections 51/54) provides for ancillary developments - involving such aspects as fishery development, recreation, the development of tourism, and, as indicated, irrigation and drainage schemes. Section 54 then requires the Authority to “consult and cooperate with departments and agencies of the Government” having such related functions, aims or objects. Part XIII of the Order emphasises the public, indeed the national character of the functions of the Authority, in that provisions is made for offences and penalties, in order to protect such functions. Thus it is an offence (section 55) to obstruct the Authority or its officers or servants in the exercise of the power to enter upon land (under section 23), or (section 56) to discharge corrosive or obstructive material into the Authority’s works upon land or water, or (section 57) to damage, destroy, or interfere with or trespass upon the works of the Authority. Such offences warrant punishment as severe as ten years’ imprisonment.

When one considers the authorities above reviewed, a pattern seems to emerge: initially it may have been considered that the dicta in *Whitaker* may have been too wide, but the latter-day authorities seem to come closer to those dicta. It seems to me that there is little difference in saying, as in *Whitaker* that

“[a] public officer is an officer who discharges any duty in the discharge of which the public are interested ...”

and saying, as in *Mzizi* (19) that

“[t]he concept of ‘State official’ is to be construed as an omnibus definition including within its parameters all officials who derive their authority from the public sector, whether it be at one level or another.”

or saying as in *Mukwezva* (25) that

“[h]e [the official] derived his authority from the public sector.”

In the present case it might be said that the accused’s employer was a parastatal; but the Authority (as its title indicates) was no ordinary parastatal; it was established as a direct result of an international Treaty between the Kingdom of Lesotho and the Republic of South Africa, equating to a similar body established in that Republic, each with its area of national responsibility in the implementation of the said Treaty. The Authority, in the constitution of its board, in the overall control of the Minister, was effectively a Government body controlled by Government. It was also partly funded by Government. The accused was appointed by no less than the Minister: I cannot see that the fact that his tenure of office was not of a permanent nature, in any way affects the issue. The functions of the Chief Executive are of such a public nature, indeed of such national and international importance, bearing upon the operation of not alone the Authority but also an international Commission, that the Parties to the Treaty saw fit to delineate those functions within the very Treaty itself. In brief, it is difficult to imagine a post of a greater public character than that of the Chief Executive. Clearly the accused was, in effect, employed by Government and derived his authority from the public sector. On a consideration of all the above authorities I consider that his employment would meet the test set in any of those cases. I wish to emphasise, that even were it not the case that the accused was also a seconded public officer, I am satisfied that, in any event, for the purposes of the common law offence of bribery, he was a State official at the relevant time.

OPINION EVIDENCE

As to the evidence of payments alleged in the indictment, the Crown very much relied upon the evidence of Mr Jean Roux (PW 13). He has an impressive *curriculum vitae*. He was conferred with the Bachelor of Commerce Degree, the Bachelor of Laws Degree and the Master of Laws Degree by the Rand Afrikaans University: he was also admitted as an Advocate of the Supreme Court of South Africa in 1992. He joined the South African Police Commercial Crime Unit in 1987 where he obtained experience in the investigation of fraud. In 1990 he joined Liberty Life Association, where he was Head of the Special Investigations Unit thereof. In 1995 he joined the firm of accountants Ernst & Young, that is, as an Associate Director in their Forensic Accounting Division. In February 1997 he joined Coopers & Lybrand Forensic Accounting (Pty) Ltd, which body merged with another to form Price Waterhouse Coopers, Forensic Services (Pty) Ltd, of which Mr Roux is a director. The thrust of Mr Roux’s experience is in forensic accounting. The question then arises as to whether the witness can render any opinion in giving his evidence, and whether the Court may rely thereon.

Much has been written on the subject of opinion evidence, sometimes with diverging views. Hoffmann & Zeffert, *The South African Law of Evidence*, 4th ed. (1988) (Reprint 1995) at pages 83/113 have written a comprehensive and illuminating chapter on the subject. The learned authors observe that there are two approaches or formulations in the matter, the “traditional formulation” and the “*Vilbro* formulation” (taking its name from the case of *R v Vilbro and Another* (26)). The traditional approach is described in May’s *South African Cases and Statutes on Evidence* 3rd ed. (1953) at para 445, page 260 thus:

“The general rule is that the evidence of opinion or belief of a witness is irrelevant because it is the function of a court to draw inferences and form its opinion from facts; the witnesses give evidence as to the facts, the court forms its opinion from those facts.”

There are recognized exceptions to that general rule, such as expert evidence, and non-expert opinion in such matters as identification, estimating age, value, speed or degree of intoxication. Hoffmann and Zeffert, however, at page 84 observe that difficulty arises from the aspect that “no satisfactory distinction can be drawn between “facts” and “inferences”, inasmuch as “facts” can be shown to be based on mental processes of inference and that accordingly

“...the law, often without realizing what it is doing, merely draws a distinction between inferences that are objectionable and those that are not (calling the one “opinions” and the other “facts”)...”.

The *Vilbro* approach on the other hand, adopts what Wigmore, in his *Treatise on Evidence* 3rd ed, Vol VII paras 1917/1918 has to say in the matter. Wigmore observes (para 1918) of the “opinion rule” that

“[i]t simply endeavours to save time and avoid confusing testimony by telling the witness: ‘The tribunal is on this subject in possession of the same materials as yourself; thus, as you can add nothing to our materials for judgment, your further testimony is unnecessary, and merely cumbers the proceedings.’ It is this living principle which is (or ought to be) applied in each instance; nothing more definite than this is the test involved by the principle.”

and further on at page 11,

“There is, thus, no special department of knowledge and no fixed formula involved. We are dealing merely with a broad principle that, whenever the point is reached at which the tribunal is being told that which it is itself entirely equipped to determine without the witness’ aid on this point, his testimony is superfluous and is to be dispersed with.”

As to the traditional approach that to render an opinion is to “usurp the function of the court (jury)”, Wigmore observes para 1920 that such phrase is “misleading, as well as unsound... a mere bit of empty rhetoric”. It is impossible, he says, to usurp the function of the Court, as the Court can always reject the witness’ opinion and “accept some other view.” Indeed, in the case of a jury trial, “no legal power, not even the judge’s order, can compel them to accept the witness’ opinion against their own.” For that matter, Wigmore (para 1922) rejects a rule

“which requires a witness having personal observation to state in advance his observed data before he states his inferences from them; all that needs to appear in advance is that he had an *opportunity to observe and did observe*, whereupon it is proper for him to state his conclusions, leaving the detailed grounds to be drawn out on cross-examination.”

The English courts recognize the aspect of relevancy. In *Hollington v Hewthorn* (27) Goddard LJ (as he then was) at page 40 observed:

“It frequently happens that a bystander has a complete and full view of an accident. It is beyond question that, while he may inform the court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide, but, in truth, it is because *his opinion is not relevant*. Any fact that he can prove is relevant, but his opinion is not” (Italics added)

In the *Vilbro* case (26) Fagan CJ (Steyn, de Villiers, Beyers and Malan JJ A concurring) observed at p226 of the Wigmore approach that “[t]he rule, then, is an eminently practical one.” The learned Chief Justice observed that “there would ordinarily be people who could be of great assistance to the court” and that “[t]here may be people who have had a reason to apply their minds specially”

to the question in issue, and indeed people who have had more opportunities for observation than the Court.

The case of *R v Herholdt and Others* (1) (28) was decided by Bekker J (as he then was) some eighteen months before *Vilbro* (26). The evidence on charges of theft and fraud concerned a complicated series of transactions involving the movement of money in and out of a number of bank accounts, and in particular the issue whether a particular withdrawal from an account arose from certain payments into the account. The State invited its witness, a highly qualified and experienced accountant (a Mr Cox), who had prepared and handed in as an exhibit, a schedule, setting out “in pictorial form together with narrative, the movement of certain monies”, to express an opinion as to the source of the particular withdrawal. Bekker J observed at pages 715/716:

“I have no doubt that Mr Cox, with his training and his knowledge of the affairs of Hendon and the issues which have to be decided by this Court, could be of assistance. I also entertain the view that his opinion on the issues I have to determine could well be considered with advantage and that Mr Harwood appears to be correct in his view that without the assistance of an accountant the Court may have considerable difficulty in coming to a conclusion, or a correct conclusion, in the absence of evidence which he seeks to place before the Court through this witness.

In any criminal case, and perhaps more so in the present one, involving innumerable books, entries and records, the movement of funds and corresponding entries and figures in banking and other accounts, I regard it as essential, if not obligatory on the part of the Crown to direct the attention of the accused, and the Court, to every and any particular book, account, entry or figure therein appearing, on which it will seek to rely for a conviction on any particular charge. This would avoid a situation in which the accused person might be taken by surprise and would serve to acquaint the Court with those items at an early and convenient stage. The prosecutor might, of course, do so himself or he may conceivably do it more conveniently through a witness, such, for example, as Mr Cox. But can he go further and invite an opinion from the witness on an issue which the Court has to decide?”

The learned Judge then referred to the “general rule” of exclusion of opinion evidence and continued at page 716:

“The fact that in a case such as the present the volume of documents, the accounts and the complexity of the entries may render the task of the Court more onerous and difficult in the absence of expert evidence and opinion does not, in my opinion, sanction any departure from nor constitute an exception to the general rule.”

Hoffmann and Zeffert *op cit.* at pages 90/91 have this to say of the decision of Bekker J:

“It is submitted that the learned Judge, sitting, as he was, without a jury, did himself less than justice in thinking that the accused might be prejudiced if he listened to the accountant’s opinion. It seems unlikely that he would have given it more than proper weight, and it was therefore unnecessary to deprive himself of the witness’s assistance.”

In the case of *S v Ramgobin and Others* (29) Milne JP (as he then was) ruled the proposed evidence of a witness as to the contents of an audio tapes, to be inadmissible. The learned Judge President observed at page 163 that the proposed evidence would be that the witness had listened to the tapes for “weeks”, and as a result the tapes were quite intelligible to him. Milne JP continued:

“It is, in other words, common cause that what is on the recording is, ordinarily speaking, inaudible. If Richards is permitted to give the proposed evidence he will, in effect, be giving his opinion as to what he hears on the tape recordings.”

The learned Judge President observed that he was “well aware of the criticisms of the rule against allowing a witness to give opinion evidence unless he is an expert.” He referred to Hoffmann & Zeffert *op.cit.* 3rd ed. at pp75/83 and also to the *Vilbro* case. He considered however that the situation in that case was “quite different from the situation which faces the Court here”, and continued at page 763:

“What will Mr Richards be able to say other than that he has listened repeatedly to the tape recordings, and that he considers that he can discern a version which he then gives? He will not be in a position to give any reasons for his conclusions other than simply to say that he can hear what is said on the recording. The Court would, therefore, have to rely on his evidence without examining any reason for his conclusions.”

Hoffmann and Zeffert *op. cit.* observe at page 87 of these dicta that “[t]he court, after all, would be in just as good a position as the witness to listen to the tape.”

The views of Wigmore (and the Appellate Division) were adopted by Boshoff J in *Ruto Flour Mills Ltd v Adelson* (30) (decided in September 1958), though strangely, as Hoffmann and Zeffert *op. cit.* observe at page 86, Boshoff J made no reference to the Appellate Divisions's decision in *Vilbro* (reported in 1957). The learned judge at page 237 observed that according to Wigmore (VII, para 1918, p10)

“the true theory of the opinion rule is simply that of the exclusion of supererogatory evidence.... Thus wherever inferences and conclusions can be drawn by the Court as well as by the witness, the witness is superfluous. An expert's opinion is received because and whenever his skill is greater than the Court's. According to Wigmore (*loc. cit.*) at pp. 13 and 21, all witnesses, whether testifying on observed *data* of their own or on *data* furnished by others may state their inferences so far only as they have some special skill which can be applied to interpret or draw inferences from these *data*. The only true criterion is: on this subject, can the jury through this person, receive appreciable help?”

And further on at page 237

“The fact that an expert expresses an opinion on a matter which the Court has to decide does not, in itself, make the evidence inadmissible. According to Phipson on Evidence, 9th ed. at page 408, where the issue involves other elements besides the purely scientific, the expert must confine himself to the latter and must not give his opinion upon the legal or general merits of the case. Where, however, the issue is substantially one of science or skill merely, the expert may, if he has himself observed the facts, be asked the very question which the jury have to decide.... Indeed, there may be cases where the Court or the jury has not the special training to enable it to act on its own opinion, in which events it really decides whether it can safely accept the expert opinion.... Applying these principles to the present problem, the first question to be asked is whether on the subject of the conduct of the business of a baker and confectioner as reflected in the books of accounts, balance sheets and profit and loss accounts, the Court *can receive appreciable help* from Mr Mollink. His skill in accountancy and his experience of the various aspects of the business of a baker and confectioner and also of the baking industry, render him *better equipped than the Court* to interpret or draw inferences from the variations in the gross profit percentage on net purchases.” (Italics added)

Boshoff J ultimately overruled the objection to the evidence of the accountant. Before doing so, Counsel for the defendant had referred Boshoff J to the decision in *Herholdt* (28). The learned judge observed at page 238:

“That case is reconcilable with the principles referred to above only on the basis that the Court came to the conclusion that the accountant ventured to express an opinion on an issue which the Court itself was entirely equipped to determine without the aid of the witness. If it decided, as was contended by Mr Tollip, that an expert witness may not express an opinion on an issue which the Court has to decide, I must respectfully disagree with the decision”.

In summary Hoffmann and Zeffert submit thus at page 90:

“It is submitted that the Wigmore - Vilbro approach is consistent with the following propositions...:

(2) There is no general rule that a witness can never state his opinion upon a matter which the court will have to decide.

(3) If the court is unable to decide an ultimate issue without the assistance of someone qualified to give his opinion on it, then it must necessarily be instructed, as it were, by expert opinion.

(4) There are some ultimate issues upon which a witness's opinion will always be supererogatory and inadmissible. Thus a witness is not permitted to give his opinion on the legal or general merits of the case.

Similarly he cannot give his opinion on a question of international law that is part of domestic law; or on 'the meaning and status of the words' of a statute that the court has to interpret; or the interpretation of all documents (except in regard to words having a special meaning), for instance, a patent specification.

(5) ... where the court is able to reach some sort of independent conclusion, but the opinion of an expert (or a knowledgeable layman as in *R v Vilbro* would be 'of great assistance to the court' in reaching it, the opinion is relevant and the court is entitled to receive it.”

In the present case, as in the *Herholdt* case (28), Mr Roux prepared a “Final Report” on the forensic investigation conducted by him. The report, as Bekker J observed in *Herholdt* at pp715/716, if nothing else, serves an “essential, if not obligatory’ purpose, namely to *direct the attention* of the accused, and the Court, to every and any particular book, account, entry or figure therein appearing, on which it will seek to rely for a conviction on any particular charge.” For my part, the report, and the witness’ evidence thereon serves to place the evidence before the Court in manageable form. Thereafter the aspect of conclusions and findings is left to the Court. The words, “appears” and “apparently”, figure prominently in the report and in the witness’ evidence. I questioned Mr Roux in the matter. He testified that the usage of such words did not indicate any uncertainty of conclusion by him, but rather an awareness that it was the function of the Court to make ultimate findings.

Though I found Mr Roux, in view of his qualifications and specialized experience, to be expert in matters to which he testified, the Court needed little or no assistance with the bulk of his evidence and, generally speaking, no assistance, in the form of an opinion, was offered. There were however some areas, particularly where the joint contributory funding of a payment out of an account was involved, where the issue of an assumption or opinion arose. In such instances, the Court was nonetheless able to form its own conclusion in the matter, without reliance upon the opinion of Mr Roux.

THE EVIDENCE OF THE BANK RECORDS

It will not always be convenient to deal with the evidence concerning each count in numerical order; as some counts are necessarily related to others which are not in numerical order. Before dealing with the bank records, I observe that the preamble to the indictment (para 12.1.1) refers to intermediaries. The six persons or corporations involved have throughout the trial been referred to as “intermediaries”, purely as a matter of convenience; no doubt the more correct description was “alleged intermediaries”. I wish it to be understood, however, that the use of the term “intermediary” or “intermediaries”, without any qualification, arose as a matter of descriptive convenience, and in no way involved and should not be taken to indicate any finding by the Court in the matter. All but one of the said alleged intermediaries [Mr Cohen, Mr du Plooy and Mr Bam] were charged with the accused in the original indictment: see e.g. the Court’s ruling of 18 December....

It is convenient to reproduce the illustration at page 25 of the ruling, duly modified, reflecting the alleged association of the alleged intermediaries with the Consultant/Contractor accused, as indicated in the sixteen counts of bribery contained in the original indictment (“A” = Accused: I shall hereafter use the abbreviations contained in para 3 of the Indictment).

Intermediary	Consultant/Contractor	Count
A2 Jacobus Michiel du Plooy	HWV	1
A4, A5, A6		
A4 Universal Development Corporation (Panama) (“UDC”)	Sogreah/Coyne/Cegelec	2,15,16
A5 Electro Power Corporation (Panama) (“EPC”)	Spie LHPC	3 4
A6 Max Cohen	Gibb	14
A10, A11, Z. M. Bam		
A10 Associated Consultants and Project Managers (“ACPM”)	ABB. Germany	5
A11 Margaret Bam	ABB. Sweden/Unknown	6
Zaliswonga Mini Bam	Lahmeyer/Lahmeyer MacDonald Consortium Lahmeyer/Dumez Acres	7 8,11,13 9,10
Direct Payment	Dumez	12

It also proves convenient to here set out the bank accounts held by the accused, the intermediaries and others. The documentation in respect of the Swiss bank accounts (Exhibit (“Exh”) “AA”) was duly supported by affidavits, which complied with the provisions of section 246 of the Criminal Procedure and Evidence Act, 1981 and which, pursuant to section 246(4) drew their authority from a number of orders made by an Examining Magistrate for the Canton of Zurich, Mrs Cornelia A. Cova, *lic. iur.*, who indeed has attested such affidavits. ...

The documentation in respect of local and South African banks was supported, not by affidavit, but by evidence *viva voce*. Under section 246(2) the documentation before the court constitutes

prima facie proof of its contents. The authenticity of the documentation has not been challenged in any way. In particular the accused, who did not give or adduce any evidence in his defence, at no time challenged such authenticity in cross-examination. The documentation opening the various accounts and other documentation is before me, disclosing correspondence handwriting, personal details and even passport documentation. Suffice it to say that I am satisfied that the accounts revealed were held by the accused, intermediaries, and others, and accurately reflect the transactions involved.

[Cullinan AJ then dealt with the evidence and continued:]

SUMMARY OF PAYMENTS UNDER BRIBERY COUNTS

My findings ... as to the total amounts, under the relevant Counts, paid by the Contractors/Consultants involved, to the intermediaries, and the total amounts paid therefrom by the intermediaries to the accused are set out in the following schedule:

In order to get some concrete idea of the scale of the payments to the accused, it is of assistance to convert the currencies involved into Maloti. Mr Roux in his report utilised rates applicable in May, 2001. Inasmuch as the payments extend back to 1988, over a period of over nine years, the 2000 rates hardly represent an average. As against that, it is surely a notorious fact that the Rand and the Maloti have very much devalued in recent years against the major currencies. In any event, the rates used by Mr Roux lend an approximate value to the transactions. Those rates operate thus:

Currency	Amount	Rate of Exchange	Converted to Maloti
USD	610,302.31	8.0475	4, 911,408.00
FFR	2,200,839.84	1.0968	2, 413,881.00
GBP	59,207.17	11.5457	683,588.00
SAR	50,000.00	Parity	50,000.00

Total M8, 058.877.00

TRANSFER AND INVESTMENT OF FUNDS IN ACCUSED'S SWISS BANK ACCOUNTS

(1) Transfer to Ladybrand Account

Mrs Susanna Rudman (PW12), Support Head in the Ladybrand (Orange Free State) Branch of the Standard Bank of South Africa Limited gave evidence and placed the bank records of accounts maintained by the accused at that branch (Exhibits AD and AE) before the Court. They reveal that the accused opened a current account No 04 203 774 3 with the branch ("the Ladybrand account"), the opening deposit being made on 19th August, 1991. Mrs Rudman testified that she had been employed in the branch since May 1987. She had dealings with Mr Sole once or twice, but she would not be able to recognize him in court. The name and address of the holder of the account is given as "Mr M. E. Sole, P.O. Box 7332, Maseru, Lesotho." The P.O. box number is that of LHDA in Maseru. Further, there are deposit slips among the records bearing the apparent signature of the accused and numerous deposits in the account were made by way of transfer from four of the accused's Swiss bank accounts. Again, deposits were made by the accused in his account in Barclays Bank in Maseru by way of cheque drawn upon the Ladybrand account. Suffice it to say, as indicated earlier, that I am satisfied that the accused was the holder of the particular Ladybrand account and other investment deposit accounts which were opened at that branch.

The Swiss and Ladybrand bank records disclose that over the period 18th October 1991 to 24th April, 1997 the accused made 24 transfers from four Swiss accounts. Apart altogether from the corresponding debits in the Swiss accounts, the foreign exchange documentation in the Ladybrand account invariably indicates that "M.E. Sole" is the "Beneficiary Customer" and

"Masupha E. Sole" is the "Ordering Customer", which accords with the names under which the Ladybrand and Swiss accounts were held respectively; it also indicates, of course, quite apart from the corresponding debits in the Swiss accounts ... that the moneys were transferred from accounts held by the accused himself in Switzerland. The four Swiss accounts were UBS, Zurich, accounts

The Ladybrand bank documents in Exhibits "AD" and "AE" extend no further in time than 12th October, 1996. There is no indication whatever that the accounts were closed on that date and it seems that the Bank was just unable to produce all necessary documentation.... In any event, the above schedule serves to further convey the sheer scale of the banking operations conducted by the accused. The accounts maintained by him in Switzerland could not be described as normal business, current or cheque accounts, where one expects to see a frequency of transactions. Those accounts were sustained solely by payments by the intermediaries and served as a conduit pipe for such: frequently only a small balance was maintained on such accounts and monies received from the intermediaries were often transferred elsewhere within a matter of days, or on the day of receipt, or even beforehand in anticipation of such receipt.

To separately analyze each and every transaction on every account maintained by the accused, would prove a very difficult task within the necessary confines of this judgment. Rather it is best that I concentrate on the scale of transactions within the accounts and the salient points emanating therefrom. For example, the transfers to the Ladybrand account are apparent, from the [evidence]. Mrs Rudman testified that the accused, not being resident in South Africa, was not obliged to complete a standard foreign exchange form, disclosing the source of the foreign monies lodged to the account. Nonetheless, telephonic enquiry was invariably made, when the accused would inform her that the funds represented "salary". The word "salary" appears as a reason for importation, on the foreign exchange documentation ... a reason which hardly meets the queries raised by the importation from overseas, by one employed in Lesotho, of more than R5 million (and see transactions 18 and 19) in the space of five and a half years.

(2) Swiss Investment Portfolio

The Ladybrand account and the various investment sub-accounts thereof, was not the only destination for funds received by the accused. The accused frequently invested large amounts on short term, usually three to six month fiduciary deposits, with the particular Swiss bank which received the particular funds. Such deposits were made locally with the bank, or otherwise with a foreign branch of that bank, or elsewhere, through the agency of the Swiss bank.....

....

(5) Transfer from Ladybrand to Maseru

[T]he accused utilised the Ladybrand account to make deposits into an account which he maintained with Barclays Bank PLC and ultimately Standard Bank Lesotho Ltd, Maseru....

In the absence of full records of that account, however, the matter remains uncertain. I am nonetheless satisfied that the accused transferred no less than M430,000.00 to the Maseru account from the Ladybrand account. Further, I am satisfied that the origin of such funds was the payments which he received over the years from the intermediaries.

SIMILAR-FACT EVIDENCE

(1) Formulation of the Rule

In view of the number of counts on the indictment and the fact that the first sixteen counts are similar, that is, counts of bribery, the issue of similar-fact evidence arises. In criminal cases the formulation of the "rule" in the matter is to be found in the dicta of Lord Herschell LC in *Makin v Attorney General for New South Wales* (31), decided in 1894, at p65, which dicta remain the *locus classicus* in the matter:

"In their Lordships' opinion, the principles which must govern the decision of the case are clear, though the application of them is by no means free from difficulty. 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 in 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 is relevant to an issue before the jury; and it may be so relevant if it bears upon the question of 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."(Italics added)

The decision in *Makin*, which was that of the Privy Council, has been applied by the courts in South Africa. In the case of *Harris v DPP* (32) Viscount Simon at p1046 observed that the decision in *Makin* "was unanimously approved by the House of Lords in *R v Ball* [33] [and] has been constantly relied on ever since. It is I think, an error to attempt to draw up a closed list of the sort of cases in which the principle operates. Such a list only provides instances of its general application, whereas what really matters is the principle itself and its proper application to the particular circumstances of the charge that is being tried. It is the application that may sometimes be difficult, and the particular case now before the House illustrates that difficulty."

Viscount Simon went on to quote the above dicta of Lord Herschell LC and then observed at page 1047:

"When Lord Herschell speaks of evidence of other occasions in which the accused was concerned as being admissible to "rebut" a defence which would otherwise be open to the accused, he is not using the vocabulary of civil pleadings and requiring a specific line of defence to be set up before evidence is tendered which would overthrow it. If it were so, instances would arise where magistrates might be urged not to commit for trial, or it might be ruled at the trial, at the end of the prosecution's case, that enough had not been established to displace the presumption of innocence, when all the time evidence properly available to support the prosecution was being withheld. Avory, J., in giving the judgment of the Divisional Court in *Perkins v Jeffery* [34], said at p707:

'In criminal cases, and especially in those where the justices have summary jurisdiction, the admissibility of evidence has to be determined in reference to all the issues which have to be established by the prosecution, and frequently without any indication of the particular defence that is going to be set up.'"

In the case of *Thompson v The King* (35) decided in 1918, Lord Sumner observed at page 232:

"No one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime, or that he is generally disposed to crime and even to a particular crime; but sometimes for one reason some times for another, evidence is admissible, notwithstanding that its general character is to show that the accused had in him the makings of a criminal, for example, in proving guilty knowledge, or intent, or system, or in rebutting an appearance of innocence which, unexplained, the facts might wear. In cases of coining, uttering, procuring abortion, demanding by menaces, false pretences, and sundry species of frauds such evidence is constantly and properly admitted. Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance, if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of not guilty puts everything in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice."

Commenting on those dicta, Lord du Parc in the case of *Noor Mahomed v R* (36) observed at page 187:

“An accused person need set up no defence other than a general denial of the crime alleged. The plea of Not Guilty may be equivalent to saying: “Let the prosecution prove its case, if it can”, and, having said so much, the accused may take refuge in silence. In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence, which incidentally shows that the accused has committed one or more other offences, may tend to prove that they are consistent only with a guilty intent. The prosecution could not be said, in their Lordships’ opinion, to be ‘crediting the accused with a fancy defence’ if they sought to adduce such evidence.”

Viscount Simon in *Harris* (32) quoted Lord du Parc’s dicta above and went on to observe at pp1047/1048:

“Lord Herschell’s statement in *Makin’s* case that evidence of ‘similar facts’ may sometimes be admissible as bearing on the question whether ‘the acts alleged to constitute the crime charged in the indictment were designed or accidental’ deserves close analysis. Sometimes the purpose properly served by such evidence is to help to show that what happened was not an accident. If it was, the accused had nothing to do with it. Sometimes the purpose is to help to show what was the intention with which the accused did the act which he is proved to have done. In a proper case, and subject to the safeguards which Lord Herschell indicates, either purpose is legitimate. Scrutton, J., points out the distinction very clearly in *Ball’s* case [33]. Sometimes the two purposes are served by the same evidence. The substance of the matter appears to me to be that the prosecution may adduce all proper evidence which tends to prove the charge. I do not understand Lord Herschell’s words to mean that the prosecution must withhold such evidence until after the accused has set up a specific defence which calls for rebuttal. Where, for instance, mens rea is an essential element in guilt, and the facts of the occurrence which is the subject of the charge, standing by themselves, would be consistent with mere accident, there would be nothing wrong in the prosecution seeking to establish the true situation by offering, as part of its case in the first instance, evidence of similar action by the accused at another time which would go to show that he intended to do what he did on the occasion charged and was thus acting criminally.... What Lord Sumner meant in *Thompson v R* when he denied (at p232) the right of the prosecution to ‘credit the accused with fancy defences’ was that evidence of similar facts involving the accused ought not to be dragged in to his prejudice without reasonable cause.”

Lord Herschell’s rule, as I have said, has been applied in a number of South African cases. In the Appellate Division case of *R v Katz and Another* (37) decided in 1945, Watermeyer CJ (Tindall, Greenberg and Schreiner JJ A and Davis AJA concurring) applied the rule, observing at page 79 that “[t]he subject has been frequently discussed” and that he “need do no more” than refer to a wealth of authority, in particular the Appellate Division cases of *R v Davis* (38) and *R v Zawels* (39). Since then the issue of similar fact evidence has come before the Appellate Division in the prominent cases of *R v Viljoen* (40), *R v L* (41) and *R v D* (42). Watermeyer CJ in *Katz* (37) at p79, after quoting Lord Herschell’s dicta, observed:

“Since that decision it has sometimes been contended that the illustrations of relevancy given by Lord Herschell constitute categories into which such evidence must be fitted before it can be regarded as admissible, but this is a mistaken interpretation of the words used by Lord Herschell. The examples he gives are mere illustrations of relevancy and were not intended to be exhaustive.”

Hoffmann and Zeffert *op. cit.* at page 55 state the rule thus:

“The prosecution may not adduce evidence of improper conduct by the accused on other occasions if its only relevance is to show that the accused is of bad character and is, therefore, likely to have committed the offence. But similar-fact evidence will be admissible if it has a relevance other than by way of this forbidden line of reasoning if its probative force is sufficiently strong to warrant its *exceptional* reception despite any practical disadvantages and despite its potentiality to prejudice the accused. This formulation fits most cases; but some have been forced into its mould uncomfortably.

There are some cases where the accused's disposition itself was so highly relevant to an issue, that it would have been an *affront to common sense and justice* not to allow evidence of that disposition in the circumstances of that case. Evidence of disposition (often referred to in other terms) was, accordingly received.”(Italics added)

The learned authors observe further at page 57:

“The similar fact rule, as it applies to criminal cases, has two major aspects: (a) that, to be admissible, the evidence must not be used to promote a forbidden line of reasoning (the accused is bad and therefore guilty; the accused is a thief and therefore guilty of theft) but must be relevant in some other way; and (b) its degree of relevance must warrant its reception. Aspect (a) is expressed by the juxtaposition of two principles: similar-fact evidence cannot be used to show that the accused is the kind of person likely to have committed the crime with which he has been charged; but it may be used when it is relevant to an issue before the court provided that this relevance does not rest solely on character. The two branches are mutually exclusive; the second branch is residuary and admits only such evidence as is not excluded by the terms of the first. *It is a chain of reasoning that is prohibited* and not necessarily a statement of fact.

If evidence is adduced to further the conclusion, by a process of reasoning, that the accused is a bad man and, therefore, likely to have committed the offence, the evidence is excluded; if there is some relevant probative purpose for it other than for the prohibited chain of reasoning, it may be received but, *when it is received, the trier of fact must eschew the forbidden reasoning.*” (Italics added)

The learned authors observe that Lord Herschell's dicta are “[t]he classic and best formulation of aspect (a) of the similar-fact rule”, quoting Lord Salmon's observation in *DPP v Boardman* (43) at p461, (p912 (All ER)) where he said (in 1975), “I doubt whether the learned analyses and explanations of the passage to which it has been subjected so often in the last eighty years add very much to it.”

Nonetheless, there was a school of thought which considered Lord Herschell's dicta to be exclusionary, a construction which has been dispelled, in South Africa, by the dicta of Watermeyer CJ in *Katz* (37). Hoffman and Zeffer consider (at page 59) that the formulation of the *Makin* rule is “easily applicable” to most cases, including *Makin* itself, where the accused husband and wife were found guilty of the murder of an adopted baby, found buried in their garden, the prosecution proving that the bodies of other babies adopted by the accused were also found buried in the garden; the relevance of such evidence arose from the improbability of a number of babies all having died from natural causes. It can be said that the court did not follow the prohibited line of reasoning, as it could only have come to a conclusion on the accused's disposition once it had already reached the conclusion as to the improbability of that number of deaths from natural causes and hence that the babies were murdered. The learned authors continue at p59:

“But not all cases are capable of being analysed in this way. It should be recognised that, in some instances, propensity itself is so highly relevant to the issue in a particular case, that evidence of propensity itself is admitted. The admission of the evidence is not for the prohibited purpose (the offence is one committed by homosexuals; the accused is a

homosexual, therefore, an inference may be drawn against him); but it is still relevant evidence of propensity. The *Makin* formula, therefore, requires some modification. The mistake has been to try to force into the *Makin* mould cases where similar-fact evidence is admissible because, in the light of the issues raised by other evidence at the trial, the fact that the accused has a criminal propensity is highly relevant.”

The learned authors take the case of *R v Straffen* (44) as an example, where the accused was charged with the murder of a little girl, by strangulation, evidence being admitted that some time earlier the accused had strangled two other little girls in very similar circumstances. The evidence was admitted on the basis that it was relevant to identity. Hoffmann and Zeffert observe at page 60:

“Rationalise it how one may, and despite the fact that evidence was not used for the crude purpose of arguing that Straffen was a maniac and therefore likely to have committed a maniacal act, there is no escaping the conclusion that his maniacal propensities, in the circumstances of that case, were highly relevant to an issue - the identity of the killer.

The real difference between the relevance of similar-fact evidence in the ordinary case in which it is excluded and cases like *R v Straffen* [44] is not one of kind but one of degree; but we are constrained by the *Makin* formulation, which has been applied by our courts (and which, indeed, the rules of precedent oblige us to apply) to draw that distinction - but, it is submitted, we must add a proviso, a qualification, to it. That proviso is to the effect that, in some cases, evidence which proves only disposition will be admissible if, on the facts of the case, it is a *disposition which is highly relevant* to an issue in it. Perhaps in recognition of this fact, South African courts in recent years have made little use of the *Makin* formulation and have tended instead to cite the proposition of Lawrence J in *R v Bond* [45] [at p43] 'In proximity of time, in method or in circumstances there must be a *nexus* between the two sets of facts, otherwise no inference can be safely deduced therefrom'. This seems to be only another way of saying that similar-fact evidence must be highly relevant to the issue of guilt.”(Italics added)

When it comes to relevance, the learned authors observe at page 61 that it very much depends on the strength of the other evidence, citing the case of *R v Ball* as an example, where the other *prima facie* evidence strongly suggested a sexual disposition, making the similar-fact evidence highly relevant as to such disposition. The learned authors consider at page 65 that it is “quite wrong to attempt to draw up a closed list of the sort of cases in which the similar-fact rule operates”. The Appellate Division decision in *R v D* comes in for some criticism: that was a sexual case where the evidence revealed an unusual and repeated pattern of behaviour. The Court, however, held that evidence of the repetition of an act is not relevant to prove the *commission* of an act in issue, but only its *nature*, once such commission has been proved. The learned authors observe at page 59:

“There can be no better example of thinking in categories of admissibility nor of the malign results of this error. The danger of categorising instances of admissibility is that it may lead to casuistry, to insoluble metaphysical problems as to the confines of the categories, and to the error of thinking that, because evidence slots into a category, it will be admissible.”

The learned authors observe at page 65 that “[n]evertheless, there has been a tendency of the courts to group cases under what Schreiner J (as he then was) has called 'sub-rules or categories of relevance'” (*R v Butelezi* (46) at p258). Hoffmann and Zeffert consider that the guidance from earlier cases is limited but in particular that “relevance is crucial to the reception of similar-fact evidence and relevance exists, not in a vacuum, but in the facts of a particular case; the determination of whether similar facts are admissible depends on the experience of the particular judge and on prevailing standards of reason taking in to account current mores.” (See

Boardman (43) per Lord Wilberforce at p443 and see *Phipson On Evidence* 14th ed at para 17-32.). Nonetheless, the learned authors consider at page 66 that categorisation “provides a convenient framework for the discussion of decided cases” Hence I propose to consider three categories.

(2) Design or System

Similar-fact evidence was admitted in a number of cases to establish a design or system on the part of the accused. In the case of *Katz* (37), the accused was charged with selling meat in excess of the price prescribed in the relevant price control regulations. He made certain admissions to a customer. Watermeyer CJ at pp79/80 observed that such admissions were admitted in evidence “for the purpose of showing a high degree of probability that the accused committed the offences charged”. The Court was not asked to draw such inference based on criminal propensity. The admissions made to the customer were relevant to show that the accused was “in his *ordinary course of business*” selling meat at an illegal price and “*the existence of this practice made it highly probable*” that he committed the offences charged.

In the case of *Viljoen* (40) the accused was convicted on 52 counts, 49 of which related to the forging of names and entries in post office savings bank books, the forging of signatures on withdrawal slips, and the uttering of the forged books and slips to an official in the post office. An accomplice, one Adamo, was involved. The trial Judge omitted to caution the jury as to accomplice evidence. Tindall JA (Greenberg JA and Davis AJA concurring) refusing the application for special leave to appeal, observed at pages 63/64:

“Now the absence of a caution in regard to the evidence of accomplices is certainly a blemish in the summing-up. Has the omission in the present case resulted in substantial or grave injustice to the accused? In the decision of this question the point arises whether the Court is entitled to have regard to the other acts of the accused as revealed by the evidence on the other counts of fraud. It could, of course, not do so if such acts *did no more than show a propensity* to do the acts in issue in the four groups of counts now under consideration. (See *Rex v Katz* [37] at p79)). In the present case we have to deal with a *systematic series of frauds* following closely upon each other, peculiar in character and all of them revealing *the same essential features*.

I have no doubt that in such a case it is permissible to have regard to the acts referred to in the other counts of fraud. The commission of those frauds by the accused seems to me to make it probable that he was the author, as Adamo stated he was, of the similar frauds referred to in the counts in which Adamo was concerned. The other frauds are admissible as showing a high degree of probability that Adamo was speaking the truth in testifying that the accused played the leading part in the frauds in which Adamo participated; see *Rex v Katz* [37]. The proof of the other frauds was therefore corroboration of Adamo’s evidence as to the part played by the accused. Now the evidence on those counts (in which Adamo was not involved) was overwhelming against the accused. It is, in my opinion, clear that, on all the evidence, no reasonable jury could have failed to find that the accused was the author of this system devised for defrauding the Department of Posts. The accused did not venture to go into the witness box and face cross-examination. I am satisfied that if the presiding Judge had given the jury the proper caution in regard to the acceptance of the evidence of an accomplice, no reasonable jury could have failed to find that the accused engineered the frauds in the four groups of counts in which Adamo was concerned and that the evidence of Adamo was substantially correct.”(Italics added)

The question arises as to whether there is any difference in principle in the approach of the courts to propensity as distinct from system. Hoffman and Zeffert have this to say at page 72:

“Something must be said about the difference between system and propensity. In a case like *R v Katz* [37] it would sound strange to say that the accused had a propensity to

overcharge; system is the more appropriate term. On the other hand, in most sexual cases it would be equally artificial to say that repetitive conduct amounted to a system; the accused is giving way to a propensity. In the one case the accused has resolved upon a course of conduct which involves repetitive action; in the other he has some mental or physiological trait which leads him to commit similar repetitive acts. The difference between the two *lies in the type of offence* rather than in the way in which evidence may be relevant. It has been said that 'relevance *via* propensity involves an assumption that the accused has not in any material respect mended his ways' but relevance *via* system assumes that the accused has not changed his mind. There may be reasons of policy why conscious resolution should be treated differently from sexual frailty, but essentially both are relevant on account of the inference to which they give rise that *conduct is likely to be repeated.*"(Italics added)

(3) Proof of the Actus Reus

Hoffmann and Zeffert observe at page 80:

"There was at one time a theory that similar-fact evidence could be used to prove the intent with which an act had been done, or the identity of the offender, but not the commission of the *actus reus* itself. The reason why this view had some currency was because without proof of the *actus reus* it was seldom possible to raise the sort of issue to which similar-fact evidence was particularly relevant. But this is not always true. In *R v Ball* similar-fact evidence was admitted to prove the *actus reus*, i.e. that the Balls had committed incest. For this reason the conviction was set aside by the Court of Criminal Appeal, but they in turn were reversed by the House of Lords. After *R v Ball* the theory was thought to be dead and in *R v Katz* [37], *R v Viljoen* [40] and *R v Sims* [47] (to name but a few cases out of many) similar-fact evidence was used to prove the commission of the *actus reus*. It will not usually be necessary for the prosecution to have resort to similar-fact evidence for this purpose: the *nature of the act* will appear clearly from a description of the act itself. But when an act is equivocal, similar-fact evidence may resolve the ambiguity."

The learned authors then cite the case of *R v Maharaj* (48), which concerned the previous course of dealings of the parties, where the accused was charged with the illegal sale of yeast, observing that similar-fact evidence was admissible "to show the *true nature* of the act done by the [accused]". In the case of *R v Sims* (47), where the accused was charged with a number of sexual offences, Lord Goddard LCJ in delivering the judgment of the Court of Criminal Appeal observed at page 701:

"[w]e think that the repetition of the acts is itself a specific feature connecting the accused with the crime and that evidence of this kind is admissible to show the nature of the act done by the accused."

That passage influenced the Appellate Division in *R v D* to hold at page 369 that the similar-fact evidence was "admissible to prove not the commission of the act in issue, but its nature, its commission having been proved by the other admissible evidence."

Hoffmann and Zeffert observe at pages 81/82 that the other evidence in *Sims* revealed, in effect, no more than opportunity, but did not establish the *actus reus*, to which of course each complainant testified: the similar-fact evidence was then adduced to establish the *actus reus*. Certainly that seems to be the effect of the continuation of the above passage by Lord Goddard LCJ where he said at page 701 at E to G:

"The probative force of all the acts together is much greater than one alone; for, whereas the jury might think one man might be telling an untruth, three or four are hardly likely to tell the same untruth unless they were conspiring together. If there is nothing to suggest a conspiracy their evidence would seem to be overwhelming. Whilst it would no doubt be in

the interests of the prisoner that each case should be considered separately without the evidence on the others, we think that *the interests of justice* require that on each case the evidence on the others should be considered, and that *even apart from the defence raised by him*, the evidence would be admissible.”(Italics added)

Further on at page 703 Lord Goddard CJ observed:

“We do not think that the evidence of the men can be considered as corroborating one another, because each may be said to be an accomplice in the act to which he speaks and his evidence is to be viewed with caution; but the judge gave the jury ample warning as to acting on the evidence of an accomplice, and no objection can be taken to the summing up of that account.”

That passage surely indicates that, making due allowance for the fact that the four complainants who testified were themselves accomplices, their evidence was mutually supportive. Inasmuch as the other evidence did not establish the *actus reus* the similar-fact evidence of the complainants can then only have been taken by the jury to do so.

(4) Similar - Fact Evidence of Different Counts

This aspect fell for consideration by Harcourt J (Friedman J concurring) in the case of *S v Gokool* (49) in which a policeman was charged with 30 counts of extortion. Harcourt J observed at page 475:

“It is clear that each count brought against an accused person must be considered separately and that the admissibility of evidence on each count must be tested as if that count had been the only count against such accused - *R v Butelezi*, [46]. But this does not prevent material, which could be admissible under the rules relating to similar fact evidence, from being received merely because a plurality of counts is involved in a case.”

The learned Judge went on at page 476 to observe:

“It has long been held that if the questioned evidence tends to establish that an accused had evolved a design or system to perform acts of the very kind in question such is admissible - *R v Mpanza* [50], *R v Khan* [51] - and this extends to a situation where the design or system is to commit the offence in question on a number of occasions.”

Harcourt J then referred to the case of *Katz* (37), quoting the dicta of Watermeyer C J therein. He then turned at page 477 to the case of *Viljoen* (40) observing that the offences therein were “of a systematic nature, were closely connected in point of time, were peculiar in character and had all revealed the same essential features”.

The learned Judge went on at page 477 to observe:

“In my judgment there is much to be said for the view expressed in *Hoffman*, [1st ed] at page 151, ... that *R v Katz* [37] and *R v Viljoen* [40] render untenable the view that the evidence of system can be used only to prove intent and not the *actus reus*. In the first of such cases the point is directly decided, and in the second the use of the disputed evidence to confirm the testimony of the accomplice was essential to the conclusion that the accused would inevitably have been convicted by a properly instructed jury.”

Further on at page 478 Harcourt J observed:

“The cases of *Katz* [37] and *Viljoen* [40] seem to me to support the view that the evidence is admissible to prove, not that the appellant had a propensity to commit the offence, but that, in the course of his duties, he had embarked upon a scheme to extort money from persons whom he had arrested...”.

Harcourt J observed at page 478 that the *Viljoen* case had been cited in argument in *R v D* but was not considered or mentioned in the judgment. Nonetheless, he observed, “[t]here is no suggestion in *R. v D* that *R v Viljoen* was wrongly decided.” He observed that the attention of the Court in *R. v D* in regard to corroboration, “was concentrated upon the controversial *R v Sims*”. That decision undoubtedly gave rise to some difficulty, that is, until it was affirmed by the House of Lords in 1952 in the case of *Harris* (32). In any event, Harcourt J in *Gokool* (49) at page 478 considered that “[i]t may be that *R. v D* should be critically reconsidered”. He considered that as the Court in *R. v D* was dealing with a “propensity”, rather than a “system” that in effect *R. v D* might be distinguished on that basis. Hoffmann and Zeffert at page 82 observe, however, that such distinction “cannot reconcile *R. v D* with *R v Ball*”.

It remains then to consider the question of the application of the above authorities to the present case. That is an aspect which it is convenient to defer for the moment.

ADMISSIBILITY OF STATEMENTS BY AND CONDUCT OF ACCUSED IN CIVIL RECORDS

I have already given my reasons for ruling that some 51 extracts of the civil Records were generally admissible as evidence of their making (see reasons delivered on 18th March, 2002). I also held however, that informal admissions against interest and the confessions of a party are admissible in evidence *against* him, as evidence of the *truth* of their contents, as an exception to the hearsay rule.

The question then arises as to whether the Court should take cognizance of statements made by the accused in the civil proceedings. Apart from the issue of relevance, the aspect of fairness arises. I cannot see incidentally that the issue of voluntariness has been raised by the defence. The gist of Mr Phoofolo’s submissions is that in conducting his defence to the civil proceedings, the accused had no freedom of choice. When it comes to voluntariness, however, for a statement by an accused to be admissible, against him, the Court must be satisfied that it was “Freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto.” (section 228(1) of the Code).

The expression “freely and voluntarily made” is to be given the meaning it has at common law: see *R v Letsie and Anor* (4) (52) at p1008. In 1914 in the Privy Council case of *Ibrahim v R* (53) at p877 Lord Summer observed:

“It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.”

And in 1929 Innes CJ in the case of *R v Barlin* (54) observed at page 462:

“[T]he common law allows no statement by an accused person to be given in evidence against himself unless it is shown by the prosecution to have been freely and voluntarily made - in the sense that it has not been induced by any threat or promise proceeding from a person in authority”.

Mr Phoofolo has not advanced any such aspects, nor can they possibly be said to arise on the record. There is no question but that any statement made by the accused was made “in his sound and sober senses”. As to whether or not the accused was “unduly influenced” in the matter, Williamson J (as he then was) in the case of *S v Mphetha and Others* (55) at page 581 was of the view that “the person in authority” concept was “of no relevance when one is considering the

question of undue influence”, that is, that “undue influence” may be exercised by a person who has no authority over the prosecution. In the case of *R v Kuzwayo* (56) van den Heever JA at page 768 posed the following test:

“[H]as it been established in the particular instance that the alleged confession was voluntary; is it clear that the confessor’s will was not - swayed by external impulses, *improperly* brought to bear upon it, which are calculated to negative the apparent freedom of volition?” (Italics added)

Williamson J in *Mpetha* (55) at page 584 had this to say of the dicta of van den Heever JA:

“I agree... that the use of the verb 'negative' by van den Heever JA in *Kuzwayo*’s case was not intended to connote a degree of impairment of will so high that in reality there was no act of free will at all. The criterion is the *improper* bending, influencing or swaying of the will, not its total elimination as a freely operating entity.”(Italics added)

It will then be seen that “undue influence” amounts to *improper* influence. Mr Phoofofo submitted that “we are not saying that the accused was compelled”. The accused was represented in the civil proceedings by learned Senior Counsel, Junior Counsel and an instructing Attorney and there is clearly no suggestion whatever of any *improper* influence being brought to bear upon the accused. The aspect of voluntariness simply does not arise therefore. The question remains as to whether the aspect of fairness does so.

In a ruling delivered on 18th March, 2002 at p7 I referred to the case of *R v Carson* (57) “where the Appellate Division held that the examination of an insolvent, under section 55 of the Insolvency Act No 32 of 1916, under which he was obliged to answer incriminating questions, was admissible *against* him, as evidence of its contents, in criminal proceedings, despite the subsequent provisions of section 273 of the Criminal Procedure and Evidence Act No31 of 1917 (see now section 228 of the Code) as to the admissibility of confessions. That decision was delivered in 1926, long before the present Constitutional dispensation...”

In the case of *Davis v Tipp NO And Others* (58) the first respondent, an Advocate, was appointed by the applicant’s employers (a Metropolitan Council, the second respondent) to conduct an inquiry, in terms of the Council’s disciplinary code, into allegations of *inter alia* bribery, corruption and theft made against the applicant. The disciplinary code provided that an employee could be charged with misconduct, an inquiry could be conducted and a penalty imposed, despite the fact that any criminal proceedings which might have been instituted against the employee in respect of the same charges had not been finalised. When the inquiry convened, criminal charges against the appellant, some of which related to some of the allegations before the inquiry, were then pending. The applicant sought a postponement of the inquiry until after the conclusion of the criminal proceedings on the grounds that if the inquiry proceeded his right to remain silent at his criminal trial would be compromised and that he would be prejudiced at the inquiry, inasmuch as his conditions of bail precluded him from consulting with witnesses. The first respondent refused to postpone the inquiry, but gave the applicant an opportunity to seek relief in the Supreme Court. The applicant did so, on the grounds that the first respondent’s discretion had not been exercised properly, and that the applicant’s right to remain silent during his criminal trial, guaranteed by section 25(3) of the Constitution, would be violated if the inquiry proceeded. The first ground was rejected out of hand (at p1155) by Nugent J.

As to the second ground the learned Judge observed at the outset at page 1156:

“The right to remain silent in the face of a criminal charge is not foreign to our common law. In *S v Zuma and Others* [59] Kentridge AJ described this right of our common law as one of a number of rights which ‘...are the necessary reinforcement of Viscount Sankey’s “golden thread” - that it is for the prosecution to prove the guilt of the accused beyond

reasonable doubt'. I do not see that section 25(3) enlarges upon that common-law right. Rather, it guarantees its future existence."

Nugent J went on at p1157 to observe thus:

"Civil proceedings invariably create the potential for information damaging to the accused to be disclosed by the accused himself, not least so because it will often serve his interests in the civil proceedings to do so. The exposure of an accused person to those inevitable choices has never been considered in this country to conflict with his right to remain silent during the criminal proceedings. Where the Courts have intervened there has always been a further element, which has been the potential for State compulsion to divulge information. Even then the Courts have not generally suspended the civil proceedings but in appropriate cases have rather ordered that the element of compulsion should not be implemented. (Compare *Du Toit v Van Rensburg* [60] at 437A/B; *Gratus & Gratus (Prop) Ltd v Jackelow* [61] at 231; *Kamfer's case* [62] at 127H).

In the present case the preservation of the applicant's rights lies entirely in his own hands, and there is no such element of compulsion. What the applicant seeks to be protected against is *the consequence of the choices* he may be called upon to make. The applicant's counsel submitted that, if the applicant were to remain silent during the inquiry in the face of damning evidence against him, he could be found guilty of misconduct and dismissed. He submitted that this is no choice at all, and is tantamount to compulsion to disclose his hand."(Italics added)

Counsel for the applicant referred to two Canadian decisions, namely, *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* (63) followed by *Williams v Deputy Superintendent of Insurance* (64), decided by the Nova Scotia Court of Appeal and Supreme Court respectively. Both cases concerned inquiries while criminal charges were pending. Nugent J observed that the legislation in both cases empowered the authorities to *compel* those concerned to give evidence, but apparently, Nugent J observed, it was *not* on that ground alone that the Court in each case ordered the inquiry to be suspended. In the *Phillip's case* (63) Hallet J observed:

"[T]he four respondents' right to silence will have been compromised even if they agree to testify, which they may be forced to do, as they may not want to leave unanswered allegations that are made at the public inquiry. They are in the coercive power of the State; the Crown will be able to gather evidence without the usual safeguards provided by the criminal law."

Similarly, McAdam J in the *William's case* (64) found that the applicant was "in the coercive power of the State". Nugent J in *Davis* (58) considered those decisions and then at pages 1158/1159, in dismissing the application, the learned Judge observed:

"The right to remain silent derives from an abhorrence of coercion as a means to secure convictions by self-incrimination (see *S v Zuma* [59]), and it exists to ensure that there is no potential for this to occur. It achieves this by *protecting an accused person from being placed under compulsion to incriminate himself; not by shielding him from making legitimate choices.*

The applicant's submission suggests that, if the alternatives which are to be chosen from are equally unattractive, then choice is tantamount to compulsion, and that the right to silence entitles an accused person not to be faced with that choice. I do not agree. What distinguishes compulsion from choice is *whether the alternative which presents itself constitutes a penalty, which serves to punish a person for choosing a particular route as an inducement to him not to do so.* While the distinction between choice and compulsion may at times be a fine one, in my view it is essential that it should be maintained if a

salutary principle is not to be extended beyond its true province and thereby risk falling into disrepute.

In the present case the applicant may well be required to choose between incriminating himself or losing his employment. If he loses his employment that is a *consequence* of the choice which he had made but not a penalty for doing so. It will be the natural consequence of being found guilty of misconduct, and not a punishment to induce him to speak. *Hard as the choice may be*, it is a legitimate one which the applicant can be called upon to make and does not amount to compulsion. In my view his right to silence does not shield him from making that choice.”(Italics added)

In the same year (1995) and indeed in the same Division (Witwatersrand Local Division) Navsa J decided the case of *Seapoint Computer Bureau v McLoughlin and De Wet NNO* (65). That case concerned an application to stay a civil action by the respondents against the applicant, pending the determination of a criminal case instituted against the applicant (alternatively its managing director). Navsa J at page 645 turned to the case of *Davis* (58) and considered the decision and dicta of Nugent J in detail concluding, at page 648, that he found the judgment to be “persuasive and analytically correct”. The learned Judge observed at p649:

“In my view, an examination of the history of the origin of the rule against self-incrimination or the right to remain silent, as conducted by Nugent J and as set out in the *Zuma* judgment *supra*, provides a pointer to how the problem ought to be approached. It is clear that compulsion by the State was the mischief aimed at. That explains why our Courts are loath to have persons, who would be accused in criminal proceedings, subjected to the coercive machinery provided by insolvency and companies legislation.”

Navsa J continued at page 649:

“The *Williams* case relied on by Mr Unterhalter, considers the choice a party has to remain silent during an inquiry as no choice at all. The *dictum* in the *William* case, referred to above, speaks of the accused being in the ‘coercive power of the state’. I am not certain that the *Williams* case, and the *Phillips* case which it follows, are not distinguishable. The fact that the proceedings sought to be stayed were statutory enquiries is important. So, too, is the fact that compelling mechanisms were available to the authorities concerned. Another factor is that the ‘coercive power of the State’ is more clearly seen in enquiries such as insolvency and companies legislation, and, presumably, in the structures creating the authorities conducting the enquiries in the *Williams* and *Phillips* cases. Why, one may well ask, is no authority available from any jurisdiction to show that in civil litigation involving two private parties, and where no coercive State machinery can be brought to bear on one of them, a Court was willing to stay proceedings. The answer readily presents itself and is alluded to in the *Davis* judgment and referred to by the plaintiff’s counsel. The improper application of principle will cause the administration of justice to fall into disrepute. To protect the right to remain silent is eminently desirable. To deny a plaintiff recourse to a judgment to which he may be entitled, because a police investigation against the opposing party may materialise, and where the defendant is not subject to coercive means, is not serving the cause of justice.

I agree with Nugent J that in principle a defendant should be left to his choice as to how to conduct the civil proceedings. In this case, if the defendant is of the view that it cannot succeed on its present plea, and that it is unable to file one, because it might thereby incriminate Kennedy [its managing director], or expose itself to criminal charges, it must then face the consequences of having filed a plea it cannot succeed on or it must face the consequences of not having a plea at all. The consequence may be judgment for the plaintiffs. This is *not in the field of the ‘coercive power of the State’*. *Bona fide* litigants ought not to be thwarted merely because their opponents are unable to resist their claims. Allegations of pending criminal investigations or proceedings, without indicators

that State coercive means are to be employed in the civil proceedings, are not sufficient to prove prejudice of a kind that will justify a stay.” (Italics added)

The learned Judge went on at page 650 to dismiss the application. Before doing so he referred to the case of *Rank Film Distributors Ltd and Others v Video Information Centre and Others* (66), to which Counsel for the applicant had referred as an authority for the proposition that the courts will readily incline towards protecting a party’s right against self-incrimination: there the Court of Appeal in England, and in turn the House of Lords, upheld a defendant’s claim to privilege against self-incrimination in resisting discovery in a copyright action. Navsa J considered that the courts in South Africa would do likewise. For the purposes of the case before him, he selected an extract from the judgment of Templeman LJ in the Court of Appeal, which “speaks eloquently of the kind of choices Nugent J says are open to a litigant in a civil case”, and which indicated “that the English Courts follow the approach that Nugent J espouses.” The extract reads:

“In every case in which a defendant is faced with possible self-incrimination as a result of discovery or interrogatories and especially where the tort and the crime are constituted by the same activity, the defendant has a choice. The defendant may choose to rely on the silence and concealment afforded by the doctrine against self-incrimination in order at one and the same time to hamper the plaintiff in the proof of his civil action and as a means of resisting or avoiding criminal prosecution or conviction. Alternatively the defendant may abandon his defence to the civil action in which case he may be immune from discovery and interrogatories and will not need to rely on the doctrine against self-incrimination unless and until he is confronted with an inquiry as to damages. *Failure to defend the civil action will not prejudice the defendant in any criminal proceedings. Alternatively again, if a defendant wishes to maintain a plausible defence to the civil suit, he will waive the privilege and give frank answers to interrogatories and full discovery.*” (emphasis by Navsa J.)

The issues raised in the *Davis* (58) and the *Seapoint* (65) cases arose once again before Nugent J in 1999 in the case of *Equisec (Pty) Ltd v Rodrigues* (67). In that case the applicant, a stockbroker, had sold shares on behalf of the first respondent, in an amount exceeding R4 million, which he paid into the first respondent’s bank account, only to discover that the share certificate had been stolen and the share transfer form had been forged. The applicant then discovered that all but about R5,000 had been withdrawn from the first respondent’s bank account. The first respondent was arrested. The applicant applied for and was granted a provisional order of sequestration of the joint estate of the first and second respondents (married in community of property). The applicant then sought a final order of sequestration. A prosecution of the first respondent being imminent, the latter brought a counter application seeking an order staying the sequestration proceedings until the finalisation of the criminal proceedings, on the grounds that he would otherwise be prejudiced in the conduct of his defence.

Nugent J dismissed the counter application for a stay on two grounds. As to the second of those grounds, if a final order of sequestration were granted, the first respondent would be subjected to a compulsory interrogation under section 65 of the Insolvency Act 24 of 1936: indeed, the applicant wished to pursue such course in order to establish the whereabouts of the money paid into the first respondent’s bank account. Nugent J at page 116 referred again *inter alia* to the cases of *Du Toit* (60) and *Gratus* (61), where the courts had not generally suspended the civil proceedings but had directed rather that there be no interrogation of the insolvent pending the result of the criminal proceedings. Since those cases, however, Nugent J observed at page 117, section 65 (2) of the Insolvency Act had been amended in 1989, providing that a person liable to be interrogated in terms of the section might not decline to answer any question “upon the ground that the answer would tend to incriminate him or upon the ground that he is to be tried on a criminal charge and may be prejudiced at such a trial by his answer.”

Nugent J observed, however, that section 65(2A) of the Insolvency Act provided that where the insolvent was required to answer such questions, that part of the proceedings should be held *in*

camera, the answers to such questions should not be published and were generally inadmissible in subsequent criminal proceedings. Nugent J then concluded at page 117 that clearly it was the intention of the Legislature to render a person liable to answer questions under interrogation, notwithstanding that criminal proceedings are pending against him, and it was then not open to the Court “to frustrate the legislation by staying the sequestration merely to avoid that occurring”.

As to the first ground upon which Nugent J dismissed the counter-application for a stay, the learned Judge commenced his judgment by observing thus at page 115:

“Where a person is accused of having committed an act which exposes him to both a civil remedy and a criminal prosecution, he may often find himself in a dilemma. While on the one hand he may prefer for the moment to say nothing at all about the matter so as not to compromise the conduct of his defence in the forthcoming prosecution, on the other hand, to do so may prevent him from fending off the more immediate civil remedy which is being sought against him.”

Further on at page 116 the learned judge, speaking of the first respondent’s dilemma, observed:

“[H]e is called upon in these proceedings to answer the allegations made against him by the applicant in the founding affidavit if he is to avoid his estate being placed under a final sequestration order. There is, of course, no legal compulsion upon him to do so. Whether a court should intervene to relieve a person of the perhaps difficult choices he faces in that regard was considered by me in *Davis v Tipp NO and Others*, which was subsequently followed in *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and De Wet NNO*. I see no reason to depart from the conclusion which was reached in those cases. In my view, the choice which the first respondent may face between abandoning his defence to the civil proceedings or waiving his right to remain silent (cf Templeman LJ in *Rank Film Distributors Ltd and Others v Video Information Centre and Others*, especially at 423D-G) *does not constitute prejudice against which he should expect to be protected by a Court* and I would not exercise my discretion in favour of the first respondent on those grounds alone.”(Italics added)

The cases of *Davis*, *Seapoint Computer Bureau* and *Equisec* were followed in 2000 by Basson J in the Labour Court in the case of *Fourie v Amatola Water Board* (68). In that case the applicant, the chief executive officer of the respondent Board, sought an order that a disciplinary hearing concerning alleged misconduct, instituted by the Board against him, be postponed pending the conclusion of criminal proceedings against him. Basson J delivered an *ex tempore* judgment in which he quoted much of the dicta of Nugent J and Navsa J which I have reproduced above. He observed at page 697/698:

“[11] *Mr Kroon*, on behalf of the applicant, argued that the distinction drawn by Nugent J and Navsa J in the above judgments on the basis of what constitutes a compellable witness is an artificial one. I do not believe that this is an artificial distinction to draw. The fact that the person in the position of the applicant has a choice to exercise his right to remain silent in civil proceedings (or at a disciplinary enquiry) and is not compelled to give evidence, is an important consideration to decide whether this difficult choice is sufficient to prove prejudice of a kind that will justify a stay or, as it was also put, whether this constitutes *prejudice against which such person should be protected by a court...*

[13] In my view, there is no merit in the argument that it depends upon the stage at which an employer wishes to institute criminal proceedings whether the employer is entitled to go ahead with a disciplinary enquiry. In the present matter, as I have stated above, it would appear that the disciplinary enquiry will take place at a stage when criminal proceedings already have been instituted, although the proceedings are not yet pending. I see no difference, in principle, between this position and the position where criminal proceedings have not been instituted but are likely to be instituted or, on the other hand,

where criminal proceedings are indeed pending. In all of these cases it is at least foreseeable, and more so in the last mentioned case, where it is highly probable, that the criminal proceedings will take place.

[14] However, the employee concerned always has the choice whether to give evidence at the disciplinary enquiry, that is, whether he or she wishes to put up a defence. In other words, the employee has the choice whether to abandon his or her defence or, on the other hand, to waive his or her right to remain silent. Clearly, there is some prejudice involved for such employee (who faces possible future criminal proceedings based upon the same alleged misconduct), but I would agree with the principles enunciated in the cases (quoted above) that *it is not the type of prejudice against which the employee should expect to be protected by a court.*" (Italics added)

The *Davis*, *Seapoint*, *Equiseq* and *Fourie* cases all concerned the proposed adjournment of civil proceedings, or internal disciplinary inquiries, pending the final determination of pending criminal proceedings. Meanwhile, some six months after the delivery of the *Davis* judgment, the Constitutional Court delivered judgment in the case of *Ferreira v Levin NO and Others: Vryenhoek and Others v Powell NO and Others* (69). The Constitutional Court was there concerned with the constitutionality of section 417(2)(b) of the Companies Act 61 of 1973, which dealt with the examination of persons by the Master of the Supreme Court as to the affairs of a company under a winding-up. Section 417(2)(b) reads:

"Any such person may be required to answer any questions put to him at the examination, notwithstanding that the answer might tend to incriminate him, and any answer given to any such question may thereafter be used in evidence against him."

Six individual judgments were delivered by the Judges of the Court, the two principal judgments being delivered by Chaskalson P (as he then was) and Ackermann J. There was minority opinion that the applicants could not rely upon the provisions of section 25(3) of the Constitution (1993), enshrining the right to a fair trial, but that section 417(2)(b) was inconsistent with section 11(1), enshrining the right to freedom and security of person. The majority held that section 417(2)(b) was inconsistent with section 25(3) and that such inconsistency could not be justified by the provisions of section 33(1) (dealing with the statutory limitation of fundamental rights). The Court recognized the necessity for some of the provisions of section 417(2)(b).

Ackermann J observed at p1076, para 151:

"Companies are used to raise money from the public and to conduct business on the basis of limited liability. There are obvious advantages to doing so. But there are responsibilities which go with it. Part of the responsibility is to account to shareholders for the way in which the company conducts its affairs and, if the company goes insolvent, to account to shareholders and creditors for the failure of the business. These responsibilities are well known to all who participate in the running of public companies. Giving evidence at a section 417 enquiry is part of the responsibility to account. It cannot simply be said that the administration of justice would necessarily be brought into disrepute by the subsequent use, even in a criminal proceedings against the examinee, of *derivative evidence* obtained as a result of the application of section 417(2)(b) of the Act. Indeed, the public, and especially the victims of the crime, might find a denial of the right to use such evidence inexplicable."

The Court adopted the approach (see para 150) whereby a blanket exclusion of *derivative evidence* was unnecessary, as it could be "dealt with on the flexible basis of discretionary admissibility", that is, regulated by the trial Judge on the basis of his residual discretion to exclude evidence whose prejudicial effect outweighs its probative value: such approach was favoured by the Canadian courts, as compared to the absolutist position in the matter adopted by the courts in the United States of America (see paras 132/150).

Accordingly (see para 157) the Court declared section 417(2)(b) invalid, but only to the extent that the words therein, “and any answer given to any such question may thereafter be used in evidence against him”, apply to the use of any such answer against the person who gave such answer, in criminal proceedings against such person, that is, other than criminal proceedings against that person arising out of the act of giving, or not giving evidence, or perjury, or failing to answer questions fully etc. It will then be seen that the order did not encompass the aspect of *derivative* evidence, arising from the examination under section 417(2)(b), the admissibility thereof being left to the discretion of the trial judge.

There followed the Constitutional Court case of *Key v Attorney-General, Cape Provincial Division, And Another* (70). The applicant sought an order that sections 6 and 7 of the Investigation of Serious Economic Offences Act 117 of 1991 violated section 13 of the interim Constitution (1993) (the right to personal privacy and the right not to be subject to searches and seizures). Documents had been seized from the applicant under the provisions of section 6, and further had been supplied to investigative accountants under section 7. The applicant was subsequently indicted on charges relating to a company in liquidation. He maintained that the evidence garnered under sections 6 and 7 was inadmissible at his pending trial. Kriegler J (the other ten members of the Court concurring) observed that the acts complained of had taken place before the advent of the interim Constitution (Act 200 of 1993) on 27th April, 1994. The learned Judge held at paras 4 and 6 that the Constitution did not render unlawful acts which were lawful at the time, and “save possibly in exceptional circumstances involving gross injustice abhorrent to our present constitutional values the courts apply the law as it was before the Constitution came into force.” Moreover, even if it were open to the Court, in exceptional circumstances, to invalidate acts prior to 27th April, 1994, an issue which Kriegler J left open, there were no such exceptional circumstances before the Court to warrant such an order.

That effectively disposed of the application, but in the circumstances Kriegler J went further and observed at pp194/195 para 11:

“Even if one were to accept that the section was constitutionally invalid, and even if one were further to assume that such invalidity in turn rendered the prior searches and seizures unlawful, it does not follow that the evidence obtained directly or derivatively as a result of such searches and seizures would *necessarily* be inadmissible in criminal proceedings against the person from whom the documents containing, or pointing to, the evidence were seized.” (Italics added)

and at pages 195/196, para 13,

“In any democratic criminal justice system there is a *tension* between, on the one hand, the public interest in bringing criminals to book and, on the other hand, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin* [69], fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. *But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.* (Italics added)

There followed in 1999 another Constitutional Court decision *S v Dlamini; S v Dladla And Others; S v Joubert; S v Schietekat* (71) in which four appeals were consolidated. The appeals concerned

the constitutional validity of a number of provisions in the Criminal Procedure Act, 1977 concerning the granting of bail. For our purposes, the relevant provision is section 60(11B)(c). The particular provision reads thus:

“(c) The record of the bail proceedings, excluding the information in paragraph (a) [re previous convictions, other charges pending and any current bail granted], shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his trial and such evidence becomes admissible in any subsequent proceedings.”

Kriegler J delivered the sole judgment in which the other nine members of the Court concurred, declaring, at para 102 that *inter alia* the above provisions were not unconstitutional on any of the grounds argued. In the court below, Counsel in the *Dladla* proceedings and also in the *Dlamini* proceedings had relied on the judgment in *S v Botha and Others* (73). It proves necessary to set out the dicta of Kriegler J in the matter *in extenso* at paras 91-95:

[91] In *Dlamini*, counsel relied on the judgment in *S v Botha and Others* in juxtaposing two constitutionally entrenched fundamental human rights, the right to bail and the privilege against self-incrimination. Submitting that those rights were impermissibly brought into conflict with one another in cases such as *Dlamini* (and *Botha*), where utterances by or on behalf of an accused during bail proceedings were subsequently allowed to be used to the detriment of the accused, counsel for the appellant urged this Court to adopt the reasoning and endorse the conclusion in *Botha's* case. That was that *Botha* could not have a fair trial if he were to be ‘... cross-examined on the incriminating evidence he gave at the bail application if he did so in ignorance of the right to refuse to answer incriminating questions’. In a later passage the learned Judge concluded as follows regarding the conflict between the two rights in question: ‘If the evidence given by an accused at a bail application is admissible later at trial, the accused faces a dilemma: if he fails to give evidence or refuses to answer incriminating questions, he may be refused bail, yet, if he does give evidence and answers incriminating questions in order to get bail, he foregoes his right to remain silent and the privilege against self-incrimination. In the interests of a fair trial, the accused should not have to choose’. The Court below [in *Dlamini*] rejected the reasoning in *Botha's* case, holding that it rendered an accused ‘free to perjure himself ... [and] would bring the administration of justice into disrepute...’.

[92] Counsel’s argument that the trial Court had erred stands or falls with its resort to the judgment in *Botha*. If that judgment is either inapplicable or, if applicable, is unsound, the argument collapses for lack of foundation. And, in my view, it fails on both scores. *Botha's* case was a criminal trial in which the prosecution unsuccessfully tried to put in a transcript of incriminating evidence that the eponymous accused had given when applying for bail. The evidence was excluded on two separate grounds; and foundational to both was a finding that the accused had given the contested evidence in *ignorance of his right against self incrimination*. By contrast, in *Dlamini* the prosecution established conclusively that the accused, *having been fully informed by the magistrate of his right to remain silent and of the risk of self-incrimination should he testify*, proceeded to make the damaging disclosure while arguing his innocence. The facts in the two cases are therefore fundamentally different and the judgment in *Botha* is inapplicable.

[93] In any event, I disagree with the reasoning and conclusion in *Botha* that the record of bail proceedings should be kept distinct from the evidence as to guilt, on the analogy of *evidence in a trial-within-a-trial as to the voluntariness of a confession*. It is true that evidence given at a bail hearing may ultimately redound to the prejudice of the accused. It can therefore not be denied that there is a *certain tension between the right of an*

arrested accused to make out an effective case for bail by adducing all the requisite supporting evidence, and the battery of rights under s35 (1) and (3) of the Constitution [the rights of arrested and accused persons]. But that kind of tension is by no means unique to applicants for bail. Nor does its mere existence sound constitutional alarm bells. Choices often have to be faced by people living in open and democratic societies. Indeed, the right to make one's own choices is an indispensable quality of freedom. And often such choices are hard.

[94] Litigation in general, and defending a criminal charge in particular, can present a *minefield of hard choices*. That is an inevitable consequence of the high degree of autonomy afforded the prosecution and the defence in our largely adversary system of criminal justice. An accused, ideally assisted by competent counsel, conducts the defence substantially independently and has to take many key decisions whether to speak or to keep silent: does one volunteer a statement to the police or respond to police questions? If one applies for bail, does one adduce oral and/or written evidence and if so by whom? Does one for the purposes of obtaining bail disclose the defence (if any) and in what terms? Later, at the trial, does one disclose the basis of the defence under section 115 of the CPA [statement by accused as to basis of defence]? Does one adduce evidence, one's own or that of others? Each and every one of those choices can have decisive consequences and therefore poses difficult decisions. As was pointed out in *Osman's case* [74] '(t)he choice remains that of the accused. The important point is that the choice cannot be forced upon him or her'. It goes without saying that an election cannot be a choice unless it is made with proper appreciation of what it entails. It is particularly important in this country to remember that *an uninformed choice is indeed no choice*. The responsibility resting upon judicial officers to ensure the requisite knowledge on the part of the *unrepresented* accused need hardly be repeated.

[95] In effect the reasoning in *Botha* wishes to give the accused the best of both alternatives or, as it was put bluntly in *Dlamini, the right to lie*: one can advance any version of the facts without any risk of a come-back at the trial; and there one can choose another version with impunity. However, the protection of an arrestee provided under the right to remain silent in the Constitution - or the right not to be compelled to confess or make admissions - *offers no blanket protection against having to make a choice*. It is true, the principal objective of the Bill of Rights is to protect the individual against abuse of State power; and it does so, among others, by shielding the individual faced with a criminal charge against having to help prove that charge. That shield against compulsion does not mean, however, that an applicant for bail can *choose to speak but not to be quoted*. As a matter of policy the prosecution must prove its case without the accused being compelled to furnish supporting evidence. But if the accused, acting freely and in the exercise of an *informed choice*, elects to testify in support of a bail, application, the right to silence is in no way impaired. Nor is it impaired, retrospectively as it were, if the testimony voluntarily given is subsequently held against the accused." (Italics added)

It remains then to apply those authorities to the facts of the present case.

THE ACCUSED'S FAILURE TO PRODUCE FOREIGN BANK RECORDS

First of all I wish to repeat that the Swiss bank records before me, bearing the accused's name, represent in fact accounts held by the accused: they bear copies of his passport, his photograph, his handwriting and signature, his physical address and postal address in Maseru, LHDA - headed stationery, and entries of transfer of funds to the account in Ladybrand, which for much the same reasons I am satisfied was held by the accused. It will be seen, however, that the accused did not produce, nor did he acknowledge that he held such accounts. The Crown, as I have indicated, has adduced evidence of 51 extracts from the civil record before me....

Mr Phoofolo submits that the contents of the civil record are simply irrelevant in this criminal trial. The aspect of relevance is the subject of a good deal of definition. In *R v Mpanza* Innes CJ observed at pages 352/353: "Now facts relevant to the issue may always be proved, and any facts are so relevant if from their existence inferences may properly be drawn as to the existence of the fact in issue."

But as Hoffman and Zeffert *op. cit.* observe at page 21, "when can inferences properly be drawn?" That aspect seems to me to be an aspect of common sense. Hoffman and Zeffert *ibid.* observe, that "[t]hat [aspect] defies definition and it would, perhaps, be best merely to say that relevance is determined by common sense." Indeed, Schreiner JA observed in the case of *R v Matthews* (75) at page 758, that relevance is "based upon a blend of logic and experience lying outside the law."

As to the present case, I consider that what the accused said as to the Swiss bank accounts in the civil trial is entirely relevant. As I said in the ruling as to the admissibility of the civil record, the contents thereof are evidence of the making thereof. But when it comes to statements by the accused, they take on an evidential value, if they are inculpatory, in which case they are admitted *against* the accused. Although an accused's statement can thus be admitted *against* him as evidence of the *truth* of its contents, as an exception to the hearsay rule, in the present case the accused's statements are not being admitted for that purpose. They are being admitted as evidence simply that he *made* such statements, in which case they do not, in any event, constitute hearsay. The statements by the accused are all exculpatory in form: he denied having any South African or Swiss bank accounts. But the Court has found that he manifestly did hold such accounts and accordingly I find that, he lied, and lied under oath, a number of times, in the High Court. His statements therefore, while exculpatory in form, have an inculpatory effect: they inevitably indicate that he wished at all costs to conceal those accounts, raising the inference that the accounts were not held and operated for a valid purpose, and indeed, in all the circumstances, supporting the inference of corrupt transactions.

Mr Phoofolo refers to the case of *S v Nzima and Another* (76) decided by Jali J in the Cape of Good Hope Provincial Division in September 2000. That case concerned the provisions of section 60(11B)(C) of the Criminal Procedure Act, 1977, which were considered by the Constitutional Court in *Dlamini*. The accused was charged with murder and illegal possession of a firearm and ammunition. The State applied to have the record of the bail hearing, at which the accused gave evidence, admitted as part of the record of the trial. The Magistrate had not informed the accused of the consequences of giving evidence, as he was required to do by the provisions of section 60(11B)(c). The accused testified that his Attorney had not advised him of his rights. The Attorney could not recall doing so. Accordingly, Jali J found that he had not. The learned Judge considered the dicta of Kriegler J in *Dlamini* at page 679 E-F. Further on at page 125 he observed:

"If one reads section 60(11B)(c) it is clear that the legislature placed an obligation on the court to advise the accused of the fact that the evidence he gave during the bail proceedings might subsequently be used against him in any proceedings. In my view, whether the accused is represented by an experienced legal representative or an inexperienced legal representative, the court still has a duty to establish that the accused's rights have been properly explained to him. It is not a duty, which rests upon a legal representative even though the legal representative may assist or compliment the court's obligation in explaining the accused's rights.

It is clear that the purpose of section 60(11B)(c) is to protect an accused person from the consequences of an uninformed decision to testify at the bail hearing which might later have consequences for him which could be unfair and thus violate his constitutional right to a fair trial. The fact that the accused was represented, in my view, is irrelevant, as there was no evidence suggesting that he was informed of his rights and was making an informed choice. This lack of information regarding the consequences of testifying goes to the very root of our criminal justice system which gives the accused person a right to

decide whether to testify or not. This, obviously, he does after a proper evaluation of the consequences of his action. The failure by the court to inform the accused, in this matter, violated the right of the accused to remain silent and the right against self-incrimination, which is recognised in section 35 of the Constitution of the Republic of South Africa Act 108 of 1996. In *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* at 677B Kriegler J stated that: 'Election cannot be a choice unless it is made with proper appreciation of what it entails. It is particularly important in this country to remember that uninformed choice is indeed no choice'. The duty of establishing that the accused has made an informed choice in terms of the Act is thus placed upon the magistrate. If the magistrate does not perform that duty then whatever evidence which is then obtained from an accused is unduly obtained."

I respectfully agree with the learned Judge. Mr Phoofolo then submits that the learned trial Judge in the civil proceedings, concerning the accused in this case, should have warned the accused that he had the right to remain silent altogether. Mr Phoofolo is there referring to the accused's evidence before the trial Judge on 6th November 1996 I assume that this submission is made in the alternative, as it is hardly consonant with the submission that the accused's utterances in the civil trial are irrelevant in these proceedings. In any event, Mr Phoofolo, in other words, would seek to draw an analogy with *Nzima* (76). But that case concerned evidence given in a bail application, which was covered by statutory provisions, placing a clear mandatory duty upon the court in the matter.

The particular proceedings in this case were of course quasi-criminal in nature, inasmuch as they were contempt proceedings. Undoubtedly, whether criminal (see section 255 of the Code) or civil proceedings are involved, the Court has a duty in the matter of the privilege against self-incrimination, which privilege I assume Mr Phoofolo invokes.

It is trite that the privilege must be claimed by the witness and it is his decision whether or not to answer the question. Nonetheless, as Holmes JA observed in *S v Lwane* (77),

"[i]n this country there is a general rule of practice in terms of which a judicial officer has a duty to warn a witness in criminal proceedings that he is not obliged to give evidence which might have a tendency to expose him to a criminal charge. The duty arises whenever *it appears* that the witness might well be about to give such evidence, whether or not a specific question has been directed thereto." (Italics added)

How is one to construe the words "it appears" italicized above? Usually it is the witness who raises the aspect of privilege. But what if the witness, represented or otherwise, uninformed or otherwise, does not claim privilege, on what basis must the Court independently act? Where the witness does claim privilege, before allowing the claim, the Court, in its discretion, must be satisfied "from the circumstances of the case, and the nature of the evidence which the witness is called to give, that there is a *reasonable* ground to *apprehend danger* to the witness from his being compelled to answer."

(See *R v Boyes* (78), *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* (79), *Phipson op. cit.* at para 20-47, and Hoffmann and Zeffert *op. cit.* pp236/243). It seems to me therefore that where a witness does not claim privilege it must, in any event, *appear* to the Court that there is a reasonable ground to apprehend danger, that is, before it can warn the accused in the matter. In the present case the two questions asked of the accused were asked on 6th November, 1996. The order of the Chief Justice on 30th October directed the production of a number of documents: the bank records were but one item on the order, and they were sought in connection with a civil claim. I cannot see, on the part of the Court, that any query could have arisen until the Standard Bank, Maseru records were produced in March 1997, pointing to the Ladybrand account, nor could suspicion have arisen until the records of the latter account were produced in April, 1997.

The prosecutor is under a duty to warn the Court if he proposes to ask an incriminating question (*S v Lwane* (77) at p440 F). But can it be said that in November, 1996 the Crown entertained any suspicion in the matter? The record subsequently indicates that the two questions asked on 6th November 1996 arose out of the fact that by that stage the accused had supplied documents relating to his Diner Club, American Express, First National Bank and Standard Bank Credit cards, which documents disclosed that they were linked to South African bank accounts. The accused testified that he did not regard such card accounts as “bank accounts”. The point is that the two particular questions were apparently asked in order to clarify why the accused had earlier failed to refer to such credit cards. I cannot see in the circumstances that any duty devolved upon the Crown in the matter of self-incrimination. Neither for that matter can I say, with respect, that there was any duty upon the learned trial Judge in the matter.

In any event, Mr Phoofolo’s objection concerns the record of 6th November 1996. What of the accused’s repeated false averments and conduct over an extended period, displaying, now it can be said, a continuing obdurate determination to conceal his South African and Swiss bank accounts? What, in particular of his false averment that the particular account at UBS Zurich was held by a foreign business associate, whose monies were being channelled through the accused’s Ladybrand account? The accused himself testified that affidavits are drawn up by Counsel or by one’s Attorney and read back to the deponent. He was represented, as I have said, by Senior Counsel, Counsel and Attorney. In particular, Counsel was present in Court on 6th November. How can it be said that throughout all this time his was an “uninformed choice”? What opportunity was there for any judicial warning as to the contents of a steady flow of affidavits? Speaking of criminal proceedings in general, Kriegler J in *Dlamini* (71) at page 677 spoke of the responsibility resting upon judicial officers in the matter, that is, with regard to an “*unrepresented* accused”. It proves fitting to repeat what the learned Judge had earlier observed at page 676, reproduced *supra*:

“Choices often have to be faced by people living in open and democratic societies. Indeed, the right to make one’s own choices is an *indispensable quality of freedom*. And often such choices are hard.

[94] Litigation in general, and defending a criminal charge in particular, can present a *minefield of hard choices*. That is an inevitable consequence of the high degree of autonomy afforded the prosecution and the defence in our largely adversary system of criminal justice.”(Italics added)

To repeat in part particular dicta of Nugent J in *Davis* (58) at page 1157:

“Civil proceedings invariably create the potential for information damaging to the accused to be disclosed by the accused himself, not least so because it will often serve his interests in the civil proceedings to do so. The exposure of an accused person to those inevitable choices has never been considered in this country to conflict with his right to remain silent during the criminal proceedings. Where the Courts have intervened there has always been a further element, which has been the potential for State compulsion to divulge information.”

The “coercive power of the State” simply does not arise in the present case. At the relevant time there were no criminal proceedings pending: the investigation in Switzerland did not commence until August 1997 and the accused was not charged before the Subordinate Court until 27th July, 1999. During the relevant time, when he gave the above evidence and made the above averments, it cannot be said that even suspicion had crystallized. The accused indeed sought to defuse or deflect any suspicion by his evidence. That was the choice he made. I cannot see, however, that such choice constitutes prejudice against which he should expect to be protected by this Court. I cannot see, in the exercise of my residual discretion, that any aspect of unfairness arises or that the prejudicial effect of the evidence of what transpired in the civil proceedings, that

is, the evidence which I have recounted above, outweighs its probative value, and I hold that the said evidence is admissible in these proceedings against the accused.

CIRCUMSTANTIAL EVIDENCE

The Crown's case is in part based on circumstantial evidence, in respect of which the Crown submits the Court should draw an inescapable inference of guilt. For over sixty years the courts have been guided in the matter by the following "two cardinal rules of logic" laid down by Watermeyer JA (as he then was) in the oft-quoted case of *R v Blom* (80):

"In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

(1) The inference sought to be drawn must be consistent with all the *proved* facts. If it is not, the inference cannot be drawn

(2) The proved facts should be such that they exclude every *reasonable* inference from them save the one sought to be drawn. If they do not exclude other *reasonable* inferences, then there must be a doubt whether the inference sought to be drawn is correct." (Italics added)

There are two schools of thought as to the process of arriving at the latter inference. One of them is represented by the approach of the High Court of Australia (Gibbs CJ, Mason J (as he then was) and Brennan J; Dean J *dissentiente*) in the notorious "dingo case", *Chamberlain and Another v The Queen* (81), but as Hoffmann and Zeffert *op. cit.* observe at page 592, that approach "would not accord with what seems to be the South African opinion." The "South African opinion" has been settled by the Appellate Division, the relevant dicta indeed being followed by the Court of Appeal of Lesotho. In the case of *R v De Villiers* (82) Davis AJA (Watermeyer CJ, Tindall, Centlivres and Feetham JJ A concurring) observed at page 508: "It is not each proved fact which must exclude all other inferences; the facts as a *whole* must do so." (Italics added)

Davis AJA went on at page 508 to quote the following passage from Best on *Evidence* 5th ed. at section 298:

"Not to speak of greater numbers; even two articles of circumstantial evidence - though each taken by itself weigh but as a feather - join them together, you will find them pressing on the delinquent with the weight of a millstone.... It is of the utmost importance to bear in mind that, where a number of *independent* circumstances point to the same conclusion the probability of the justness of that conclusion is not the *sum* of the simple probabilities of those circumstances, but is the *compound result* of them." (Italics added)

And further on at pages 508/509 Davis AJA observed:

"The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the *cumulative* effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a *whole* is beyond reasonable doubt inconsistent with such innocence." (Italics added)

In the Court of Appeal case *Nkosi v R* (83) Browde JA (the late Mahomed P, and Steyn JA (as he then was) concurring) at page 44 quoted the above passage from Best and again in the case of *Lebete and Another v R* (84) (the late Kotze JA, and Leon JA concurring) at page 481. In particular, in *Lebete* (84) at pp 481/482 Browde JA applied the above dicta of Davis AJA.

The Appellate Division confirmed its approach in the matter in the case of *R v Mtembu* (85) in the following dicta of Schreiner JA at pp 679/680:

“It is not clear to me that the Crown’s obligation to prove the appellant’s guilt beyond reasonable doubt required it to negative beyond reasonable doubt all pieces of evidence favourable to the appellant. I am not satisfied that a trier of fact is obliged to *isolate each piece of evidence in a criminal case and test it by the test of reasonable doubt*. If the conclusion of guilt can only be reached if certain evidence is accepted or if certain evidence is rejected then a verdict of guilty means that such evidence must have been accepted or rejected, as the case may be, beyond reasonable doubt. Otherwise the verdict could not properly be arrived at. But that does *not* necessarily mean that *every factor* bearing on the question of guilt must be treated as if it were a *separate issue* to which the test of reasonable doubt must be distinctly applied.”(Italics added)

Hoffmann and Zeffert *op. cit.* at page 590 observe that the second rule in *Blom* has been regarded by some as a statement of the standard of proof in a criminal case. The Honourable Mr Justice H. C. Nicholas in his essay, “*The Two Cardinal Rules of Logic in Rex v Blom*”, in *Fiat Justitia. Essays in Memory of Oliver Deneys Schreiner* (1982), has this to say on the point:

“The second rule of logic in *Blom* is a salutary rule, whose field of application is limited by its nature. It is a tool for *detecting and avoiding fallacy*, for testing the logical validity of a conclusion. It is no more than that. *It is not a legal precept*. It is not another way of stating the criminal standard of proof. It does not in itself provide an automatic answer to the question whether guilt has been proved beyond a reasonable doubt. Even if the rule is satisfied, it does not follow that the trier of fact *must* convict the accused...”. (Italics added)

Hoffmann and Zeffert *ibid.* observe:

“In other words, it would be fallacious reasoning for a court to convict if the second rule is not satisfied; but if it is satisfied, it does not follow that the accused is guilty. That the second rule is “a tool for detecting and avoiding fallacy” is, with respect, obviously correct. It is the fact that it is a tool that has been forget out of the metal of the criminal onus that has caused confusion. It is obvious that it may often be difficult to see an accused’s being acquitted when the rules in *Blom*’s case have been satisfied - if the inference that X killed Y intentionally is (a) consistent with the proved facts and (b) the only reasonable inference from them, in practice X will often be convicted. But this does not mean that the second rule should be seen as merely as restatement of the overall onus in a criminal case, for the onus still rests upon the State to prove *unlawfulness*.”(Italics added)

Be that as it may, inasmuch as the rules in *Blom* may be applied to intermediate facts, in order to detect and avoid fallacy and to test “the logical validity of a conclusion,” the rules must be applied to the aspect of the overall *guilt* of the accused, before he can be convicted. In other words, an accused cannot be convicted unless (1) his guilt is consistent with all the proved facts and (2) the proved facts are such that they exclude every reasonable inference from them save the guilt of the accused.

At the risk of over-simplification, I believe that the test can be and has frequently been stated thus: the Court cannot convict an accused unless, on the proved facts, the inference of guilt is, not alone a reasonable inference, but is the *only* reasonable inference.

THE INTERMEDIARIES

I use the term “intermediaries” as a matter of convenience, as of course, it remains to be seen whether their activities constituted a link between the Consultants/Contractors and the accused.

[Cullinan AJ then considered the conduct of Mr Cohen, Mr du Plooy and Mr Bam, and then considered the applicability of similar fact evidence in relation thereto]

APPLICATION OF SIMILAR FACT EVIDENCE

As earlier stated, similar fact evidence is exceptionally admissible, not to show that the accused is of bad character and is likely to have committed the relevant offence, but, for example, in a case such as this, where different counts are involved, to establish design or system, if its probative force is sufficiently strong to warrant its exceptional reception.... In the present case, while each count must be considered separately, nonetheless they are similar in nature, and reflect a system over an extended period whereby eleven Consultants/Contractors paid large sums of money to three intermediaries, Mr Cohen, Mr du Plooy and Mr Bam, who in turn virtually forthwith paid the accused in most cases a regular percentage thereof, depending upon the intermediary, ranging from 60% by Mr Bam, and 50% by Mr du Plooy, to a relatively small fraction by Mr Cohen. Many of the transactions involved were relatively contemporaneous, so that at times funds became intermingled; so much so that on occasion it proves difficult to identify the source of a particular payment to the accused. Indeed, it is true to say that the transactions involved are inextricably bound together and the facts of this case are such that it is difficult to do otherwise than look at the global picture: to do otherwise would seem to be an exercise in unreality. In particular I see nothing prejudicial or unfair in doing so.

The initial opening of the accused's first Swiss bank account and the transfer thereto by Mr Cohen on behalf of UDC, of the sums of GBP 2,500.00 and USD 2, 500.00, in February 1988, seems to have set the train in motion. Thereafter the purpose of numerous payments of large amounts of money by three intermediaries to the accused over a period of some nine years, can only have had and can only have been understood by the accused to have one purpose, that is, a corrupt one. Again, there can be no doubt, nor could the accused have entertained any doubt about the purpose of the three direct payments to him by Dumez Nigeria Ltd during the period of October 1989 to June 1990.

The payments by the intermediaries were made for a purpose and it follows that they informed the accused of such purpose. In brief, the accused must then have known of the *source* (the identity of the Consultant/Contractor) as well as the purpose of each payment, and in particular what was expected of him in return for such payment; alternatively a payment might well have been made in respect of consideration already granted by the accused.

As to knowledge and intent by the Consultant/Contractor, the following factors emerge:

(1) It is significant that Mr Cohen set the wheels of corruption in motion by his payments to the accused and by being instrumental in opening the accused's UBS account, that is, in February 1988, three months before a payment to him by Spie Batignolles in May 1988, to be followed by the other French companies, and through them Gibb and LHPC, with whom Mr Cohen was in association.

(2) Apart from payment by Spie Batignolles to UDC in May, 1988, it is significant that one Consultant/Contractor, Dumez, had made a direct approach to the accused, at an early stage, during the period October 1989 to June 1990, that is, before any "system" had set in. Having established direct links with one Consultant/Contractor, it seems hardly likely that the accused, over the ensuing seven to eight years, did not do likewise with the other Consultants/Contractors, who were contributing to his financial welfare.

(3) It is significant that one of the three consultants, Mr Bam, served three Consultants/Contractors, namely, Acres, Dumez and Lahmeyer, who, unlike those served by Mr Cohen, were not associated in any way, and whose interests were necessarily diverse.

(4) It is significant that the three consultants engaged by eleven Consultants/Contractors all resorted to corrupt payments.

(5) It is extremely unlikely that all eleven Consultants/Contractors were being individually or collectively deceived by their respective consultant.

(6) All Consultants/Contractors were generally successful, being awarded one or more contracts. The consultants supplied something more than mere information, therefore, sufficient to cause enquiry as to their methods. This was particularly the case with associate companies such as Sogreah, Coyne and Gibb (SCBG), Cegelec, Spie and LHPC, that is associated by partnership or nationality, all availing of the services of one consultant.

(7) Although the personal services of Mr Bam had been directly or indirectly (as representative of ACPM) engaged as a consultant, nonetheless three Consultants/Contractors each made a payment to Mrs Bam.

(8) The fact that Mr Bam and Mr du Plooy each paid the accused a constant percentage of money received from the Consultant/Contractor, that is, 60% and 50% respectively (which former percentage was revealed to the accused in his bank documents), indicates an agreement with either the accused or the Consultant/Contractor, or indeed both. How could the accused ensure that he was receiving the correct amount, without establishing the amount received by the intermediary? Surely the most satisfactory source of this information was the Consultant/Contractor himself? For that matter, in the case of Mr Cohen, it can be said that the fluctuating amount and percentage of payment would point to a greater need, on the part of the accused, to liaise with the particular Consultant/Contractor in the matter.

(9) Clearly the most significant factor is that all payments were effected by the Consultants/Contractors to their respective consultants, and also Mrs Bam, through the medium of Swiss bank accounts, all operated with "*Banque Restante*" facilities. Indeed, HWV itself availed of the use of a Swiss bank account. The consultants rendered their services locally. All of the Consultants/Contractors operated local bank accounts. So also did LESCON and ACPM and presumably Mr and Mrs Bam. So also at one stage did Mr du Plooy. While no doubt the trend or 'system' was initiated by Mr Cohen, associated with two companies registered in Panama, but apparently operating out of Zurich, nonetheless what need was there for banking facilities which were nothing less than covert, an aspect which is underlined by the accused's resistance to discovery in the civil proceedings? If Mr Cohen or Mr du Plooy did not operate local bank accounts at the relevant time, there was nothing to prevent them doing so. None of the Consultants/Contractors were based in or operated out of Switzerland. For the purposes of payment of the various contractual currency components, they supplied to LHDA the details of many foreign bank accounts. Not one of them however, supplied the details of any bank account in Switzerland Surely, therefore, if the relevant representation agreements were conducted *bona fide*, in the highly sensitised and tense atmosphere prevailing in the world of multi-million and even billion Maloti construction tenders, the *stigma* of covert banking facilities would never have been contemplated.

CREDIBILITY

Mr Phoofolo submitted that Mr Roux demonstrated bias. With that I cannot agree. Indeed, as previously indicated, Mr Roux's forensic report and evidence demonstrated impartiality, inasmuch as it clearly acknowledged the Court's role in the matter.

Again, Mr Phoofolo submitted that Mr Putsoane was similarly biased. I could well understand that Mr Putsoane might feel some resentment towards the accused in view of the lack of advancement of Basotho Engineers ... and in particular in view of the accused's failure to involve Mr Putsoane in the purported settlement of the Dumez claim (Contract 104). But I cannot see that, if that was the case, any such feelings affected Mr Putsoane's evidence, which was largely

factual. For my part I was impressed with Mr Putsoane's candour, as I was with that of Mr R. T. Mochebelele (PW11) (particularly as to Counts 17 and 18), and that of Mr Rafoneke and the other witnesses employed by the LHDA. For that matter there was no Crown witness whose evidence in any way gave me any cause to doubt its veracity.

THE ACCUSED'S SILENCE

The accused has not adduced any evidence in answer to the Crown's case, and has elected to remain silent. He is not obliged to give any evidence. That right is enshrined in the Constitution. Section 12(7) thereof provides that "[n]o person who is tried for a criminal offence shall be compelled to give evidence at the trial."

That of course has been the constitutional position in Lesotho for many years now - reaching back to the bill of rights in the 1965 and 1966 Constitutions, followed by the Human Rights Act 1983 and the present Constitution. But, of course, the right to silence has been protected at common law for a much longer period. In the 1915 case of *R v Dube* (86) where the accused, who had remained silent in her defence, had been convicted of murder, Innes CJ observed at page 563:

"She was by law a competent witness, though she was under no obligation to tender her testimony. The *onus* rested upon the Crown to establish her guilt. At the same time the fact that she did not endeavour to explain the circumstances of suspicion which the prosecution had set up was an element which the trial Court was entitled to take into consideration."

Much of course depends upon the strength of the prosecution's case. In the 1944 case of *R v Slabbert & Prinsloo* (87) Schreiner J (as he then was) observed at pp330/331:

"In cases turning mainly or wholly on circumstantial evidence the Court has to explore the possibility that there may be an innocent explanation of apparently damaging facts. It will depend on the circumstances whether the fact that any particular explanation was not advanced by the accused is important or not.

Sometimes defence evidence would be required to make an explanation appear reasonably possible. The cases relating to the recent possession of stolen goods provide frequent examples. To take a related sort of case, if the accused's hat were found in a house that had just been burgled it would theoretically be possible, even in the absence of defence evidence to imagine circumstances explanatory of the hat's presence there consistently with the accused's innocence. The hat might have been lost by or stolen from the accused or he might have lent it to someone. It might be one of a number of hats belonging to the accused and might simply have disappeared. But unless he gave evidence laying the foundation for one or other of these explanations the possibility that one of them might be the true explanation would presumably be regarded as remote and not reasonable. In such cases the accused would fairly certainly have been alive to the explanation if true and so *his failure to propound it would remove it from the range of reasonable possibility*. Lapse of time may introduce the factor that the accused may have forgotten the facts which might provide an innocent explanation whether that might reasonably explain his failure to propound the facts will depend on their nature and on the length of time involved.

Unless at the time when an explanation is to be expected of him, i.e. at the trial or earlier according to the circumstances, it is reasonably certain that the accused is aware of the facts and appreciated their importance there is no reason to reject the explanation merely because no evidentiary foundation therefor is laid by the accused." (Italics added)

In 1952 Schreiner JA had this to say in the case of *R v Ismail* (88) at pp209/210:

“Since the absence of evidence from the accused is not one of the facts, that make up the transaction itself under investigation at the trial, but is a consideration which may point, in a general way, to guilt, it is often difficult to decide what weight, if any, should be given to it in any particular case. It would of course be wrong, in cases resting on circumstantial evidence, to require that the inference of guilt should be inevitable, without the factor of the absence of defence testimony, before that factor could be used. *If that were so it could only be used where it was unnecessary.* On the other hand it is right to bear in mind that there is no obligation upon the accused to give evidence in any sense except that if he does not so *he takes a risk.* The extent of that risk cannot be analysed in terms of logic; it depends on the correlation and assessment of the factors by the trier of fact, that is, on his judgment. When the matter comes on appeal the judgment of the appellate tribunal, subject to certain limitations, fixes again the measure of the risk taken. Each case has to be dealt with in relation to its own circumstances; considerations which may have to be taken into account in any particular case are the strength or weakness of the Crown case, *the apparent certainty with which the accused could have answered that case, if he were innocent,* and probability or improbability of the accused’s failure to testify being explainable on some hypothesis unrelated to his guilt on the charge in question.” (Italics added)

The Appellate Division dealt once again with the same issues in the 1972 case of *S v Mthetwa* (89) at p769 where Holmes JA observed:

“(1) Where the State case against an accused is based upon circumstantial evidence and depends upon the drawing of inferences therefrom, the extent to which failure to give evidence may strengthen the inferences against him usually depends upon various considerations. These include the cogency or otherwise of the State case, after it is closed, the case with which the accused could meet it if innocent, or the possibility that the reason for his failure to testify may be explicable upon some hypothesis unrelated to his guilt; see *R v Ismail*, at p210, and *S v Letsoko and Others*, at p776B-D.

(2) Where, however, there is direct *prima facie* evidence implicating the accused in the commission of the offence, his failure to give evidence, whatever his reason may be for such failure, in general *ipso facto* tends to strengthen the State case, because there is then nothing to gainsay it, and therefore less reason for doubting its credibility or reliability; see *S v Nkombani and Another*, [91] at p893G, and *S v Snyman*, [92] at p588G. In the latter case this Court went on to say, at p588H, 'The ultimate requirement of course, is proof of guilt beyond reasonable doubt; and this depends upon an appraisal of the totality of the facts, including the fact that he did not give evidence'. As to the extent of the risk to which Schreiner JA referred in *Ismail* (88), Miller J had this to say in the [case] of *S v Khomo and Others* (93) at pp345/346:

' It is well known that an accused person, although not obliged to say anything, may nevertheless assist the State case when he remains silent, depending upon all the facts and circumstances. When I say he may assist the State case, I mean no more than that his silence is one of the factors which may be taken into account in assessing the weight of the evidence in its totality, and may be given some weight, depending upon the facts and circumstances. *In general, greater weight* will be attached to silence where there is *direct* testimony implicating the accused, which the Court could reasonably expect he would simply explain away if it were not true, than in a case where there is no such direct evidence, and where the question of his guilt or otherwise depends upon *inferential* reasoning.... In such a case an accused person might well take up the attitude that he concedes all the facts proved, but that he challenges the ability of the Court to draw an inference of guilt from those facts, and, if that is his view, his failure to give evidence may not be attributable to any consciousness of guilt on his part, but to his *confidence* that the evidence does not establish guilt and does not require to be answered.” (Italics added)

Hoffmann and Zeffert *op. cit.* have this to say at page 596:

“Prima facie evidence - Like so many terms in the law of evidence, *prima facie* evidence is used in two different senses. It sometimes means evidence upon which a reasonable man could find in favour of the party adducing it; that is to say, the amount of evidence which a plaintiff must produce in order to avoid having absolution decreed at the end of his case, or which would be sufficient to prevent the accused from being discharged at the end of the prosecution's evidence. It is often said that in the absence of such evidence there is “no case to answer”, but the refusal of absolution or discharge does not necessarily mean that an answer is required. The defendant or accused may close his case at once and still succeed. In this sense, therefore, a ruling that a party had 'made out a *prima facie* case' means only that his opponent runs the risk of losing if he offers no evidence.”

And at pages 598/599 the learned authors observe

“Failure to give evidence - The provisions of the Criminal Procedure Act 1977 making the accused a competent but not compellable witness have in practice produced an intermediate situation in which the accused is not technically obliged to give evidence but is usually under strong pressure to do so. If a witness has given evidence directly implicating the accused, he can seldom afford to leave such testimony unanswered. Although evidence does not have to be accepted merely because it is uncontradicted, the court is unlikely to reject credible evidence which the accused himself has chosen not to deny. In such cases the accused's failure to testify is almost bound to strengthen the case for the prosecution.

An accused's failure to testify can be used as a factor against him, it has been held, only when, at the end of the case for the State, the State has *prima facie* discharged the *onus* that rests on it (in the sense, here, of evidence upon which a reasonable man could convict), it cannot, therefore, be used to supply a deficiency in the case for the State, that is to say, where there is no evidence on which a reasonable man could convict.

The situation is rather different when the evidence against the accused is not direct but circumstantial. If the prosecution has proved suspicious circumstances which the accused, if innocent, could reasonably be expected to answer or explain, his failure to testify will strengthen any unfavourable inferences which can properly be drawn from the prosecution evidence. But this form of reasoning is permissible only when the prosecution case is strong enough to call for an answer. *It must be sufficient in itself to justify, in the absence of explanation or answer, the inference of guilt.*” (Italics added)

and further on at page 599:

“Furthermore, in considering what weight may be given to the accused's failure to explain, it is important to consider whether an explanation could reasonably have been expected. For example, if the accused is shown to have committed some act not ordinarily done except with a guilty state of mind, it will normally be reasonable to expect the accused to explain why he did it and, in the absence of explanation, to draw an inference of guilt.”

In the case of *Griffin v California* (94) the Supreme Court of the United States of America considered Article 1 section 13 of the Constitution of California, which provided in part that:

“... in any criminal case whether the defendant *testifies or not*, his failure to explain or deny by his testimony any evidence or facts in the case against him may be commented

upon by the court and by counsel and may be considered by the court or the jury. “
(Italics added)

The Court held that that provision was in violation of the self-incrimination clause of the Fifth Amendment to the Constitution of United States of America (no person “shall be compelled in any criminal case to be a witness against himself”), as a comment by the prosecutor in the matter and the Court’s acquiescence constituted “an offer of evidence”. Stewart J, dissenting, observed at p115 that

“... whenever in a jury trial a defendant exercises this constitutional right, the members of the jury are bound to draw inferences from his silence. No constitution can prevent the operation of the human mind.”

Douglas J, however, in delivering the opinion of the Court (by a majority of six to two members, the Chief Justice not participating) observed at page 110:

“What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.”

Douglas J went on to hold that:

“The Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the states by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused’s silence or instructions by the Court that *such silence is evidence of guilt.*” (Italics added)

In the case of *R v Boss* (95) Cory JA in the Ontario Court of Appeal adopted at page 177 the following comment by Professor R J Delisle (“*Annotation to R v Lafontaine*” (1984), 43 Cr (3d) 283 at p285):

“If the Crown’s case strongly indicates guilt, and common sense suggests that an explanation would be forthcoming from one innocent of the charge, no rule of law can effectively legislate against the drawing of an adverse inference from a failure to testify.”

Cory JA went on at p182 to observe:

“The appellant contends that in the absence of the desired direction to the jury he is subject to a *tactical* compulsion to testify which amounts to being compelled to testify contrary to section 11(c) of the Charter. It is said that if the accused does not give evidence he is penalized for exercising his right not to testify. However, the *tactical obligation* which an accused may feel to testify *does not constitute a legal obligation or compulsion* to testify. The use of the word ‘compelled’ in section 11(c) indicates to me that the section is referring to a legal compulsion forcing an accused to give evidence in proceedings brought against him or her. The tactical obligation felt by the accused will no doubt increase with the strength of the Crown’s case, but it remains a tactical and not a legal compulsion. The decision whether or not to testify remains with the accused *free of any legal compulsion*. Thus, section 4(5) of the Canada Evidence Act does not infringe upon the provisions of section 11(c) of the Charter.”(Italics added)

Those dicta were adopted with approval by Basson J and Van Der Walt J in the Northern Cape Provincial Division in the case of *S v Scholtz* (96), where the learned judges also relied upon the decision in the Botswana case *Attorney-General v Moagi* (97). The learned judges at page 48 also relied on the following passage from Geldenhuys and Joubert, *Criminal Procedure Handbook* (1994) at pages 6/7:

"If a person has certain rights, obviously he should not be penalised for exercising those rights, otherwise the rights in reality amount to nothing at best and to liabilities or traps at the worst. A person who exercises his right to silence at his trial may not be penalised for the exercise of the right as such; no adverse inference should be drawn against his decision not to testify, for two reasons: first, no such inference can be drawn for there may be a multitude of reasons why he does not wish to testify (he may think the State case is so weak that it does not merit an answer; he may not trust the court or legal system, or be afraid or ignorant as to strategy; or he may simply want to exercise the right to silence about which he has been informed); secondly, no such inference can logically be drawn to fill gaps in the State case: if an element of a crime (e.g. identity in the case of robbery) has not been covered by *prima facie* proof, the nothingness of the accused's silence cannot logically fill that gap in the State's case; thirdly, it would be unethical and contrary to the principle of legality to punish an accused for the exercise of a right which he has been told he may exercise. The foregoing *does not, however, mean that an accused's defence cannot be severely or fatally damaged by his silence*. It can happen like this: If the State has proved a *prima facie* case against the accused, i.e. it has covered each and every element of the crime (as defined by substantive criminal law) by evidence (whether verbal or documentary, lay or expert, direct or circumstantial) and the accused has not raised a reasonable doubt on any of these elements (for example by shaking a State witness in cross-examination), and he then does not testify (i.e. he does not put another version before the court), the court as a matter of fact only has the uncontroverted State evidence to go on; the *prima facie* proof hardens into sufficient evidence for a conviction. But note that this happens simply because the defence did not "disturb" the State's case; *the silence of the defence did not add anything positively to the State's case*. The inference is not really an inference in the strict sense of the word but simply an observation or conclusion that the accused could not or would not disturb the State's *prima facie* case, with the result that the latter stands uncontroverted and becomes proof beyond a reasonable doubt."

Suffice it to say that Basson J and Van Der Walt J held that the accused's constitutional right to silence did not prevent the Court from drawing an adverse inference against the accused in certain circumstances. That decision was delivered in March 1996. Three months later, in the same Provincial Division, in the case of *S v Brown en'n Ander* (98), Buys J was seized with the very same issue. The learned judge considered *inter alia* the dicta in the *Griffin* (94) and *Boss* (95) cases. He also quoted with approval at page 62 the following dicta of Kentridge AJ in the *Moagi* case:

"The essential objection to regarding the accused's silence as a factor which might tell against him and in favour of the prosecution, is that if this is permissible, there is *indirect compulsion* on the accused to enter the witness box. In *R v Ismail* Schreiner JA said that an accused who exercises his right to remain silent always takes a risk. This is undoubtedly so. But it is (or should be) only the risk taken by any litigant who does not give evidence to contradict his adversary's case. That is, the risk that his adversary's case will be accepted. Under the common law rule, at least in its South African form, the accused takes the additional risk that his silence will be used as a piece of positive evidence against him, which may have the effect of strengthening and completing an otherwise inadequate prosecution case. If the exercise of a privilege can have consequences, *its value is diminished* and in some cases even *nullified*. A right to remain silent is no right, if silence can be construed as *evidence, even slight evidence of guilt*." (Italics added)

The report of both *Scholtz* (96) and *Brown* (98) is in Afrikaans but I have been assisted by the very full Editor's Summary and English headnote in both cases. The headnote in *Brown* reads at page 51:

"The Court examined the history of the accused's right to silence and came to the conclusion that the Constitution Act 200 of 1993 had brought about no change in the existing law except that there was now a change of emphasis. The Court remarked that the fact that the accused's decision not to give evidence could result in prejudicial consequences for him did not have its origin in a rule of law: it was merely a logical conclusion which can be made in specific circumstances in a Court. On the one side there was evidence which *prima facie* proved a particular condition and on the other side there was nothing. That which *prima facie* proves the relevant condition becomes in the absence of any contradictory evidence in an appropriate case sufficient evidence.

The Court held further that section 25(3)(c) of the Constitution granted an accused a right to remain silent. No adverse inference could be made against an accused merely by virtue of the fact that he had exercised his right to silence. The exercise of the right to silence had, however, certain consequences, for instance that it left the *prima facie* evidence on behalf of the State uncontradicted. This uncontradicted *prima facie* evidence could in appropriate circumstances constitute sufficient evidence against the accused. Whether this occurred would depend on the facts and circumstances of every case. In certain cases the exercise of the right to silence in terms of section 25(3)(c) could therefore have prejudicial consequences for an accused."

There followed three months later, in September 1996, this time in the Witwatersrand Local division, the case of *S v Lavhengwa* (99) where Claassen J and Cameron J were seized, *inter alia*, with the same issue. Claassen J quoted the following opinion of Etienne du Toit S.C., the author of section 27 in *Constitutional Law of South Africa*, Chaskalson *et al.* at para 27 - 25:

"I am of the view that it would be wrong to attach any significance to the silence of an accused person when the silence is the result of an exercise of a constitutional right to remain silent."

(And see *Commentary On The Criminal Procedure Act*, du Toit *et al* at 22-4c/4d (Service 20, 1998). Claassen J went on at page 487 to quote the following observations of W. Trengove S.C., the author of section 26, Chaskalson *et al.*, *op. cit.* at 26 - 15:

"It is suggested however ... that the South African courts are likely to uphold the rule permitting an inference to be drawn in appropriate circumstances. It accords, first, with common sense. The inference is permissible only when the accused fails to give evidence despite the fact that the prosecution evidence strongly indicates guilt; an innocent accused would have refuted the evidence against him, and there is no other explanation for his failure to do so. In these circumstances common sense demands that an inference be drawn and *human nature is such that one would be all but inevitable*. It has indeed been suggested that "no rule of law can effectively legislate against the drawing of an inference from a failure to testify". Secondly, it is not mere sophistry to reason, ... that an accused's right to remain silent is not denied or eroded by an inference drawn from his choice to exercise that right in circumstances where an innocent person would not have chosen to do so. It is suggested thirdly that, even if the rule permitting an adverse inference impinged upon the right of the accused of remain silent, it is in any event probably a justifiable limitation in terms of section 33(1)." (Italics added)

Claassen J observed at page 487 that the above observations were based on the authority of the *Boss* (95) case. The learned Judge quoted with approval the dictum of Cory JA that: "[a]n accused who decided to remain silent in the face of a case presented by the Crown that cries out for an explanation, must accept the consequences of that decision". Mr Trengove's conclusion was also based, Claassen J observed, on the majority decision of the Botswana Court of Appeal in the *Moagi* case, that is, that an unfavourable inference was permissible and did not offend the constitutional right of the accused not to be compelled to give evidence. The learned Judge at

page 487 concluded (Cameron J concurring) that weight of authority was in favour of that conclusion.

There is then a conflict of authority in the matter. For my part, I observe that the material word in section 12(7) of the Constitution is “*compelled*”. That word has its origins in the iniquity of the notorious Court of Star Chamber where accused persons were subjected to compulsory interrogation, often under torture. Ultimately judges resisted cross-examination of the accused, leading eventually to the non-competence of the accused as a witness. Competency was later restored, but fortunately not compellability. The accused now has a *choice* whether to give evidence or not. At one stage in the history of the criminal law, he had no such choice: he was *compelled* to give evidence. Now, as Cory JA observed, there may be a tactical compulsion upon him to testify, depending upon the strength of the Crown case: but there is no legal compulsion. I consider, however, that no adverse inference should be drawn from the accused’s silence in the sense that it is an *evidential* item bolstering the Crown case, and it certainly cannot cure defects in the Crown case. Such silence is simply not evidence in the case. Nonetheless, there may be cases where the strength of the Crown’s case is such, that the *result* of the accused’s silence is that no reasonable doubt exists in the mind of the Court, and the Crown’s *prima facie* case becomes a case beyond reasonable doubt.

COUNTS 17 AND 18

[Cullinan AJ then considered the evidence concerning the fraud charges under Counts 17 and 18 and concluded that]

Accordingly, I am satisfied beyond reasonable doubt that ... the accused unlawfully and with intent to defraud made the representation charged causing actual proprietary prejudice to the LHDA in the amount of M16,289.85.

THE COUNTS OF BRIBERY: CONCLUSION

The counts of bribery, excluding counts 5, 10, 11, 15 and 16 in respect of which, as earlier indicated, the accused must be acquitted, all have certain features in common.

As I said in an early ruling in this case, it is not necessary for the Crown to specify the particular action or inaction sought of the accused. It is not possible for the Crown to prove, that is, by direct evidence, whether particular payments were made as a reward for past favours or as an inducement for future favours.

The defence was raised, in submissions that the accused had no power to award contracts or variation orders etc. ... [T]he accused’s statutory powers under the Treaty and the Act meant he wielded a pervasive powerful influence. While, for example, he did not sit on Tender Evaluation Committees, or Negotiating Committees, it was he who appointed the members thereof and might then be in a position to influence individual members thereof. Again, while the Board and the Commission and Sponsors might make the ultimate decisions, as Chief Executive for many years and as an experienced Engineer, he clearly was a very influential member of the Board, whose recommendations would carry much weight. In any event, what he could not or should not do and what in fact he did are two different things. The doctrine of *res ipsa loquitur* has no place in criminal law, but suffice it to say that the accused’s conduct with regard to e.g. Contract 104 and Contracts 129A and 129B speaks for itself: he simply behaved in an unauthorized manner.

The defence of “representation agreements”, was not raised by the defence, as no evidence was adduced by the defence. Nonetheless I saw fit to deal with it. I may stand accused by the following dicta of the learned Davis AJA in *R v Bhardu* (102) at p823: “The Court should not, as it seems to me, find on his [the accused’s] behalf some explanation which, if given, might perhaps have been true, but which he himself has not given.” The particular issue was not raised by the defence, but I was of the view, that it arose on the papers before me, and that therefore, in the

interests of the accused, I should accord it some consideration. The result of such consideration is that it has not raised a reasonable doubt in my mind as to the eventual outcome. Suffice it to say that there cannot possibly be any doubt as to the purpose of the payments by the intermediaries to the accused: beyond reasonable doubt they were bribes. As for the Consultants/Contractors involved, it is not necessary for the Crown to prove any direct link between them and the accused, though of course in the case of Dumez there is direct evidence thereof: it is not necessary to prove any direct agreement. As I indicated earlier, the accused was obviously fully aware of the source and purpose of the payments.

On the other side of the coin, if a Consultant/Contractor was no more than *aware* that his payments to the intermediary, or part thereof, were being utilised for the purpose of bribing the accused and he consented thereto, then the intermediary was an intermediary in the full sense of the word and acted as agent for the Consultant/Contractor and the accused, thus establishing *consensus* in a corrupt agreement. That there was such consensus, in borne out by the factors previously enumerated, which I need not repeat. That being the case, where a Consultant/Contractor made a payment to an intermediary, from which source the intermediary made a payment to the accused, the latter payment then constituted a payment by the Consultant/Contractor to the accused.

There is the accused's repeated untruthful evidence under oath in the civil trial, when he made determined efforts to conceal his Swiss and South African banking accounts. That undoubtedly points to the covert nature of the Swiss bank accounts, but as I see it the payments revealed in the accused's and the intermediaries' bank accounts, are in themselves capable of only one explanation. I can then say that, even in the absence of the relevant contents of the civil record, I would have reached the same conclusion in this case.

As for the accused's silence, the weight of authority indicates that it is not an item of *evidence* as such. Whether or not it *adds* anything to the Crown's case, I am in the position that I can, in any event, decide this case without reference to such silence. In all the circumstances, on the totality of the Crown evidence, without reference to the accused's evidence and conduct in the civil trial, and without reference to his silence in this trial, I am satisfied beyond reasonable doubt, as the only reasonable inference, that in the eleven counts of bribery involved, the accused and the relevant Consultant/Contractor in each count, unlawfully, intentionally and corruptly entered into a corrupt agreement, whereby the accused agreed to further the private interests of that Consultant/Contractor in its involvement with the LHWP, pursuant to which agreement the Consultant/Contractor paid the accused [a] sum of money....

FINDINGS

It remains then to set out my findings. It proves convenient to at first conform with the order of Counts adopted earlier in the judgment. Thereafter, for clarity, I will revert to the numerical order:

Count 1: I find the accused guilty as charged, save that I find that during the period 1st October, 1991 to 22nd September, 1992 HWV paid USD 375,000.00 to the accused.

Count 2: I find the accused guilty as charged, save that I find that during the period 16th to 24th April, 1991, Sogreah, Cegelec and Coyne paid GBP 20,986.36 to the accused.

Count 15: I find the accused guilty as charged, save that I find that during the period 19th April to 22nd April, 1991 Cegelec paid USD 35,842.30 to the accused.

Count 16: I find the accused not guilty.

Count 3: I find the accused guilty as charged, save that I find that during the period 24th May to 27th May, 1988 Spie Batignolles paid USD 5,617.11 and GBP 3,020.81 to the accused.

Count 4: I find the accused guilty as charged, save that I find that during the period 17th November, 1992 to 31st March, 1994 LHPC paid FFR 58,654.90, GBP 15,200.00 and USD 17,180.49 to the accused.

Count 5: I find the accused not guilty.

Count 6: I find the accused guilty as charged, save that I find that during the period 20th June to 19th August, 1994 a Consultant/Contractor involved in the LHWP, to the Crown unknown, paid USD 91,609.00 to the accused.

Count 7: I find the accused guilty as charged, save that I find that during the period 30th April, 1992 to 10th April, 1997 Lahmeyer and Lahmeyer MacDonald Consortium paid FFR 108,599.10, SAR 50,000.00 and USD 85,053.41 to the accused.

Count 8: I find the accused guilty as charged, save that I find that on 8th February, 1991 Lahmeyer paid FFR 135,760.00 to the accused.

Count 11: I find the accused not guilty.

Count 12: I find the accused guilty as charged, save that I find that during the period 11th October, 1989 to 22nd June 1990 Dumez Nigeria Limited for and on behalf of Dumez paid FFR 509,905.62 to the accused.

Count 13: I find the accused not guilty.

Count 14: I find the accused guilty as charged, save that I find that on 22nd January, 1991 Gibb paid GBP 20,000.00 to the accused.

Count 9: I find the accused guilty as charged, save that I find that during the period 4th June, 1991 to 7th May, 1997 Acres paid FFR 1,306,920.22 to the accused.

Count 10: I find the accused not guilty.

Count 17: I find the accused guilty as charged, save that I find that the amount involved was M16,680.00.

Count 18: I find the accused guilty as charged, save that I find that the amount involved was M16,289.85.

I then summarise my findings in the numerical order of Counts;

Count 1: GUILTY

Count 2: GUILTY

Count 3: GUILTY

Count 4: GUILTY

Count 5: NOT GUILTY

Count 6: GUILTY

Count 7: GUILTY

Count 8: GUILTY

Count 9: GUILTY

Count 10: NOT GUILTY

Count 11: NOT GUILTY

Count 12: GUILTY

Count 13: NOT GUILTY

Count 14: GUILTY

Count 15: GUILTY

Count 16: NOT GUILTY

Count 17: GUILTY

Count 18: GUILTY

Accordingly I acquit the accused of Counts 5, 10, 11, 13 and 16 and convict him of Counts 1, 2, 3, 4, 6, 7, 8, 9, 12, 14, 15, 17 and 18.

[Editor's Note: Masupha Sole was later sentenced to 18 years in prison]

R v ACRES INTERNATIONAL LIMITED

Bribery - Criminal liability of corporations - Genuineness of representative agreement - Evidence - Circumstantial evidence - Effect of accused's silence - Evidential effect of false evidence

High Court of Lesotho

Lehohla, J

13 September 2002

For Crown: Mr G H Penzhorn SC; Mr H T Woker
For Defence: Mr S Alkema SC; Mr W Geysler

LEHOHLA, J

The accused Acres International Limited hereinafter referred to as Acres is indicted before the High Court on two counts of bribery.

In Count 1 the Crown charges that: Acres is guilty of the crime of bribery in that over the period June 1991 to January 1998 Acres paid/transferred C\$493 168-28 into a Swiss bank account held by Zalisiwonga Mini Bam (now deceased) who thereafter paid/transferred the said sum, or part thereof, to Mr Sole which payment/transfer was made to Mr Sole....

In Count 2 the Crown charged that Acres is guilty of the crime of bribery in that over the period 31 January 1991 to 3 April 1991 Acres paid/transferred C\$188 255-48 into a Swiss Bank Account held by Margaret Bam, who thereafter paid/transferred or was supposed to pay/transfer the said sum, or part thereof, to Mr Sole which payment/transfer was made to Mr Sole....

The Preamble to the charges consists of 24 paragraphs. For purposes of clarity it is deemed fruitful to extract and cite the paragraphs referred to in the two counts above.

Paragraph 22 mentioned in Count 1 makes reference to paragraphs 10, 11, 20 and 21. Paragraph 10 reads that: "Mr Sole was a civil servant in the employ of the Lesotho Government, and as such a state or public official".

Paragraph 11 reads that "While retaining his status as a civil servant Mr Sole was seconded to the LHDA as Chief Executive Officer".

Paragraph 20 reads that: "Margaret Bam as well as the aforementioned Zalisiwonga Mini Bam were responsible for or involved in, as intermediaries, the payment /transfer of funds from Acres to Mr Sole through Bank Account(s) held by them in Switzerland".

Paragraph 21 reads that: "The counts of bribery referred to hereinafter relate to:

21.1 payments made by Acres -

21.1.1 to the mentioned intermediaries who in turn paid such monies or part thereof over to Mr Sole into his Swiss Bank Account(s); and/or

21.1.2 of monies or part thereof which were destined/intended for the benefit of Mr Sole in Lesotho, and or

21.2 Contracts which were -

21.2.1 to be executed in Lesotho by Acres, and/or

21.2.2 were negotiated by or on behalf of Acres with the Lesotho

Highland Development Authority (LHDA) in Lesotho, and/ or

21.2.3 were concluded by or on behalf of Acres with the LHDA in Lesotho; and/or

21.2.4 Contracts in respect of which Acres was to benefit either in Lesotho or from the work it was to perform in Lesotho; and/or

- 21.3 Variation orders and/or Contractors claims arising out of Contracts referred to in paragraph 21.2 above, and/or
- 21.4 payments which were made or were to be made by the LHDA to Acres pursuant to Contracts between the LHDA and Acres, such payments being made or initiated or authorised in Lesotho.”

Finally paragraph 22 reads that “The payments referred to in paragraphs 20 and 21 above were made in respect of action or inaction by Mr Sole in his capacity as described in paragraphs 10 and 11 above and/ or were intended to influence Mr Sole in such capacity and/or were intended to be utilised by the intermediaries as referred to in paragraph 20 above for this purpose”.

By agreement with respective counsel the court entered a plea of not guilty for Acres with regard to both charges set out above....

I have made a liberal use, as far as possible, of the summary ably prepared by [defence counsel] Mr Alkema SC in his handy set of written submissions and heads of arguments regarding facts which are common cause between litigants or are at least not seriously disputed. Otherwise I have also resorted to my own devices as well as incorporating the Crown’s version, as far as possible, of what they submitted as matters which are common course. These are as follows:

1. During 1981 Acres was appointed as a sub-consultant to a Canadian company, Delcanda, the main consultant in the construction project of the Moshoeshoe Airport, Maseru. Another subContractor on the project was Lescon (Pty) Limited, a company registered as such in Maseru. The managing director of Lescon at the time was one Z M Bam, a South African citizen with permanent residence in Lesotho.

The airport project was completed towards the end of 1986. During the period 1980 and 1986 Tony Russel, Acres’ corporate representative on the airport project, got to know Z M Bam well, having worked closely with him on the project.

2. During this period, the Lesotho Highlands Water Project (LHWP) was established. The object and purpose of the project was to provide water to the Republic of South Africa (RSA) and hydro-electrical power to the Kingdom of Lesotho.

The project was described in evidence and fittingly so as one of the biggest dam and hydro-electrical projects in the world. To this end the RSA and the Government of Lesotho (GOL) signed a Treaty commonly referred to as “the Treaty” in these proceedings. The purpose of the Treaty is defined as follows in Article 3(1):

“The purpose of this treaty shall be to provide for the establishment, implementation and maintenance of the project.”

3. In terms of Article 6(4) of the Treaty, GOL was charged with the duty of establishing

“... The Lesotho Highlands Development Authority (LHDA) as autonomous statutory body under the Laws of the Kingdom of Lesotho in accordance with the provisions of this Treaty.”

The LHDA was duly established by GOL in terms of Order No. 23 of 1986. In terms of Article 7(1) of the Treaty, the LHDA.

“... shall have the responsibility for the implementation, operation and maintenance of that part of the Project situated in the Kingdom of Lesotho, in accordance with the provisions of this Treaty, and shall be vested with all powers necessary for the discharge of such responsibilities”.

4. As such, the LHDA had the power, *inter alia*, to appoint consultants and Contractors to the Project, but always subject to the provisions of the Treaty. In evidence, the LHDA was often equated to “the Client”. Be it noted that the LHDA, throughout the project, concluded a vast number of Contracts with consultants/Contractors estimated in number to verge on 500. These Contracts ranged from the appointment of financial consultants such as chartered accountancy firms and economists, to the appointment of environment experts to undertake environmental impact studies, the appointment of engineering consultants/Contractors, to establish the infrastructure of the project. Many of the engineering (consultancy) Contracts were of a supervisory nature only.
5. During the time in question the LHDA consisted of seven divisions: ...

Each Division had, at its head, a manager known as the Division Manager.... The managers reported, in turn to the Chief Executive of the LHDA whose functions and duties are described in Article 7 of the Treaty, read with Order No. 23 of 1986. The Chief Executive at all relevant times was one E M Sole. The Chief Executive, in turn, reported to the board of Directors of the LHDA established in terms of the Treaty and appointed in terms of the aforesaid Order.
6. During the initial stages of the project - pre-LHDA - an American company known as TAMS, was awarded the Contract as Study Supervisor during the feasibility study phase of the LHWP. During 1986, TAMS was sole-sourced to submit proposals under Contract 19 (C 19), which made provision for technical assistance to the LHDA. Effectively, this meant the provision of qualified professional staff to the structures of the LHDA, and more particularly the staffing of various posts in the technical division of the LHDA.
7. The *sole-sourcing* of a consultant must be distinguished from the process known as competitive bidding. Under the process of *competitive bidding*, the client invites a number of consultants to submit technical and financial proposals for the services: the process is known in the industry as the *short-listing* of firms. Under the process of sole-sourcing, only one consultant is invited to submit proposals. If the proposal or tender is found to be acceptable by the client, the procedure thereafter remains the same, whether under a competitive bidding system or under a sole-sourcing system. Such procedure includes the technical and/or financial evaluation of the proposal; and if found acceptable, an invitation to negotiate the Contract; the negotiation process; the preparation of a document known as a Memorandum of Understanding (MOU) based in principle on the agreement reached during the negotiations; and thereafter the preparation and signature of the final Contract, based on the MOU.
8. The process of sole-sourcing is accepted in the engineering industry and is internationally recognised; also by funding agencies such as government institutions, the World Bank, the European Union, and other commercial banks. The “Guidelines” issued by the World Bank recognise the advantages of the sole-sourcing process and describes the circumstances under which it will be advisable to sole-source a consultant/Contractor in preference to open bidding system.

9. It is also customary in engineering practice that if the proposals of a consultant who had been sole-sourced are found to be unacceptable, he is excluded from invitations to once more submit proposals when the process is changed to the competitive bidding system; i.e. (he is not short-listed),
10. It so happened that the proposals of TAMS under Contract 19 were found to be unacceptable by the LHDA and the procedure was therefore changed to a competitive bidding system. Consequently TAMS was not invited to submit proposals. The consultants invited by the LHDA to submit proposal were Acres, Bechtel, Halcrow, and Snowy Mountain, Australia. The proposals of Acres were ranked the highest by the LHDA, and having completed the rest of the process referred to in paragraph 7 above Contract 19 was awarded to Acres during April 1987.
11. By letter dated 28th April 1989, and in the course of the operation of Contract 19, the Chief Executive, Sole, advised Acres that the LHDA had decided to sole-source Acres in respect of Contract 65. Acres was accordingly advised in accordance with the prevailing practice that,

“... should the technical proposal be judged inadequate, or the financial proposal be judged excessive, then LHDA intends to request proposal from a short-list of consultants.(This short-list will not include your firm)”.

The decision to sole-source was called in question by the prosecution through PW15 and PW10.
12. Contract 65, like Contract 19, provided technical assistance to the LHDA. As such, Acres was required to provide professional engineering staff to fill various line positions in the Planning- and -Design and Construction Division (formerly the Technical Division of the LHDA). In the evidence before court, Contract 65 was described as *an extension* of Contract 19, save that it carried more responsibilities. Whereas Contract 19 was concerned primarily with the tender design, preparation of tender documents and tendering for the main construction works, Contract 65 included the provision of services relating to the establishment and implementation of the construction Contract of Katse Dam and the transfer Tunnel and Delivery Tunnels lying South.
13. Acres’ proposals in respect of Contract 65 were found to be acceptable by the LHDA, and it was invited to the negotiation process. Having gone through the process of negotiations, a MOU was prepared which formed the basis of a Contract and which Contract was eventually signed by the parties on 21st February 1991 in Maseru. Acres continued to render services under Contract 65 until November 1999.
14. At the end of 1988 Z M Bam left Lesotho to take up employment with the Botswana Housing Corporation in Botswana. He was to remain there until February 1991.
15. After Sole told Acres that it would be invited on a sole-sourced basis, to put in a proposal for the continuation of services in April 1989, Acres contacted Z M Bam and proceeded to negotiate with him over a period of 18 months a representative agreement in respect of the new Contract i.e. Contract 65, which was first mooted after a trip to Canada by Sole in March.

16. After Sole had issued a letter of intent on 24 July 1990 Acres then started to mobilize, with Sole authorising that mobilization and undertaking to pay Acres, on 14th August 1990.
17. This took place despite that Contract 65 had not yet been signed. Matters of such importance as the fact that Acres' fee had not yet even been agreed, had not been ironed out when this occurred. This was followed by Acres claiming an advance payment under the unsigned Contract in September 1990. Nor was the question of taxation finalised when this authority was given to mobilize.
18. In September 1990 Sole travelled to Canada.
19. On 23rd November 1990 Acres signed a representative agreement with an entity called ACPM whose address was given as that of a bank in Geneva.
20. On 28th November Witherell, an employee of Acres on Contract with the LHDA, authorised the payment to Acres of its advance under the unsigned Contract on behalf of the LHDA.
21. On 29th November 1990 the Maloti portion of the advance i.e. M250 000-00 was paid to Acres and on 4th January 1991 the Canadian Dollar portion, C\$1 160 000-00 i.e. 1.16 million Canadian dollars was paid.
22. On 28th January 1990 Acres paid Z M Bam (not ACPM) C\$180 000-00
23. On 21st February 1991 Sole signed Contract 65 on behalf of the LHDA as indicated in paragraph 13 above.
24. Monthly payments from Acres to Z M Bam proceeded to share this money on a 60/40% basis with 60% going to Sole.
25. This arrangement endured until after Sole lost his court challenge against his dismissal in January 1997, whereafter Acres reduced its payments to Z M Bam to approximately 40% of what it had been paying up to then. These payments now Z M Bam did not share with Sole. Acres then ceased paying altogether when Z M Bam died in 1999 (with Acres owing up he was owed a portion of his fees even as this case started)
26. The monies paid by Z M Bam to Sole were paid into an account in Switzerland from which account Sole then fed an account in Ladybrand from which account he in turn transferred funds to his account in Maseru. All this is summarised in exhibit "K4". All this was not challenged.
27. At the same time as he was receiving these funds from Acres and in turn paying a portion over to Sole, Z M Bam was also receiving funds from other Contractors/consultants, namely ABB Germany, ABB Sweden, Lahmeyer, Lahmeyer MacDonald Consortium and Dumez, and also in respect of these payments he shared the proceeds with Sole. This was also done through Swiss bank accounts with Sole also being paid in Switzerland.
28. The evidence also shows Z M Bam's accounts in Switzerland being used almost exclusively for the receipt of monies from these Contractors/consultants and the transfer of portions thereof to Sole.
29. Shortly before Acres finally left the project, an indictment was served on it and also on a number of other consultants/Contractors. In the indictment Acres

was charged with two counts of bribery it being alleged in the first account that during the period June 1991 to January 1998 Acres paid an amount of C\$493 061-60 into the Swiss bank account of Z M Bam who thereafter transferred the said sum, or part thereof, to Sole. In the second count, it is alleged that Acres paid an amount of C\$180 825-48 into the Swiss bank account of M M Bam, the wife of Z M Bam, who thereafter transferred the said sum to Z M Bam. Because there is no direct evidence that Z M Bam transferred this money to Sole, the Crown relies on inferences that may be relied on to show from proved facts that the moneys arising under this transaction landed in Sole's purse.

30. In respect of both counts, it is alleged that the aforesaid payments were made by Acres with the intention to pay bribe moneys to Sole, and that the accounts of Z M Bam and M M Bam were only used as conduits to make payments to Sole. It is alleged by the prosecution that Acres used M M Bam and Z M Bam as intermediaries to make payments to Sole. It is therefore alleged that, in respect of both counts, Acres committed the crime of bribery.
31. Acres says that it had appointed ACPM of which Z M Bam was the proprietor to act as Acres' representative in Lesotho. Acres goes further to say the alleged payments to ACPM were in strict accordance with the representative agreement. Acres asserts that it has no knowledge that Z M Bam made payments to Sole and denies that it intended payments it made to ACPM to be made over by Z M Bam to Sole. It thus pleaded not guilty to the charges of bribery in the two counts.
32. The need to appoint agents by foreign company operating on foreign shores is recognised by various Government agencies, the Canadian Government and international funding agencies such as the European Union and the World Bank.
33. The document purporting to set out the terms of an agreement between the parties was signed by Hare and Rynard on behalf of Acres and by Z M Bam on behalf of ACPM.
34. The only real issue before this court is whether or not Acres, when paying Z M Bam, intended for him to share the money with Sole or, if not actually so intending, whether it was reckless as to whether this occurred or not.
35. In its defence Acres put up a "representative agreement." The main issue canvassed in the evidence was whether this agreement was genuine or not....

ADMISSIONS

[The court admitted certain undisputed Swiss, South African and Lesotho bank records relating to Acres, Z M Bam and Masupha Sole, and continued]

The benefit to be reaped from admission of these records is that their contents are as a matter of course admitted in so far as they show the following.

1. That the LHDA also paid Acres in Lesotho the advance of M250 000-00. It also paid Z M Bam in Lesotho (through Lescon, via Lahmeyer).
2. Sole had bank accounts in Lesotho ... as well as in South Africa

3. Acres in fact paid Z M Bam in South Africa
4. Z M Bam also had accounts in South Africa ... as well as in Lesotho surviving under the name Lescon
5. Acres also had bank accounts in Lesotho

Mr Penzhorn [for the Crown] submits that all payments could have easily been effected locally as opposed to in Switzerland. It seems to me that no common sense counter to this submission would carry the day. In fact a further logical development of this submission seems unassailable in its bold but truly penetrating if devastating implication that had these payments been legitimate it is inconceivable that they would have been effected in Switzerland.

One major factor that has remained unassailable resulting from the above is that the payments in Switzerland to Lesotho and South African residents contravened these two countries' Exchange Control Regulations.

REGARDING CORPORATE LIABILITY

Our section 338 of the Criminal Procedure and Evidence is based on the old provision in the 1917 South African Act. As regards the present South African section 332 the following passage appears in the *South African Criminal Law and Procedure* Volume 1 by Burchell and Hunt (1983) at page 395 reading

“Being an artificial *persona*, a corporation cannot itself commit an *actus reus* or entertain *mens rea*. It follows that a corporation can be penalized for crimes committed only by its agents or servants. In a sense, therefore, when criminal liability is imposed upon a corporate body, it is vicarious. However, the criminal responsibility of natural persons, in truth it rests upon the imputation to the corporation of the crimes of persons acting on its behalf, rather than upon vicarious responsibility. Their acts and states of mind are the company's acts and states of mind and it is held liable, not for the acts of its servant, but for what are deemed to be its own acts.”

At page 397 the following passage merits citation:

“It will be seen that section 332(1) removes the obstacle to fixing criminal liability upon a legal *Persona* that since it has no mind it could not be found guilty of a crime requiring *mens rea*. In terms of the subsection where a corporation is charged with such a crime the *mens rea* of the director or servant who committed the crime will be imputed to the corporation. ... Section 332 (1) expressly renders corporate body liable where, committing the crime, the director or servant acted beyond his powers or duties but while 'furthering or endeavouring to further the interests of' the corporation. Liability under the section, therefore, extends beyond the normal limits of vicarious responsibility where 'the principal or master is liable only if the agents or servants acted within the scope of his authority or employment'”.

It follows first that a corporate body can be convicted of virtually any crime requiring *mens rea*. In *R v Bennett and Co (Pty) Ltd* (1941 TPD 194) the company was for instance convicted of culpable homicide. The fact that what the servant does was expressly forbidden by the company makes no difference provided that in doing so he sought to further the interests of the company.

For this reason I am inclined to the submission made by Mr Penzhorn that provided that Acres' money was used, the intention of that firm's employees when paying the money to Z M Bam is the intention ascribed to Acres. If they intended the money or part of it to be paid to Sole or if they were reckless as to whether or not this happened, Acres would have so intended either in the form of *dolus directus* or *dolus eventualis* whatever the case may be. It cannot be over-emphasised that there is no presumption against Acres. The only thing being that the intention is ascribed to it.

It should be regarded as now trite that the present form of citation of the company as the accused in its own name is perfectly correct following the sound ruling by Cullinan AJ on 6th March 2001 in *Rex v Sole CRI/T/111/99* (unreported).

It should also be noted that the same judge, for very sound reasons for which I would take the cue from his ruling does not agree with Burchell and Hunt where these learned authors say in bribery there necessarily has to be a *quid pro quo*. I share the learned Judge's view that it is enough that money was received for purposes of favour. Whether the Bribie (*sic*) reneged afterwards is irrelevant. One thing to keep in mind is that it is of vital importance to note that in bribery unlike in other forms of crime where the victim of an offence is the complainant or is the deceased, the participants in the unlawful transaction are both culprits. They are both beneficiaries thus making the detection of this form of crime difficult to make, and the prosecution a very arduous task. That is why I agree with the soundness of the view that does not insist on production of proof that the Bribie gave such and such a benefit in return for what he received from the briber. Thus it is enough for the Crown to only prove payment and receipt with the requisite intent without the need to prove actual benefit.

The Crown has accordingly set out to state that the only possible reason why Acres would have wanted to pay Sole was in order to have him look favourably towards Acres in the context of its Contractual relationship with the LHDA. The Crown maintains that the fact that Sole accepted this money is evidence proving the existence of an agreement to this effect; further that this in turn constitutes bribery. If in the assessment of material laid for evaluation before this court the points raised are borne out in evidence then I am in no doubt that the Crown's contentions would pass muster. The Crown cleared the decks for action by stating that whatever Sole did or did not do thereafter for Acres is irrelevant. Even if he did his duty he, as well as Acres, still committed bribery.

WHAT FORMS BACKGROUND TO THE PAYMENTS

It is important to have background knowledge of what the instant case seems to be all about.

First as the record shows ... Sole was the Chief Executive of the LHDA at the relevant time forming /constituting the framework of this case. He was at all relevant times also a public official He and two others namely Acres and Z M Bam are the role players who came together in the context of the water project.

Acres is a company registered in Canada and was an external company in Lesotho involved previously when they were engaged in the airport Contract in about 1982. It is here that Acres worked alongside Z M Bam as part of Delcanda.

Acres then bid for TAC-1 i.e. Contract 19 and were successful. The Contract was awarded after a competitive bidding process.

Under TAC-1 Acres was closely involved with the running of the LHDA. As shown earlier they were involved in the setting up of the LHDA whose engineering component was primarily staffed by Acres engineers. Acres' involvement with the LHDA scaled the dizzy heights of that organisation. For instance Jonker was the assistant to the Chief Executive of the LHDA.... Thereafter his position was held by another Acres' man Witherell from 1st October, 1989.

Witherell's appointment was under a separate Contract i.e. Contract 64. He dealt with his own Contract on behalf of the LHDA....

Under this Contract Witherell had wide powers within the LHDA.... Documentation before this court shows him dealing with Contractors on behalf of the LHDA.... In Sole's absence Witherell was entitled to authorise payments to Contractors.... He even authorised payments to Acres who were his employers. This followed instances where he had signed Acres' invoices on behalf of Acres itself.

The close involvement of Witherell in the LHDA management appears variously from the evidence and in some instances it is illustrated by the minutes of various management meetings all attended by him. As assistant to the Chief Executive both Jonker and Witherell must have had a close working relationships with Sole. In fact Brown admitted this saying that Sole and Witherell even socialised....

As repeatedly mentioned in this judgement it was in 1989 towards the beginning thereof when it was decided that Acres should continue under TAC-2 known as Contract 65.

The first draft of Request for Proposals (RFP) was issued in March 1989. Correspondence followed and the RFP was given to Acres in January 1990. In April 1990 Acres' proposal was evaluated. Witherell then dealt with Contract 65 as at 23rd May 1990. At that time he had specifically been appointed as Acres' agent in Lesotho i.e. on 18th May 1990. He was at the time also a signatory on behalf of the LHDA. In fact, by May 1990 Witherell had been in Lesotho for a considerable period of time. As early as 14th October 1987 he, along with Jonker and Hare were signatories to Acres' bank account with Barclays Lesotho in terms of account number 811 000 485.

The signing of the MOU on 19 May 1990 meant that Contract 65 was basically in place, so Acres mobilised. It placed its people in the LHDA under the proposed Contract, as from 1st August, 1990. Sole's letter is on record to substantiate this fact. This came after Sole had issued a letter of intent dated 28th July 1990. ... Acres personnel occupied line positions within the LHDA.

All this was done without the approval of the LHDA board, JPTC or World Bank. In this galley it remains questionable whether there is any validity in the alleged strict approval processes and the proposition that Sole could not really do anything to assist the LHDA. Compare the requirement that approval must be in writing [and] everything be open, transparent and negotiated....

According to Acres' High Court summons against the LHDA the agreement in respect of Contract 65 was reached orally on 28th March 1990 and put into effect on 1st August 1990. The question is how could it come about that a company of Acres' world stature concludes a contract of this magnitude by only word of mouth.

Taken against the background that what has not been done is that Sole has not signed and therefore Acres' are out on a limb as of 23rd November 1990, then the words of Cullinan AJ become very relevant as they appear at page 203 of the *Sole* judgment.

As from August 1990 Acres claimed payments from the LHDA. Many of the payment certificates were in fact signed by Witherell, not only on behalf of Acres but also on behalf of the LHDA. All this then belies Acres' need for Z M Bam's assistance in facilitating payments. PW5 (Sophia Mohapi) testified that Z M Bam never assisted in this regard; and I believe her. As a matter of fact she had no idea that Z M Bam was Acres' agent.

Although Contract 65 was sole-sourced, Sole warned Acres on 1st February 1990 that the LHDA would look to other bidders and exclude Acres if negotiations were not successful. It stands to reason that in this galley Acres would have had every reason to want to keep Sole well disposed towards them. Oiling his palm could not be put past his ruling passion that bribery has stood him in good stead on a number of occasions including where a case of brandy offered to a Minister would secure him what he wanted from the particular Minister....

On 16th August 1990 the World Bank indicated that it had no objection to the LHDA entering into the new Contract with Acres. By the time that the World Bank gave signification of its non-objection, Acres was already working on the new contract.

TAC-2 was signed some six months later i.e. on 21st February 1991. This was done without the necessary World Bank approval which was only given on 13th March 1991. Needless to say the JPTC had not approved nor in fact known as Meyer came to testify later on this point corroborating Letlafua Molapo's evidence.

I accordingly accept the Crown's submission that none of the major milestones leading up to the conclusion of Contract 65 were reached with the requisite prior approval in writing.

FEATURES OF THIS CASE

An outstanding feature of this case is that it is based on circumstantial evidence. There is no direct evidence to show that Acres concluded a bribe agreement with Sole. Should there be any such conclusion it would necessarily have to be inferred from the evidence as a whole.

Another feature of circumstantial evidence is that it is more cogent and compelling in many instances in its probative value than direct evidence. For example, evidence of identification by a fingerprint would be considered more reliable than the direct evidence of a witness who identified the accused as the person he saw. See *S v Shabalala* 1966(2) SA 297 A at 299C.

Mr Penzhorn took issue with Counsel for the defence against the latter's attempt to take individual witnesses' evidence separately and subject it to a test whether that evidence standing alone can lead to the only inference that incriminates the accused. Mr Penzhorn therefore urged that the correct approach is to hear all the evidence and find from it if the totality of that evidence points in the direction of guilt. I agree with this approach.

Mr Alkema relies heavily on the famous case of *R v Blom* 1939 AD 188 at 202-303 where it is succinctly stated that:

"In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

Learned counsel urged that a distinction should be made between inferences validly drawn on the one hand and conjecture speculation and various forms of assumptions on the other hand.

Applying the dictum in *Blom* and paying particular heed to the caution immediately above learned counsel submitted that the inference that Acres made payments to Sole pursuant to an offer to bribe is not consistent with the evidence of the representative agreement. Next he submitted that the evidence of the representative agreement and the payments made by Acres to ACPM/Bam thereunder, exclude the inference that the payments were made in terms of an offer to bribe.

Assuming the accuracy of the propositions made above Mr Alkema submitted that the inferences which the Crown seeks to draw, are based on conjecture and speculation, and not on the proved facts before this court. I hasten to state that the reasoning he has adopted would only follow provided the representative agreement is found to be valid by this court.

Suffice it to say any inference that the Court should draw from the circumstantial evidence must be the only reasonable one in the circumstance and it must be consistent with all proved facts as I understand the underlying rationale in *Blom* above is. Otherwise reference to *S v Setsetse* 1981 (3) SA 353 at 369H-370C would suffice in underscoring the principle involved.

The court in going about the exercise advocated by the authorities when dealing with a case involving circumstantial evidence is alert to the authority of *Govan v Skidmore* 1952 (1) SA 732 (N) where an

illustration of the application of the principle involved indicates that the approach in criminal cases is distinct from that in civil ones in the sense that in civil ones the inference need only be the most provable among any number of possible inferences.

Suffice it to say the question of circumstantial evidence which is a feature in this case along with that of accused's silence and false testimony will be revisited after the assessment and evaluation of evidence in this case which is based on protracted facts which necessarily therefore lead to the judgment being a long one in an endeavour to treat as many of the facts canvassed as possible and accord them their due significance.

[The court then dealt with the evidence and length, and continued]

ISSUES

As stated earlier the main issue canvassed in the evidence was whether the representative agreement put up by the defence is genuine or not.

The Crown alleges that Sole favoured Acres. The other issue canvassed in evidence related then to whether or not this was so, more particularly in the context of establishing Contract 65, and in addition whether when showing such favour he also acted regularly.

In the words of Mr Alkema SC the issue in this case concerns the legitimacy of the representative agreement signed by the parties on 23rd November, 1990. If the payments by Acres to ACPM/Bam were made in terms of a legitimate representative agreement, then such payments are destructive of an inference of bribery and corruption.

But as already indicated in the body of this judgment overwhelming evidence to the contrary shows the representative agreement as not genuine at all. It was only necessary for me to formulate the premise on which the notion of the legitimacy of the representative agreement is founded in order to reject it.

The defence states in the alternative that if (as the prosecution allege) the representative agreement is simulated and there was no intention on the part of either Z Bam or Acres that effect should be given to such agreement, then it follows (and is conceded by the defence) that the only reasonable inference from the payments by Acres to Z M Bam is that those payments were intended as the payment of bribes for onward transmission to Sole. The Crown contends that no effect was given to the representative agreement and that the true intention of the parties was to channel moneys through accounts of Z M and M M Bam to Sole. It should be noted that the payments from Z M Bam to Sole are not disputed by Acres and are common cause between the parties.

It is stimulating that Mr Alkema seems to have captured the essence of the proceeding before this court in his accurate observation and conclusion that the gravamen of the case is therefore quite clearly whether the representative agreement between Acres and ACPM/Bam dated 23rd November, 1990 is legitimate or whether it constitutes a simulated agreement. If the former, Acres is entitled to an acquittal; and if the latter, Acres should be convicted (*sic*) at least on Count 1. But ... this court has overwhelmingly been persuaded and has itself made a definite finding based on solid evidence that the so-called representative agreement was just a smokescreen kept in the back ground only to be readily available as a form of an insurance should Acres or any of the parties involved find themselves faced with a prosecution for bribery. It is important to note that the Crown has built its case on evidential blocks none of which has been seriously challenged as it is apparent the defence in this case is based on the validity of the alibi. The defence appears not to focus on the arguments raised in support of the Crown's view and in turn on the inferences flowing therefrom, but largely focuses on what they are presenting before this court....

The court is alert to the effort by the defence to water down the rather striking feature of the enormity of the moneys that Z M Bam received from Acres and a good portion of which went to Sole's account. The court makes a finding that these moneys were indeed huge. Sole according to the evidence was the best paid person in Lesotho yet Z M Bam even exceeded him. In any case it is a matter of record

fighting against which would be vain and imprudent that in *Rex v Sole* a branch of this court made a definitive finding as follows at page 203:

“It is then significant that Lahmeyer and LMC in particular should, as expected, conduct its normal course of business, involving the payment of millions of *maloti*, through local banks, yet also paid Mr Bam further *large amounts of money into Swiss bank* accounts, sixty per cent of which he channelled to the accused”. (emphasis mine).

The facts of the instant case satisfy me that the trio involved who were operating under cover of darkness afforded by the inaccessibility of Swiss accounts at the time, were, when the lights came out, discovered without a fig leaf to cover their glaring nudity.

CIRCUMSTANTIAL EVIDENCE - ACCUSED’S SILENCE

Revisiting now the question of circumstantial evidence along with accused’s silence and false testimony.

In drawing any inference it behoves the Court to look at all the evidence together and not piecemeal. See *S v Ostilly & Ors* 1977 (2) SA 104 (D) at 106H-107A where Kumbleben J said:

“...the court should not restrict its attention to those portions of evidence which tend to support the state case but is obliged to have regard to the whole of such evidence to ensure that statements favourable to the State are seen in their proper context and that exculpatory statements are not left out of account”.

I, like the learned Judge stated, agree that this is the correct approach.

It stands to reason therefore that the Court must decide whether the inference is the only reasonable one that can be drawn from the complete picture painted by all the established facts. This then means that to find fault with individual witnesses on a piecemeal basis without considering the effect of that criticism on the overall picture or impression is a wrong approach. Where such criticisms, even if valid, do nothing to displace the inference or give rise to no other reasonable inference then the criticisms are of no real value or relevance. Despite lip service to the contrary this is exactly what the defence urged upon the court in the application for discharge. Indeed even the foundation laid for this eventuality was discernible from the cross-examination which would invite a witness whether his response excluded an elaborate number of possibilities suggested to him.... The court therefore recalls the fact that the Crown witnesses were individually criticised but in my humble opinion those criticisms did nothing to displace the impression created by the evidence as a whole.

I endorse the words of Davis AJA in *R v De Villiers* 1944 AD 493 at 508 that: “It is not each proved fact which must exclude all other inferences; the facts *as a whole must* do so.” (Italics supplied) See also *R v Sole* at pages 191 to 192.

Both counsel made common cause in impressing upon the court the important words appearing in *Cooper & Anor NO v Merchant Trade Finance Ltd* 2000 (3) SA SCA at 1027F-G which restates the dictum in *R v Blom* above. Of importance is to bear in mind that a distinction must be drawn from the proven facts on the one hand and conjecture, speculation and making assumptions on the other. The former being in order while the latter is impermissible.

Formulating its request for the form of inferences the court is to draw the Crown submitted two main inferences to the following effect:

- (1) That Acres knew very well that it was paying Z M Bam to use its money to bribe Sole.
- (2) That Acres used Z M Bam to camouflage this fact by using Z M Bam to break the chain of evidence relating to the payments between Acres and Sole.

I have already indicated previously that the main thrust of the defence case that an inference to draw from the facts they advanced that Acres made payments to Sole pursuant to an offer to bribe is not consistent with the evidence of the representative agreement would depend on the validity of that representative agreement in the first place. Since a reading of this judgment leaves no doubt that in the eyes of this Court that representative agreement was but a worthless smokescreen, it stands to reason that nothing turns on the submission made by the defence in that regard. It is therefore rejected.

Likewise the submission that the evidence of the representative agreement and the payments made by Acres to ACPM/Bam thereunder, exclude the inference that payments were made in terms of an offer to bribe, is rejected on the score of absurdity in that no valid inference can be founded on an invalid representative agreement.

I accept the submission that the so-called representative agreement is analogous to a criminal carefully setting up his alibi before committing his crime so that he is able to fall back on it should the need arise. Thus the argument is equally rejected that says the "pattern" of Roux (PW7) is based on selective figures and ignores the total amount paid by Acres to Z M Bam. The extension of this argument is also rejected to the extent that it seeks to persuade this Court that "In any event, and even if there is a 'pattern' in respect of some of the payments, it ignores ... the existence of an inference that the payments were made in accordance with the terms of a representative agreement."

The defence seeks to make a merit of the fact that certain aspects of evidence referred to were not challenged. While this may be true it ignores the overall effect of evidence advanced by the Crown to sustain a conclusion sought. In this regard the word of caution by authorities comes in handy that the dependability of circumstantial evidence should be likened rather not to a chain the measure of whose strength is the weakest link thereof but rather to a rope to which reference is aptly made by Elyan J in *Marcus Leketanyane v Regina* 1956 HCTLR at 3 where the learned Judge quoting with approval of a passage in *Wills Circumstantial Evidence* 7th edition, p.435 said:

"Such evidence is more aptly compared to a rope made up of strands twisted together. The rope has strength more sufficient to bear stress laid upon it, though no one of the filaments of which it is composed would be sufficient for that purpose".

In any case the words of Curlewis JA in *R v Hepworth* 1928 AD 265 are very apt that

"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side...".

For completion it seems necessary to cite the dictum in *de Villiers* (above) more fully as where at pages 508-509 appear the following words:

"In a case depending upon circumstantial evidence ... the Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way, the Crown must satisfy the court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with innocence".

I am in respectful agreement with the above dictum for it even enjoys the support of Darling J in *Rex v Armstrong*, (unreported, 1922) to the following effect:

"Circumstantial evidence going to prove the guilt of a person is this: one witness proves one thing and another proves another thing, and all these things prove to conviction beyond a

reasonable doubt; but neither of them separately proves the guilt of the person. But taken together they do lead to one inevitable conclusion”.

In order to justify the inference of guilt, though, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. See *R v Kasa* [1936] OPD 200 and *R v Tshabangu* 1934 AD 519

I find Lord Coleridge's disquisition on circumstantial evidence both down-to-earth and stimulating in its simplicity contained in his summing-up in the trial of *R v Dickman* (1910) 5 Crim App R 320:

“It is perfectly true ... that this is a case of circumstantial evidence alone. Now circumstantial evidence varies infinitely in its strength and proportion to the character and variety, the cogency, the independence, one of another, of the circumstances. I think one might describe it as a network of facts cast around the accused man. The network may be a mere gossamer thread, as light and unsubstantial as the very air itself. It may vanish at a touch. It may be that, strong as it is in part, it leaves gaps and rents through which the accused is entitled to pass in safety. It may be so close, so stringent, so coherent in its texture that no efforts on the part of the accused can break through. It may come to nothing. On the other hand, it may be absolutely convincing. If we find a variety of circumstances, all pointing in the same direction, convincing in proportion to the number and variety of those circumstances and their independence one of another, although each separate piece of evidence, standing by itself, may admit of an innocent interpretation, yet the cumulative effect of such evidence may be ... overwhelming proof of guilt. Ask yourselves then, what is the cumulative effect then upon your minds of so many, so varied, so independent pieces of evidence, all pointing, it is said, in one direction, all tending, it is said, to inculcate the prisoner and the prisoner alone in the commission of this crime?”

Even at risk of over burdening this proceeding I deem it important to indicate adherence by various authorities to the principle outlined above. For instance Davis A.J.A in *R v de Villiers* 1944 AD 493 buttresses the view expressed above as follows in his own words:

“But I should not leave this point without dealing shortly with an argument pressed upon us by Mr Morris that, in a case depending upon circumstantial evidence, ‘ the court must take each factor separately and, if each of them is possibly consistent with innocence, then it must discard each in turn’. This argument is entirely fallacious. ... It is not each proved fact that must exclude all other inferences; *the facts as a whole* must do so. ... As stated by *Best*, Evidence, 5th ed. s. 298, ‘Not to speak of greater numbers; even two articles of circumstantial evidence - though each taken by itself weigh but a feather - join them together, you will find them pressing on the delinquent with the weight of a millstone. ... It is of the utmost importance to bear in mind that where a number of independent circumstances point to the same conclusion, the probability of the justness of the conclusion is not the sum of the simple probabilities of those circumstances, but is the compound result of them. ... The court must not take each circumstance separately to give the accused the benefit of any reasonable doubt...”.

Conclusions reached above namely that Acres knew very well it was paying Z M Bam to bribe Sole and that Z M Bam was used to camouflage this fact are inter-related. One relates to *mens rea* while the other relates to the truthfulness of Acres' defence. As to *mens rea* this has always been a matter of inference. Very seldom is there direct evidence of *mens rea* as where an accused is heard saying “let me swing for the bastard”. Thus it can more commonly be gathered from the circumstances. These being that in a case of assault the nature of the weapon used, the location of the blow delivered and the degree of force applied are matters of importance in trying to determine the existence of *mens rea*. See *S v Mbelu* 1966 (1) Prentice Hall H. 176 (N). As with the cited authority above, the same reasoning is applicable in the instant matter to ascertain Acres' *mens rea* from all the facts.

Of course Acres bears no *onus*. The Crown must prove its case against the accused beyond a reasonable doubt. It appears on the Crown's evidence that the only inference is that Acres knew that it was paying Z M Bam in order for him to use its money to pay Sole. On the face of it Exhibit “K4” lends

support to this inference especially when viewed against the background of the water project and Acres' involvement with the LHDA. Of further importance in this regard is that Exhibit "K4" does not stand on its own but is re-enforced by evidence collectively pointing to the guilty knowledge on Acres' part, as well as a strong motive to bribe.

The collective force of all this evidence, standing unanswered, more than satisfies the test in *Blom's* case cited above. On this evidence the only inference to be drawn is that Acres intended to bribe Sole and indeed did so through Z M Bam. The two propositions in the instant paragraph are lent strong support by the authorities of (i) S.E. van der Merwe *et al* in their invaluable works styled *Evidence* at page 417 where it is stated:

"The State will have established a *prima facie* case; an evidential burden (or duty to adduce evidence to combat a *prima facie* case made by his opponent) will have come into existence i.e. it will have shifted, or been transferred, to the accused. In other words, a risk of failure will have been cast upon him. The onus still rests on the State; but if the risk of losing is not to turn into the actuality of losing, the accused will have the duty to adduce evidence, if he wishes to be acquitted, so that, at the end of the case, the Court is left with a reasonable doubt..."

The other is (ii) that of *R v Mlambo* 1957 (4) SA 727 at 737 D-F to the effect that:

"Proof of motive for committing a crime is always highly desirable, more especially where the question of intention is in issue. Failure to furnish absolutely convincing proof thereof, however, does not present an insurmountable obstacle because it is quite unrealistic to loll in the realm of conjecture when there is at hand material which furnishes a perfectly sound, rational, common sense solution to the problem".

I am in agreement with this approach.

It follows from Van der Merwe *et al* that it is then for Acres to displace the inference drawn. I should emphasise that this does not mean Acres bears any onus. Instead the Crown evidence which calls for an answer which is not forthcoming from Acres *prima facie* becomes conclusive proof whereby the Crown is adjudged to have completely discharged the onus of proof. If as it has also happened in the instant case a doubtful or unsatisfactory answer is given it is equivalent to no answer and the *prima facie* proof, being undestroyed, amount to full proof.

In the celebrated passage of Lord Devlin in *Broadhurst v R* [1964] AC 441 at 457 it is to be noted that:

"It is very important that the jury should be carefully directed on the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty and accordingly to convict him without more ado. It is the duty of a judge to make it clear to them that this is not so. Save in one respect, a case in which an accused gives untruthful evidence is not different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if on the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends of course on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness".

As stated earlier the representative agreement is doubtful and unsatisfactory, so because the court does not believe the evidence of Hare and Brown that should conclude the matter against Acres.

See *Ex Parte the Minister of Justice: In re R v Jacobson and Levy* 1931 AD 466 at 479 where Stratford JA said:

“It is not, however, in every case that the burden of proof can be discharged by giving less than complete proof on the issue; it depends upon the nature of the case and the relative ability of the parties to contribute evidence on that issue. If the party, on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence ‘calls for an answer’ then, in such a case, he has produced *prima facie* proof, and in the absence of an answer from the other side it becomes conclusive proof and he completely discharges his onus of proof. If a doubtful or unsatisfactory answer is given it is equivalent to no answer and the *prima facie* proof, being undestroyed, again amounts to full proof”

I accept the submission that in the instant case Acres’ answer has been shown to be more than just “doubtful or unsatisfactory”. It has indeed been shown to be a manifestly false answer.

In coming to the conclusion that Acres’ version ought to be rejected as false beyond doubt this court has borne in mind the instructive words of Van der Spuy, J in *S v Munyai* 1986(4) S 712 at 715 G where it is stated that:

“... even if the State case stood as a completely acceptable and unshaken edifice, a court must investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false”.

Of course my investigation of the instant case qualifies it as so.

It is also fruitful to heed the terse lucidity of Lord Denning’s phrase with regard to the criminal standard about which he said:

“It need not reach certainty, but it must carry a high degree of probability. Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. 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’s possible but not in the least probable; the case is proved beyond reasonable doubt, but nothing short of that will suffice’”. See *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373

I am particularly enamoured of the underlying purpose for the approach adopted by Lord Denning in the passage just quoted to be seen to be protecting the community and not allowing culprits to get away with it by resort to a whole host of flights where their fancy may take them.

I am in no doubt therefore that for purposes of the onus in a criminal case, it has been shown that Acres’ answer cannot reasonably be true. See *Ntsele vs S* 1998 (3) All SA 517B-C (SCA) where reference is made to onus of proof and to the fact that where the State relies on circumstantial evidence, it is sufficient that the cumulative effect of the evidence before the Court indicates that the accused is guilty beyond a reasonable doubt.

ACCUSED’S SILENCE AND FALSE TESTIMONY

Reference to *Broadhurst* and *Van der Merwe* above has at once a good deal of bearing on the topic relating to an accused’s silence and his giving false testimony.

I need only indicate that because Z M Bam in his capacity as Acres’ agent has been shown to have been using Acres’ money to pay Sole. This piece of evidence has furnished the court with *prima facie* material calling for an explanation by Acres. The rule of thumb being that where the prosecution has presented a strong case based on circumstantial evidence which the Accused, if innocent, could reasonably be expected (not required) to answer or explain, his failure to do so will serve to strengthen any unfavourable inferences which can properly be drawn.

In *R v Dube* 1915 AD 557 at 563 Innes CJ said:

“The onus rested upon the Crown to establish her guilt. At the same time the fact that she did not endeavour to explain the circumstances of suspicion which the prosecution had set up was an element which the trial Court was entitled to take into consideration”

In keeping with this authority is *R v Bardhu* 1945 AD 813 at 822-3 where Davis AJA said:

“... the accused has given an explanation which has been rejected - one which cannot even possibly be true. ... The court should not ... find on his behalf some explanation which, if given, might perhaps have been true, but which he himself has not given”.

I agree entirely with this statement.

R v Mlambo (above) is also worth paying attention to at 738 B to D where Malan JA said:

“... if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping a conviction altogether and his evidence is declared to be false and irreconcilable with he proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so”.

I must hasten to indicate that the importance of the phrase “in suitable cases” should be read as a clear indication that *R v Mlambo* is not an attempt to undermine the cardinal rules in *R v Blom*. In any case regarding *Blom* as to the second rule of logic on which Mr Alkema reposed a lot of faith the authorities sound a word of caution as follows:

“The second rule of logic in *Blom* is a salutary rule, whose field of application is limited by its nature. It is a tool for detecting and avoiding fallacy, for testing the logical validity of a conclusion. It is no more than that. It is not a legal precept. It is not another way of stating the criminal standard of proof. It does not in itself provide an automatic answer to the question whether guilt has been proved beyond a reasonable doubt. Even if the rule is satisfied, it does not follow that the trier of fact *must* convict the accused ...”.

See the *South African Law of evidence* by Hoffmann *et al* 4th ed, at page 590

The weight to be given to a failure to give evidence was discussed in *R v Ismail* 1952 (1) SA 204 A at pages 206F-H and 209G to 210C respectively.

At page 206 F - H Centlivres CJ said:

“... the evidence led for the Crown was sufficient, taken in conjunction with the absence of evidence for the defence, to make it impossible for this Court to hold that the magistrate was wrong in arriving at the conclusion that beyond reasonable doubt the appellant possessed 80 bottles of wine for the purpose of sale. In the absence of any explanation by the appellant as to why he was in possession of the 80 bottles of wine plus 87 found in his store and having regard to the humble position he occupied in the community, it is asking too much of human credulity to draw from the facts proved in this case any inference other than that the appellant was in possession of the 80 bottles of wine for the purpose of sale”.

At page 210C the learned Chief Justice whose expressed view has my full endorsement goes on to say:

“Each case has to be dealt with in relation to its own circumstances; considerations which may have to be taken into account in any particular case are the strength or weakness of the Crown case, the apparent certainty with which the accused could have answered that case, if he were innocent, and the probability or improbability of the accused’s failure to testify being explainable on some hypothesis unrelated to his guilt on the charge in question”.

Hence for instance the endorsement of the sentiments expressed above by Quenet JP in *R v Joseph* 1964 (4) SA 54 (SRAD) at page 57 D-F where the learned Judge President said:

“The cases relating to the recent possession of stolen goods provide frequent examples. ... [I]f the accused’s hat were found in a house that had just been burgled it would theoretically be possible, even in the absence of defence evidence, to imagine circumstances explanatory of the hat’s presence there consistently with the accused’s innocence. The hat might have been lost by or stolen from the accused or he might have lent it to someone. It might be one of a number of hats belonging to the accused and might simply have disappeared. But unless he gave evidence laying the foundation for one or other of these explanations the possibility that one of them might be the true explanation would presumably be regarded as remote and not reasonable. In such cases the accused would fairly certainly have been alive to the explanation if true and so his failure to propound it would remove it from the range of reasonable possibility. Lapse of time may introduce the factor that the accused may have forgotten the facts which might provide an innocent explanation: whether that might reasonably explain his failure to propound the facts will depend on their nature and on the length of time involved. Unless at the time when an explanation is to be expected of him i.e. at the trial or earlier according to the circumstances, it is reasonably certain that the accused is aware of the facts and appreciated their importance there is no reason to reject the explanation merely because no evidentiary foundation therefor is laid by the accused”.

I am thus fortified in my view that remote possibilities more often than not remain no more than just that, that is until such time as the accused makes them reasonable ones by introducing them as evidence.

In the instant situation the case of the Crown is much stronger in that the accused has given an explanation in the form of the representative agreement. But because the court has determined that it is false this would seem to be the end for the defence case. Likewise if the court believed Hare that would be the end of the case for the Crown. But that is not so.

I may add only for purposes of emphasis that where an accused gives false evidence, the Court is at large to infer that there is something he wishes to hide, adding then an element of suspicion to facts which may otherwise have been neutral. See *S v Rama* 1966 (2) SA 395 (A) at 400 H to 401 B.

In *Mawaz Khan v R* [1967] 1 All E.R at 81H-83B the Privy Council specifically held that a false explanation constitutes some evidence of guilt.

In keeping with the above view, which I wholly support, the effect of a false explanation and the value to be attached to it in South Africa is authoritatively set out in *S vs Mtsweni* 1985 (1) SA 576 (A) the headnote of which summarises the position neatly as follows:

“The weight to be attached thereto must relate to the circumstances of each case. In considering false testimony by an accused, the following matters should, *inter alia*, be taken into account:

- (a) the nature, extent and materiality of lies and whether they necessarily point to a realisation of guilt;

- (b) the accused's age, level of development and cultural and social background and standing in so far as they might provide an explanation for his lies;
- (c) possible reasons why people might turn to lying, e.g. because, in a given case, a lie might arise in some people to deny the truth out of fear of being held to be involved in a crime, or because they fear that an admission of their involvement in an incident or crime, however trivial the involvement, would lead to the danger of an inference of participation and guilt out of proportion to the truth".

In the instant case when the other circumstances surrounding the factor of these payments is added the inference of corruption becomes conclusive.

The court is of a firm view that if Z M Bam could keep all the money he received from Acres for himself he would surely have done so. There is no suggestion based on any evidence that Z M Bam would have paid Sole out of generosity or some other obligation, contractual or otherwise. Acres certainly have not offered any sensible explanation for the payments made by them to Z M Bam. I need once more to emphasise that no onus lies on Acres at all to prove its innocence. But the extortion theory hinted at before the World Bank is nothing short of fanciful and speculative. So are the various theories advanced by [some defence witnesses].

It is strange that the best Acres has been able to do in the face of all this fourfold cord of damning evidence is that it did not know that its money was going through to Sole.

The court is disinclined to follow the path advocated by Mr Alkema because broadly speaking it means that the court should treat piecemeal the circumstantial evidence which forms the basis of this case. That path also seems to ignore the importance of the authorities which highlight factors which characterise circumstantial evidence such as that it is like a rope with several strands and not like a chain upon whose single links depends its strength.

I accordingly reject the submissions the acceptance of which would lead to the acquittal of Acres.

COURT'S FINDINGS

1. The court's findings are that the representative agreement is not what it purports to be but mere sham.
 2. The court rejects the theory that Acres didn't know that Z M Bam was paying Sole with the money obtained from Acres.
 3. Acres had an interest in ensuring that Sole was kept happy in order for Acres to derive benefit of favourable disposition by the LHDA towards it. For this it was prepared to pay Sole.
 4. In order to pay Sole Z M Bam's accounts were used as a conduit. Again this was done with Acres' full knowledge.
 5. All the moneys that Z M Bam paid in the ratio of 60% to Sole while Z M Bam retained 40% or thereabouts were bribe moneys to ensure that Acres' interests in the LHDA were secured to the detriment of other competitors who were under false belief that Acres had won Contract 65 by fair means over them.
- (1) Z M Bam could hardly have squeezed so much money out of Acres without persuading Acres that it was worth its while. That he was paid 25% of Acres' mark-up is a clear indication that he achieved this by letting

- Acres know that Sole was in on the deal;
- (2) Because of my acceptance of this on reasonable grounds now everything falls into place.

Anomalies in the Acres' version, like

- (i) wanting to use Bam as an agent even though he was in Botswana
- (ii) paying so much money allegedly for political intelligence
- (iii) why is it that most of the services in the representative agreement were not necessary
- (iv) the fact that no one knew Z M Bam was Acres' agent
- (v) the fact he was paid in Switzerland

begin to make sense.

(3) Acres' reliance on the representative agreement pronounced a sham in (1) above establishes *mens rea* in the sense that by relying on this document Acres, as in the case of alibi, put its eggs in one basket. Thus because of the crack suffered by the defence in an instance where their denial of criminal liability was proved to be false the whole proverbial edifice was destined to come tumbling down.

6. The court further finds that the reason why Acres would want to hide its true agreement or understanding with Z M Bam is that it has a guilty knowledge of what the real situation involved here is (much akin to a man who intending to murder his wife carefully plans his alibi in advance so that it is in place if and when he becomes a suspect).

7. The court further relies in making the above findings on the concession by the defence that the representative agreement does not reflect the true agreement.

8. The incontrovertible facts before this court are a negation of the validity of the representative agreement, thus leaving the credibility of Acres in tatters in this case. (There is no reason for the court to believe Acres about the need to provide "political intelligence" when, if this were true, Acres could and would easily have drawn the agreement in those terms).

9. Because various amendments which were made to the agreement for over one and half years yet at no stage were services provided for in Schedule 1 ever amended, thus showing they were not required the court makes a finding that they could only have been intended as "window dressing" or just an "eye-wash"

10. The 40/60% split of Acres money between Z M Bam and Sole and the very amounts conceded to be "huge" by the defence connote the existence of a specific and compelling reason why Z M Bam made these payments to Sole. The reason was promotion of corruption. Payment of these moneys into and out of Swiss accounts held by Z M Bam and in turn to Sole betokens corrupt motive as these accounts were operated in breach of foreign exchange regulation and were in secret.

11. The court finds that it makes no difference that Acres thought payments they made into M M Bam and Z M Bam's accounts were in ACPM account for as long as it is established, as has indeed been the case, payments were made with the intention to bribe

12. The court also finds that not all the moneys can be traced through to Sole. However it does not change the fact that all the moneys involved were used in order to facilitate bribery thus the fact that a portion thereof remained with Z M Bam for his part in the scheme does not affect the situation.

Because the Crown has discharged its onus in respect of both counts of which Acres stands charged the court accordingly finds Acres guilty on both these counts of bribery.

My assessors agree.

CRIMINAL LAW

Principles of corporate criminal liability

R v ACRES INTERNATIONAL LIMITED

See above

Common law offence of misconduct in public office - Elements of the offence - Whether unconstitutional for uncertainty - Principles of constitutional interpretation

SHUM KWOK SHER v HKSAR

Court of Final Appeal of the Hong Kong Special Administrative Region

Chief Justice Li, Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Sir Anthony Mason NPJ

7-10 May 2002 ; 10 July 2002

(Case FACC No. 1 of 2002)

The facts appear in the judgment of Sir Anthony Mason NPJ

Cases referred to in the judgment

Ahnee v DPP [1999] 2 AC 294

Anonymous (1704) 6 Mod 96 (Case 136)

Attorney-General v Times Newspapers Ltd [1974] AC 273

Commonwealth v. Steinberg (1976) 362 A 2d 379

De Freitas v. Ministry of Agriculture [1999] 1 AC 69

Ex parte Telegraph Group [2001] 1 WLR 1983

HKSAR v Ng Kung Siu (1999) 2 HKCFAR 444

Hashman and Harrup v United Kingdom (1999) 30 EHRR 241

Henly v Lyme Corp (1828) 5 Bing 91, 130 ER 995

Ng Ka Ling v Director of Immigration (1999) HKCFAR 4

Question of Law Reserved (No. 2 of 1996) 88 A Crim R 417

R v Bembridge (1783) 22 ST 1

R v. Borron (1820) 3 B & Ald 432

R v Bowden [1995] 4 All ER 505

R v Canadian Pacific Ltd (1995) 99 CCC (3d) 97

R v Cotter [2002] EWCA Crim 1033

R v Dytham [1979] QB 722

R v Ghosh [1982] QB 1053

R v. Halford (Case 223) (1734) 7 Mod 193

R v Kneller [1973] AC 435

R v. Llewellyn-Jones (1967) 51 Cr App R 4

R v. Marshall (1855) 4 EL & BL 475

R v. Morales (1992) 77 CCC (3d) 91)

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Sabapathee v The State [1999] 1 WLR 1836
SW v United Kingdom (1995) 21 EHRR 363
Sunday Times v. United Kingdom (1979) 2 EHRR 245
Twinsectra Ltd v Yardley [2002] 2 WLR 802

For the Appellant: *Mr John Griffiths, SC and Mr Andrew Bullett*
For the Respondent: *Mr Michael Thomas, SC, Mr Michael Blanchflower, SC*

CHIEF JUSTICE LI

1. I agree with the judgment of Sir Anthony Mason NPJ.

MR JUSTICE BOKHARY PJ

2. In this important case the Court has had the benefit of two excellent arguments. In the course of one, Mr Michael Thomas SC for the prosecution made a powerful plea for the retention of every defensible means at the law's disposal for the maintenance of proper standards in the conduct of public affairs. And in the course of the other, Mr John Griffiths SC for the defendant made a no less powerful plea for insistence upon that measure of certainty in the criminal law without which measure of certainty the rule of law would be replaced by arbitrariness and there could be no freedom.

3. The prosecution submits that the elements of the common law offence of misconduct in public office are such that the offence is committed whenever (i) a public official (ii) in the course of or in relation to his public office; (iii) wilfully or intentionally (iv) culpably misconducts himself. If that alone formed its definition, I would regard this offence as unconstitutional for uncertainty. But I have had the advantage - the great advantage as always - of reading in draft the judgment prepared by Sir Anthony Mason NPJ. I have no doubt that the true definition of this offence is as he states it. This means, first, that the conduct must be both wilful and intentional rather than merely wilful or intentional. Secondly, it means that the conduct must be serious. Accordingly, the offence of misconduct in public office is committed when (i) a public official (ii) in the course of or in relation to his public office, (iii) wilfully *and* intentionally (iv) culpably misconducts himself and the misconduct is serious. I respectfully agree that, so defined, this offence is sufficiently certain to be constitutional.

4. As Sir Anthony Mason NPJ points out, the degree of certainty required will depend on the context of the law in question. In agreeing that the offence of misconduct in public office is sufficiently certain, I am crucially influenced by the fact that it is not the type of offence which criminalises conduct in such a way as to limit the exercise of a fundamental freedom eg. free speech. Where any offence of that type is concerned, I think that an exceptionally high degree of certainty of definition would be required if, quite apart from any other objection, it is not to be open to objection as unconstitutional for uncertainty. For in the absence of such a degree of definitional certainty, the whole question of what is left of the fundamental freedom concerned would be thrown into doubt. It is not by countenancing such a state of affairs that the courts discharge their duty of protecting fundamental freedoms.

5. For the reasons given by Sir Anthony Mason NPJ, I too would dismiss this appeal.

MR JUSTICE CHAN PJ

6. I agree with the judgment of Sir Anthony Mason NPJ.

MR JUSTICE RIBEIRO PJ

7. I agree with the judgment of Sir Anthony Mason NPJ.

SIR ANTHONY MASON NPJ

8. This appeal from the Court of Appeal (Stuart-Moore VP, Mayo VP and Woo JA) comes to the Court by way of the Appeal Committee certifying that the decision of the Court of Appeal involved a point of law of great and general importance, namely, whether the common law offence of misconduct in public office is

inconsistent with rights guaranteed by the Basic Law, and the grant of leave to appeal. By its decision, the Court of Appeal dismissed an appeal by the appellant against his conviction of 4 offences of misconduct in public office.

Offences charged

9. The appellant (the defendant) was tried before His Honour Judge Line in the District Court on 4 charges of misconduct in public office, contrary to Common Law. At all material times, the appellant was alleged to have held the office of Chief Property Manager of the Government Property Agency ("GPA") of the Hong Kong Government.

10. The particulars of Charge (1) were that between 1 August 1994 and 31 December 1994, without reasonable excuse or justification, the appellant did a series of acts calculated to injure the public interest, namely dishonestly causing and permitting Onclever Limited ("Onclever") to be wrongfully pre-qualified as a tenderer for government contracts for management of domestic accommodation by

(i) failing to declare a conflict of interests arising from the appellant's family relationship with the directors and shareholders of Onclever, contrary to the Civil Service Branch Circular No. 19/1992 ("the Circular");

(ii) failing to abstain from the decision making process in respect of the pre-qualification of Onclever; and

(iii) acting partially in favour of Onclever in the said pre-qualification process, namely recommending Onclever to be pre-qualified despite knowledge of its lack of the necessary qualifications for pre-qualification.

11. The particulars of Charge (2) were that between 1 January 1997 and 31 December 1997, without reasonable excuse or justification, the appellant did a series of acts calculated to injure the public interest, namely dishonestly causing and permitting the wrongful award of a management contract with a contract sum of \$56,147,076 in favour of Onclever by

(i) failing to declare a conflict of interests arising from the appellant's family relationship with the directors and shareholders of Onclever, contrary to the Circular;

(ii) failing to abstain from the decision making process in respect of recommendations to the Central Tender Board ("CTB") of successful tenderers for the management contract of the Military Estate; and

(iii) acting partially in favour of Onclever, namely recommending Onclever to be awarded the said management contract despite knowledge of its lack of the necessary qualifications for the said management contract.

12. The particulars of Charge (3) were that between 1 January 1998 and 21 December 1998, without reasonable excuse or justification, the appellant did a series of acts calculated to injure the public interest, namely dishonestly causing and permitting the wrongful award of a management contract of the former Hong Kong International Airport at Kai Tak with an estimated contract value of \$87,560,000 in favour of Onclever. Similar particulars as those enumerated under Charge (2) were repeated.

13. The particulars of Charge (4), as amended, were that between 1 February 1996 and 1 November 1999, without reasonable excuse and justification, the appellant did a series of acts calculated to injure the public interest, namely dishonestly acting partially in favour of Onclever, Southern Services Limited ("Southern Services") and their related company, AA Property Services Limited ("AA Property"), thereby

causing and permitting the said companies to be awarded in excess of 90% of all short term contracts with a total contract sum in excess of \$13,720,410.91 by

(i) failing to declare a conflict of interests arising from the appellant's family relationship with the directors and shareholders of Onclever and Southern Services, contrary to the Circular;

(ii) keeping all the quotation letters in his exclusive custody;

(iii) failing to abstain from the exercise of control of the quotation system in respect of the award of short-term contracts despite the conflict of interests aforesaid;

(iv) recommending the said companies to bid for the short term contracts, i.e. (a) Onclever on all such contracts from 1 April 1996 until the end of December 1998; (b) AA Property Services for all such contracts from 26 December 1996 until the end of August 1998; (c) Southern Services for all such contracts from 13 April 1998 and the end of September 1998.

The facts

14. The summary of the undisputed material, which follows, is taken from the judgment of Woo JA in the Court of Appeal. His Lordship's recital of the undisputed facts is based on two statements of admitted facts pursuant to s.65C of the Criminal Procedure Ordinance, Cap. 221.

15. Between 1 August 1994 and 21 December 1998, the appellant was posted to the GPA as the Chief Property Manager, and as such, he became responsible to the Government Property Administrator.

16. The Circular on conflict of interests was issued on 4 December 1992, which contains, inter alia, the following provisions:

" This circular sets out the common areas in which a conflict of interest may arise between an officer's official duties and his private interests. ...

2. The situations described in this circular are by no means exhaustive; ... In case of doubt, officers should seek the advice of their superior officers or departmental secretaries.

3. All officers are strongly reminded that they should at all times make a conscious effort to avoid or declare, as appropriate, any conflict that may arise or has arisen. Failure to do so may render them liable to disciplinary action which may result in removal from the service.

4. A conflict of interest is likely to arise when an officer's loyalty to the Government conflicts with his loyalty to:-

(a) his family and other relations; ...

5. ... all civil servants should be honest and impartial in their dealings with members of the public and with their staff. A civil servant must not use his position in the Civil Service, nor any information made available to him in his capacity as a civil servant, to benefit himself or his family, financially or otherwise, or to favour his relations or friends or any other group of people with whom he has personal or social ties. He should also avoid putting himself in a position where he might arouse any suspicion of dishonesty, or of using his official position to benefit himself or favour his family and friends.

6. An officer should therefore:- ...

(d) report to his superior officer any private interest that might influence, or appear to influence, his judgment in the performance of his duties. ...

16. ... the officer should declare his private interest to his superior officer, who will then advise him how to proceed."

17. The Discovery Bay Estate comprised around 6,000 residential units. Discovery Bay Services Management Limited ("DBSM") was responsible for management at the estate. DBSM had contracted out security services and cleaning services to other companies. Since 1989, up to 1999 and continuing, Onclever had been awarded the security services contract. Cleaning work had been contracted out to another company. There were about 90 security guards at the Discovery Bay Estate.

18. There are 3 methods by which government contracts are awarded to the private sector, namely,

(i) pre-qualify tendering, a method by which the government identifies, or shortlists, a number of suitable tenderers, with suitable qualifications to bid for particular types of government contracts. When the government intends to award a contract of the type in question, the pre-qualified tenderers will be invited to put in their tender documents and make a bid for the contract.

(ii) Open tendering, which is used where no initial screening of the qualifications and experience of bidders is necessary.

(iii) Quotation contracts, which are usually short term contracts of a much lesser contract sum than those awarded under the two methods referred to above.

19. On 29 July 1994, by a memorandum dated that date, the Government Property Administrator sought approval from the Chairman of the CTB, who was the Secretary for the Treasury, for a pre-qualification exercise to shortlist a number of suitable tenderers with proven experience in residential property management. It was intended that a total of eight 3-year term management contracts would be awarded following the pre-qualification exercise. Such approval was given by the Chairman of the CTB on 11 August 1994.

20. At the assessment panel meeting on 19 October 1994, Onclever was not recommended to be pre-qualified for management contracts for non-domestic accommodation in accordance with the "Analysis of Documents" prepared by Winnie Chiu (PW1). It was recommended to be pre-qualified for management contracts for domestic accommodation.

21. Lun Kai-yeung (PW2) prepared a Revised Analysis of Documents to the effect that Onclever Limited had met all the pre-qualification requirements for domestic accommodation. The Revised Analysis of Documents was sent to the Assessment Panel members on 15 November 1994 for the record. On 25 November 1994, by a memo of that date, the CTB accepted the recommendation of the Government Property Administrator and approved the pre-qualification of Onclever and 7 other companies.

22. On 13 March 1997, by a memorandum signed by the appellant dated that date, approval was sought from the Secretary for the Treasury in respect of a Draft Tender Notice for the management of 10 military sites. The contract would be awarded through open tender. Paragraph 2 of the Draft Tender Notice read:

"2. Tenders are invited from tenderers with the following qualifications and experience only - 'Property managing agents in sound financial status with a minimum of five years of experience in estate management field and currently managing residential estates of not less than 1,000 units, one of which must comprise 300 or more units.'

Documentary proof of the above qualification and experience must be submitted with the tender. ..."

23. On 1 May 1997, by a memorandum signed by the appellant and dated that date, approval was sought from the Secretary for the Treasury on a revised Draft Tender Notice in which para. 2 referred to above was deleted. It was stated in that memorandum:

"In view of the nature of the properties managed i.e., they are all awaiting redevelopment or sale in the future and not intended for extensive use in their present condition, it is not expected that a first class management service is required. I am content that a tenderer who can meet the minimum tender specifications and offer the lowest cost will be competent to take on the job ... Against this background, the 'Tender Notice' and 'Information on Tenderer's Qualification and

Experience' have been revised and a copy of each is attached herewith for your reference please."

24. In a memorandum signed by the appellant to the Secretary of the CTB dated 7 July 1997, it was stated:

"The tender submitted by Onclever Ltd is the lowest. ... Onclever Ltd was established in 1989 and has more than seven years in estate management field. It has more than 10,000 residential units under its management (with one estate at Discovery Bay with 6,064 units) and currently in sound financial status Onclever Ltd has previously been engaged in some minor service orders with this Agency and its performance has been good. I also confirm that Onclever Ltd is suitable to perform the contract. I therefore recommend that this contract with an estimated contract value at HK\$56,147,076 be awarded to Onclever Ltd."

25. The CTB approved the award of the contract to Onclever at a total estimated cost of \$56,147,076 for the 3-year management contract. The appellant executed the management agreement on behalf of the GPA. Patrick W Y Hui ("Patrick Hui") executed the agreement on behalf of Onclever in the presence of Paul W W Hui ("Paul Hui").

26. From April 1998, GPA intended to launch a tendering exercise to select a contractor for managing the Kai Tak site after decommissioning of the airport. The Tender Notice which was published in furtherance of this exercise specified that:

"Tenders are invited from tenderers with the following qualifications and experience only -

'Property managing agents in sound financial status with a minimum of five years experience in estate management field and currently managing residential estates of not less than 2,000 units with one of which must comprise 1,000 or more units and non-domestic estates of substantial magnitude of not less than 100,000 square metre."

27. In a memorandum signed by the appellant to the Chairman of the CTB dated 17 July 1998, it was stated:

"Apart from quoting the most competitive price, Onclever is also a reputable estate management company with good reference and track record in the business. It was incorporated in 1989 and has some eight years' experience in estate management. ... The largest estate in the private sector under its management is Discovery Bay comprising 6,064 residential units and 2,310,000 square metre of non-domestic area. The Discovery Bay Services Management Ltd rated Onclever's performance as good and they had no hesitation in recommending Onclever's service. ... Onclever is also GPA's property management and leasing agent of all ten ex-military sites since 1 August 1997. The contract sum is HK\$56 million. Its performance with GPA is of good standard."

28. The CTB approved the award of the contract to Onclever at a maximum amount of \$87.56 million. As a result, Onclever was awarded this contract. The Chairperson of the CTB and the CTB would not have approved the award of this Kai Tak management contract to Onclever had she and it known that the representations as to Onclever's experience in the property management field set out in the appellant's memo dated 17 July 1998 were untrue.

29. On 20 September 1993, the appellant, Paul Hui and one NG Kit-ling passed through Hung Hom Immigration Control Point at the same immigration terminal at 1431 hours, and departed from Hong Kong. On 21 September 1993, the appellant returned to Hong Kong at 2135 hours, Paul Hui at 2031 hours and NG Kit-ling at 2135 hours.

30. The appellant had never declared any conflict of interest to his employers.

The prosecution case at trial

31. The case for the prosecution was that at all relevant times, the appellant, as the Chief Property Manager of the GPA, had misconducted himself in that public office in respect of his official dealing with Onclever and its associated companies.

32. The appellant had a younger brother, Eric Shum. Eric Shum married Stella Hui in December 1980. Stella Hui had two brothers, Paul Hui and Patrick Hui. Paul Hui was the managing director and majority shareholder of Onclever and a director of Southern Services. Patrick Hui was the president of Onclever and a director and shareholder of Southern Services.

33. In 1992, the appellant's wife and Stella Hui purchased a flat in Cheung Chau Island. The appellant gave Stella Hui money each month for the mortgage on the property. The appellant's wife and Stella Hui set up a computer company which worked for, and received income from, Onclever.

34. Before 1994, Eric Shum was employed by Paul Hui to fix Onclever's computers and maintain its computerised accounting system. When Onclever was pre-qualified for Government contracts in 1994 the appellant told Eric Shum to stop working for Paul Hui.

35. Onclever was a security company, providing security services to buildings. It did not have 5 years' experience in property management: this was one of the conditions of eligibility for pre-qualification to tender for large government contracts. Despite knowing this lack of experience on the part of Onclever, in 1994 the appellant pushed Onclever's cause and wrongly caused it to be qualified. Onclever and its associated companies were treated preferentially by the appellant by always being selected for government contracts.

36. In 1995, Mr Tanner (PW9) very soon after taking over from the appellant (who had moved to another post in the GPA) had doubts as to whether Onclever should have been pre-qualified due to their lack of experience. He successfully recommended to the CTB that they be removed for this reason. This was a unique event and it was common knowledge in the GPA where Mr Tanner's building management division and the military estates division, where the appellant then worked, had offices on the same floor.

37. In 1997, the appellant wrongfully caused Onclever to be awarded the \$56 million management contract for government military sites despite its lack of the required qualification for having had 5 years' experience in property management. In 1998, the appellant did the same in relation to the \$87 million Kai Tak contract.

38. The appellant could authorize short-term contracts. He favoured Onclever, Southern Services and AA Property in respect of such contracts by instructing a subordinate, Chan Ping-kwong (PW12), that they were always to be invited to tender for such contracts. These instructions were referred to at the trial as "the Chan instructions". The companies were awarded over 90% of these short-term contracts between April 1996 and December 1998 to a value in excess of \$13 million. The appellant knew the family connection between himself and the Hui brothers ("the relationship") but never declared the relationship or any conflict of interest and never abstained from the decision making process in relation to these matters.

The judgment of the trial judge

39. The trial judge concluded that the defence case was not credible and rejected it. Material aspects of the appellant's case are dealt with below. He accepted the evidence given by the prosecution witnesses and rejected that of the appellant and his witnesses. The trial judge convicted the appellant on the 4 charges and sentenced him to concurrent terms of 9 months imprisonment (which sentence was increased to concurrent terms of 30 months imprisonment by the Court of Appeal upon an application for review by the Secretary for Justice).

40. The judge made the following findings. At latest since his visit to the Mainland with Paul Hui in September 1993, the appellant had known that Paul and Patrick Hui were brothers of Stella Hui, the wife of the appellant's younger brother, Eric Shum. Realising that the relationship posed a conflict of interests, the appellant failed to disclose the relationship to anyone in the GPA. Instead, he pushed Onclever to qualify in the pre-qualification exercise for Government tenderers though he knew perfectly well that

Onclever did not have the required experience of 5 years in property management. He gave the Chan instructions in awarding contracts of less than \$500,000, over which process he had control, and that resulted in over 90%, totalling in excess of \$13 million, of such contracts in the relevant period being awarded to Onclever and its associated companies, Southern Services and AA Property. He also recommended Onclever to be awarded the management contract for the 10 military sites worth \$56 million and that for the Kai Tak site worth \$87 million, misrepresenting that it had the required experience. The Judge found that the reasons for the appellant's non-disclosure was "his desire to help and favour Onclever" and that in each case he was partial.

41. The judge said:

"In relation to the assessment panel I was sure that his moving of it to recommend Onclever for pre-qualification was due in significant part to his hidden connection to Onclever and not just due to a desire for new blood and greater competition."

42. The judge went on to find that the appellant acted dishonestly, applying the test in *R v. Ghosh* [1982] QB 1053, by deliberately not disclosing a connection that itself prompted a public officer to favour a company in a significant way. The Judge further found that the appellant "must have ... realised" that what he did was dishonest.

43. He also found that the appellant's voice was the only voice raised in favour of the proposition that Onclever had met the criteria for pre-qualification, that he knew that Onclever did not meet the criteria, that he came to the meeting of the assessment panel knowing that Onclever did not do so but with the intention of having them pre-qualified if he could and that he successfully persuaded the panel to do so.

44. The judge found, in relation to the first three charges that Onclever was wrongfully pre-qualified and awarded the two contracts, that it was the appellant who caused the wrongful qualification and that, in relation to the fourth charge, that the appellant gave the Chan instructions.

45. The judge further found that the appellant's acts were calculated to injure the public interest in that the appellant, in each case, tilted in favour of Onclever what should have been a level playing-field.

The decision of the Court of Appeal

46. The Court of Appeal unanimously dismissed the appellant's appeal on the eleven grounds argued. Of these grounds, only the ground that the offence of public misconduct is so vague, uncertain and ill-defined that it is inconsistent with arts 9, 14.2, 14.3 and 26 of the International Covenant on Civil and Political Rights ("ICCPR") is material to the appeal to this Court. The Court of Appeal considered that the offence was not so vague, uncertain or ill-defined as to be inconsistent with the ICCPR.

Appellant's case in this Court

47. The appellant accepts that misconduct in public office was an offence at common law but contends that it is too vague, uncertain and ill-defined to comply with arts 8, 28 and 39 of the Basic Law and arts 9, 14.2, 15.1 and 26 of the ICCPR.

48. Central to the appellant's case are the remarks made by Lord Widgery CJ in *R v. Dytham* [1979] QB 722, which were quoted and applied in the courts below in this case. In that case, his Lordship said (at 727-728) with reference to the charge of misconduct in public office in that case:

"This involves an element of culpability which is not restricted to corruption or dishonesty but which must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment."

49. The appellant identifies various elements in this statement which are said to be uncertain. They relate both to the elements of the offence and its scope. Thus, the appellant argues that the elements of "culpability", "calculated to injure the public interest" and of conduct that calls for "condemnation and punishment" are uncertain, as is the requisite mens rea or culpable state of mind as well as the question

whether it is one or more than one offence. The appellant also argues that, to the extent that dishonesty is an element in the offence, the *R v. Ghosh* test, applied by the trial judge, is uncertain and arbitrary. According to the argument, the process of reaching a conviction is therefore "arbitrary", contrary to art. 9 of the ICCPR. The appellant also argues that, in so far as it is necessary to embark upon research into constitutional and jurisprudential history in order to throw light on the elements of the offence, the law is insufficiently accessible and contravenes art. 39 of the Basic Law. Further, the appellant contends that the extension of the offence beyond its limits as described in the old authorities violates the principle against retrospective imposition of criminal liability contrary to art. 15 of the ICCPR.

Respondent's case in this Court

50. The respondent's case is that the characteristics of the common law offence of misconduct in public office are sufficiently certain to satisfy the standard of legal certainty. According to the respondent, the essential characteristics of the offence are:

- (1) A public official;
- (2) who in the course of or in relation to his public office;
- (3) wilfully or intentionally;
- (4) culpably misconducts himself in public office.

Articles 28 and 39 of the Basic Law and arts 9, 14, 15 and 26 of the ICCPR

51. Article 28 of the Basic Law provides:

"The freedom of the person of Hong Kong residents shall be inviolable. No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment ..."

52. Article 39 of the Basic Law stipulates that the provisions of the ICCPR as applied in Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR. The second paragraph of the article goes on to provide:

"The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

Hong Kong Bill of Rights Ordinance (Cap. 383)

53. The Hong Kong Bill of Rights Ordinance provides for the incorporation into the laws of Hong Kong of the provisions of the ICCPR as applied to Hong Kong. The incorporated provisions are contained in the Hong Kong Bill of Rights ("the Bill") which is set out in Part II of the Ordinance. Articles 5(1), 11(1), 12 and 22 of the Bill incorporate the provisions of arts 9.1, 14.2, 15.1 and 26 of the ICCPR in the same terms. Accordingly, the provisions of the Bill are the embodiment of the ICCPR as applied to Hong Kong (*HKSAR v. Ng Kung Siu* (1999) 2 HKCFAR 442 at 455 BE, per Li CJ; 463 J, per Bokhary PJ).

54. Article 5(1) of the Bill provides:

"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

55. Article 11(1) of the Bill provides:

"Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

56. Article 12(1) of the Bill provides:

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under Hong Kong or international law, at the time when it was committed ..."

57. Article 22 of the Bill provides:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Mr Griffiths SC for the appellant did not advance oral argument in support of the case based on art. 22. Accordingly, I shall say no more about it.

The interpretation of the Basic Law and the Bill

58. It is established that art. 39, being part of Ch. III of the Basic Law which provides for the fundamental rights and duties of the residents of the HKSAR, is to be given both a purposive and generous interpretation (*Ng Ka Ling v. Director of Immigration* (1999) 2 HKCFAR 4 at 28D-29A, per Li CJ). The same approach is to be adopted to the provisions of the Bill as the object of those provisions is to guarantee the fundamental rights and freedoms of the residents of the HKSAR.

59. In interpreting the provisions of Ch. III of the Basic Law and the provisions of the Bill, the Court may consider it appropriate to take account of the established principles of international jurisprudence as well as the decisions of international and national courts and tribunals on like or substantially similar provisions in the ICCPR, other international instruments and national constitutions. (See, for example, *Ahnee v. DPP* [1999] 2 AC 294 at 306, where the Privy Council, in construing s.10(4) of the Constitution of Mauritius which was in terms virtually identical with art. 12(1) of the Bill, applied to art. 10(4) the interpretation given by the European Court of Human Rights in *Sunday Times v. United Kingdom* (1979) 2 EHRR 245 to the expression "prescribed by law" in art. 10(2) of the European Convention on Human Rights.)

The principle of legal certainty and the requirement of accessibility

60. International human rights jurisprudence has developed to the point that it is now widely recognised that the expression "prescribed by law", when used in a context such as art. 39 of the Basic Law, mandates the principle of legal certainty. This principle is likewise incorporated in the expression "according to law" in art. 11(1) of the Bill.

61. As to art. 5(1), the expression "established by law" is used. However, there is a question as to the scope of art. 5(1), whether it is only concerned with laws relating to arrest or detention before trial or whether it extends to the substantive law for breach of which the person is charged. That question was not fully argued in this case. Since the appellant's case, based on art. 5(1) with the wider scope, does not add to his case based on art. 39 of the Basic Law or art. 11(1) of the Bill, it is unnecessary to consider the question of the scope of art. 5(1) in this case. Accordingly, I shall say nothing more on art. 5(1).

62. The decisions of the European Court of Human Rights authoritatively establish that the expression "prescribed by law" in art. 10(2) of the European Convention on Human Rights and Fundamental Freedoms ("the European Convention") incorporate the requirements that the relevant law be certain and that it be adequately accessible (*Sunday Times v. United Kingdom* (1979) 2 EHRR 245 (the thalidomide case); *SW v. United Kingdom* (1995) 21 EHRR 363 at 398; *Hashman and Harrup v. United Kingdom* (1999) 30 EHRR 241). The Supreme Court of Canada has expressed the principle of legal certainty in like terms in the context of fundamental rights and freedoms guaranteed by the Canadian Charter of Rights and Freedoms (*R v. Nova Scotia Pharmaceutical Society* (1992) 74 CCC (3d) 289; *R v. Morales* (1992) 77 CCC (3d) 91), as indeed has the Privy Council in interpreting and applying the Constitution of Antigua (*De Freitas v. Ministry of Agriculture* [1999] 1 AC 69 at 78-79, per Lord Clyde).

63. In *Sunday Times v. United Kingdom*, the Court rejected an argument that the English law of contempt of court was so vague and uncertain and that the principles of contempt of court enunciated by the House of Lords in *Attorney-General v. Times Newspapers Ltd* [1974] AC 273 so novel that the restraint imposed upon freedom of expression by the law of contempt could not be considered as "prescribed by law" within the meaning of art. 10 of the Convention. The majority, with reference to that expression, said (at 271, para. 49):

"First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice."

64. In *Hashman and Harrup v. United Kingdom* (1999) 30 EHRR 241, where conduct *contra bonos mores* was held to be too vague and imprecise to justify a restriction on the applicants' liberty of action in the form of an order binding them to keep the peace and be of good behaviour, the European Court of Human Rights pointed to the tension between requiring a law to be formulated with sufficient precision and the desirability of avoiding rigidity in the law. The Court said (at para. 31):

"The Court recalls that one of the requirements flowing from the expression 'prescribed by law' is foreseeability. A norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. At the same time, whilst certainty in the law is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. The level of precision required of domestic legislation - which cannot in any case provide for every eventuality - depends to a considerable degree on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed."

65. In conformity with this statement, in *SW v. United Kingdom* (1995) 21 EHRR 363, the Court rejected an argument that the offence of marital rape violated art. 7 of the European Convention (which is identical with art. 12(1) of the Bill) relating to retrospectivity. The argument was based on the recognition by the House of Lords that the old principle that a husband could not rape his wife no longer formed part of the law. The Court, accepting that art. 7 applied to a common law offence, stated (at para. 36):

"There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial law-making is a well entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen."

See also *R v. Cotter* [2002] EWCA Crim 1033 at paras 35-36.

The offence of misconduct in public office

66. The offence of misconduct in public office has a long history, going back at least to 1704. In that year, in the case of *Anonymous* (1704) 6 Mod 96 (Case 136), the Court said:

"If a man be made an officer by Act of Parliament, and misbehave himself in his office, he is indictable for it at common law, and any public officer is indictable for misbehaviour in his office."

A year later, in *R v. Wyat* (1705) 1 Salk 380 the offence was expressed again in very broad terms when the Court said:

"Where an officer neglect a duty incumbent on him, either by common law or statute, he is for his default indictable."

67. Since then there have been many cases in which public officers have been convicted of the offence. It must be acknowledged, however, that over time the elements of the offence have been described in a variety of different ways. Thus, Stephen's Digest 9th Edn (1950), art. 142 stated

"Every public officer commits a misdemeanour who, in the exercise or under colour of exercising the duties of his office, does any illegal act, or abuses any discretionary power with which he is invested by law from an improper motive ... But an illegal exercise of authority, caused by a mistake as to the law, made in good faith, is not a misdemeanour ..."

In *R v. Borron* (1820) 3 B & Ald 432, a case concerning the conduct of a magistrate, Abbott CJ stated (at 434) that the question was "from what motive had [the act] proceeded; whether from a dishonest, oppressive, or corrupt motive." And, in *R v. Marshall* (1855) 4 EL & BL 475, Lord Campbell CJ said that "a judge who maliciously obstructs the course of justice is guilty of a misdemeanour". Similar statements have been made in other cases. (See, for example, *R v. Young and Pitts* (1758) 1 Burr 556; *Commonwealth v. Steinberg* (1976) 362 A 2d 379). On the other hand, there are other authorities which state that a breach of duty on the part of a public official committed with wilful intent is all that is required to make out the offence. (See, for example, Bacon's Abridgement 1740 ed at 744; *R v. Halford* (Case 223) (1734) 7 Mod 193; *Question of Law Reserved (No. 2 of 1996)* 88 A Crim R 417 at 418, per Doyle CJ).

68. It is not surprising, therefore, that the comment has been made from time to time that the offence is not easy to define. It has been said that it is "not easy to lay down with precision the exact limits of the kind of misconduct or misbehaviour" (*R v. Llewellyn-Jones* (1967) 51 Cr App R 4 at 6); that "the offence is not easily capable of exhaustive definition" and "there is some uncertainty as to the precise content of the offence and even its correct title" (*Question of Law Reserved (No. 2 of 1996)* at 420, 438); that "the very notion of misfeasance in public office ... imports more nebulous issues [than murder] that are less easy to define" (*Ex parte Telegraph Group* [2001] 1 WLR 1983 at 1993); and that it is "obscure and often ill-defined" (PD Finn, "Official Misconduct" [1978] 2 Crim LJ 307 at 318). Nonetheless, it is clearly established that it is an offence at common law (*R v. Llewellyn-Jones*).

69. The difficulty which has been experienced in defining with precision the elements of the offence stem not so much from the various ways in which they have been expressed as from the range of misconduct by officials which may fall within the reach of the offence. This is because, to quote the words of PD Finn, "Public Officers: Some Personal Liabilities" (1977) 51 Australian Law Journal 313 at 315

"The kernel of the offence is that an officer, having been entrusted with powers and duties for the public benefit, has in some way abused them, or has abused his official position."

It follows that what constitutes misconduct in a particular case will depend upon the nature of the relevant power or duty of the officer or of the office which is held and the nature of the conduct said to constitute the commission of the offence.

70. Lord Mansfield appears to have recognised this problem as early as 1783. In *R v. Bembridge* (1783) 22 ST 1, his Lordship spoke (at 155-156) of two principles, one governing the officeholder who accepts an office of trust and confidence concerning the public and acts "contrary to the duty of his office", the other governing "a breach of trust, a fraud, or an imposition in a subject concerning the public". Both principles were held to apply to Bembridge, an accountant in the office of the paymaster-general of the forces. It was his duty to see that amounts owing to the Crown were properly included in the account. Not only did he fail to perform his duty in this respect, he "corruptly" concealed from the auditors the existence of amounts owing.

71. It is not entirely clear whether Lord Mansfield's reference to two principles was intended to relate to the one offence or two different offences. Be this as it may, in the later cases, the offence has been regarded as a single offence.

72. It was only natural that, in the course of time, the description of the offence tended to focus on the nature of the misconduct charged, more particularly in those cases where the misconduct complained of was not a simple breach of a positive duty to which the officer was subject, but consisted of a failure to exercise, or amounted to a wrongful exercise of, a discretion or power, as, for example when an officer exercised a discretion or power attaching to his office for personal gain or advantage. There were other cases where the officer acted outside the scope of the powers of his office.

73. Most of the reported cases in the 18th and 19th centuries involved dishonest, corrupt or partial conduct on the part of officeholders who, in performing their functions or exercising their powers, did so for personal gain or personal advantage. In describing the relevant conduct, the courts referred to the defendant's motive as "dishonest", "corrupt", "partial" or used some other adjective to describe an improper motive. These descriptions appeared to reflect a view that, in some cases at least, a motive so described must be established before the defendant could be convicted of misconduct in public office.

R v. Dytham

74. It was in the light of the law as it had then developed that *R v. Dytham* was decided. In that case, the appellant, who was a uniformed constable, was present at and a witness to the criminal offence of violent assault on a man by others resulting in the man's death. The appellant failed to carry out his duty as a police constable by omitting to take any steps to preserve the Queen's peace or to protect the person of the man or to arrest or bring to justice his assailants. The appellant was convicted. The English Court of Appeal dismissed an appeal from the conviction.

75. Lord Widgery CJ, who delivered the judgment of the Court, in referring to the earlier cases, said (at 726C):

"Indeed in some cases the conduct impugned cannot be shown to have been misconduct unless it was done with a corrupt or oblique motive. This was the position for example in *Rex v. Bembridge* (1783) 3 Doug KB 327; and also in the modern case of *R v. Llewellyn-Jones* [1968] 1 QB 429. There the registrar of a county court was charged in a count which alleged that he had made an order in relation to funds under his control 'in the expectation that he would gain a personal advantage from the making of such an order.'"

His Lordship went on to discuss the amended count in the indictment in the case before the Court. Speaking of neglect of duty, his Lordship observed (at 727G-728A):

"The neglect must be wilful and not merely inadvertent; and it must be culpable in the sense that it is without reasonable excuse or justification.

... it was not suggested that the appellant could not have summoned or sought assistance to help the victim or to arrest his assailants ... The allegation made was not of mere non-feasance but of deliberate failure and wilful neglect.

This involves an element of culpability which is not restricted to corruption or dishonesty but which must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment. Whether such a situation is revealed by the evidence is a matter that a jury has to decide."

76. Two points need to be made about *R v. Dytham*. The first is that when Lord Widgery's remarks in the last paragraph just quoted are read in context, they are not to be understood as a definition of the offence of misconduct in public office or as a definition of the elements of the offence. The terms used by his Lordship "calculated to injure the public interest so as to call for condemnation and punishment" are not the language of definition. Read in context, the words suggest that his Lordship was endeavouring to convey the idea that the conduct complained must be injurious to the public interest and of a sufficiently serious nature to warrant conviction and punishment. The linkage his Lordship makes with the idea of culpability reinforces this view of his Lordship's purpose. In this respect, it is to be noted that Lord

Widgery employs the concept of culpability to embrace two different matters, namely, first, the absence of reasonable excuse or justification and, secondly, that the conduct complained of may not involve corruption or dishonesty but must be of a sufficiently serious nature.

77. The second point is that there was no clear previous authority for the proposition that, in any category of case of misconduct in public office, the prosecution must prove to the satisfaction of a jury, as elements of the offence, that the conduct of the defendant was calculated to injure the public interest so as to call for condemnation and punishment.

78. For these reasons I do not accept the appellant's principal submission that the offence as defined in *R v. Dytham* is insufficiently precise to constitute "law" within the meaning of art. 11(1) of the Bill or to satisfy the requirements "prescribed by law" in art. 39 of the Basic Law and "established by law" in art. 5(1) of the Bill. This conclusion, however, by no means disposes of the appellant's case.

Question of Law Reserved (No. 2 of 1996)

79. It is necessary to identify the constituent elements of the offence. With that end in view I turn to *Question of Law Reserved (No. 2 of 1996)* 88 A Crim R 417. In that case, police officers and a private citizen were charged in a number of counts with "Abuse of Public Office (Common Law)". The prosecution case was that the three police officers gained access to confidential information in their official capacities and passed that information to the private citizen. The trial judge reserved questions of law for the consideration of the Court of Criminal Appeal. The Court held that there existed a generic indictable common law offence of misconduct in public office which covered misfeasance or nonfeasance in public office by a public officer.

80. Doyle CJ considered (at 418) that the object of the offence was correctly stated by PD Finn (as he then was) in his article "*Official Misconduct*" (1978) 2 Crim LJ 307 when he said (at 308):

"Official misconduct is not concerned primarily with the abuse of official position for pecuniary gain, with corruption in the popular sense. Its object is simply to ensure that an official does not, by any wilful act or omission, act contrary to the duties of his office, does not abuse intentionally the trust reposed in him."

With Doyle CJ, I agree that this statement accurately states the object of the offence.

Identifying the elements of the offence, including its mental element

81. As I have already noted, in an earlier article, "*Public Officers: Some Personal Liabilities*" (1977) 51 Australian Law Journal 313, Dr Finn had correctly pointed out (at 315) that the essence of the offence is that an officer who has been entrusted with powers and duties for the public benefit has abused them or his official position. Abuse of such powers and duties may take various forms, ranging from fraudulent conduct, through nonfeasance of a duty, misfeasance in the performance of a duty or exercise of a power with a dishonest, corrupt or malicious motive, acting in excess of power or authority with a similar motive, to oppression. In all these instances the conduct complained of by the public officer takes place in or in relation to, or under colour of exercising, the office.

82. The critical question is: what is the mental element required to constitute commission of the offence? In the case of nonfeasance, non-performance of a duty arising by virtue of the office or the employment, all that is required is wilful intent, accompanied by absence of reasonable excuse or justification. Mere inadvertence is not enough. So much is established by the authorities, notably the more recent cases including *R v. Dytham* and *Question of Law Reserved (No. 2 of 1996)* at 418, per Doyle CJ.

83. In other cases, the question is more complex. That is because outside the area of non-performance of a duty, an additional element is generally, if not always required, to establish misconduct which is culpable for the purposes of the offence. In such cases, in the absence of breach of duty, the element of wilful intent will not be enough in itself to stamp the conduct as culpable misconduct. A dishonest or corrupt motive will be necessary as in situations where the officer is exercising a power or discretion with a view to conferring a benefit or advantage on himself, a relative or friend. A malicious motive will be

necessary where the officer exercises a power or discretion with a view to harming another. And a corrupt, dishonest or malicious motive will be required where, an officer acts in excess of power. The point about these cases is that, absent the relevant improper motive, be it dishonest, corrupt or malicious, the exercise of the power or discretion would not, or might not, amount to culpable misconduct. Although the examples constitute some only of the range of situations which fall within the reach of misconduct in public office, they are enough to illustrate the proposition that the existence of an improper motive, beyond the existence of a basic wilful intent, is necessary to stamp various categories of conduct by a public officer as culpable misconduct for the purposes of the offence.

84. In my view, the elements of the offence of misconduct in public office are:

- (1) A public official;
- (2) who in the course of or in relation to his public office;
- (3) wilfully and intentionally;
- (4) culpably misconducts himself.

A public official culpably misconducts himself if he wilfully and intentionally neglects or fails to perform a duty to which he is subject by virtue of his office or employment without reasonable excuse or justification. A public official also culpably misconducts himself if, with an improper motive, he wilfully and intentionally exercises a power or discretion which he has by virtue of his office or employment without reasonable excuse or justification. Subject to two qualifications, this statement of the elements of the offence accords with the respondent's submission.

85. The first qualification is that, although the respondent submits that the misconduct must be either "wilful" or "intentional", I consider that the misconduct must be "wilful" as well as "intentional". In *R v. Sheppard* [1981] AC 394, the House of Lords considered a statutory provision which made it an offence "wilfully" to neglect a child in a manner likely to cause him unnecessary suffering or injury to health. By majority it was held that a person "wilfully" fails to provide medical attention for a child if he (i) deliberately does so, knowing that the child's health may suffer unless he receives attention; or (ii) does so because he does not care whether the child may need medical attention or not. In other words, "wilfully" signifies knowledge or advertence to the consequences, as well as intent to do an act or refrain from doing an act. Wilfulness in this sense is the requisite mental element in the offence of misconduct in public office, most notably in cases of non-feasance. There is no reason why the same mental element should not be requisite in cases of misfeasance and other forms of misconduct in public office. For this reason "wilfully" and "intentionally" are not employed disjunctively in the statement of the elements of the offence in the preceding paragraph.

86. The second qualification which I attach to the elements of the offence stated in the previous paragraph is that the misconduct complained of must be serious misconduct. Whether it is serious misconduct in this context is to be determined having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities.

87. Although this qualification is not made in the earlier cases, it underlies the concluding observations of Lord Widgery CJ in *R v. Dytham*. The qualification is consistent with the concept of abuse of office and it is appropriate that the offence should be so qualified in the light of the creation of a range of disciplinary offences that now apply in the case of public sector employees. The qualification is not to be taken as a dividing line between the offence of misconduct in public office and disciplinary offences. There is no doubt a borderland in which the common law offence and disciplinary offences overlap.

The offence is not imprecise or vague or arbitrary

88. The common law offence as so explained is not so imprecise as to offend the requirement of Basic Law art. 39 or of arts 5(1) and 11(1) of the Bill. Nor is it arbitrary within the meaning of art. 28 of the Basic Law. The offence is unusual in that it applies to various forms of misconduct by a public officer with the

result that what the prosecution needs to establish varies with the form of culpable misconduct alleged. That variation does not, however, lead to the existence at common law of more than one offence. Despite its variations, it has always been recognised as the one offence.

89. In expressing the view that there is no relevant imprecision, I bear in mind the passages in *Sunday Times v. United Kingdom*, *Sabapathee v. The State* [1999] 1 WLR 1836 and *R v. Nova Scotia Pharmaceutical Society* (1992) 74 CCC (3d) 289 to the effect that a law must be adequately accessible in the sense that it gives a person an adequate indication of the law relevant to his situation so that (if need be with advice) he can regulate his conduct. On the other hand, it is well settled that the degree of precision required will vary according to the context of the law. In *Sabapathee v. The State*, Lord Hope of Craighead, speaking for the Privy Council, said (at 1843):

"But the precision which is needed to avoid [striking down as unconstitutional] will necessarily vary according to the subject matter. The fact that a law is expressed in broad terms does not mean that it must be held to have failed to reach the required standard. In an ideal world it ought to be possible to define a crime in terms which identified the precise dividing line between conduct which was, and that which was not, criminal. But some conduct which the law may quite properly wish to prescribe as criminal may best be described by reference to the nature of the activity rather than to particular methods of committing it. It may be impossible to predict all these methods with absolute certainty, or there may be good grounds for thinking that attempts to do so would lead to undesirable rigidity. In such situations a description of the nature of the activity which is to be penalised will provide sufficient notice to the individual that any conduct falling within that description is to be regarded as criminal. The application of that description to the various situations as they arise will then be a matter for the courts to decide in the light of experience."

90. To similar effect are the remarks of Gonthier J in *R v. Nova Scotia Pharmaceutical Society* in delivering the judgment of the Supreme Court of Canada. He noted (at 306c) that the threshold for a holding of vagueness is relatively high. He went on to say (at 310b-c):

"an unintelligible provision gives insufficient guidance for legal debate and is therefore unconstitutionally vague."

He continued (at 311c-d):

"... it is inherent [in] our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective. The ECHR has repeatedly warned against a quest for certainty and adopted this 'area of risk' approach ..."

Gonthier J concluded his discussion of the point with comments which are particularly apposite to the case in hand. He said (at 312h-313c):

"... laws that are framed in general terms may be better suited to the achievement of their objectives, in as much as in fields governed by public policy circumstances may vary widely in time and from one case to the other. A very detailed enactment would not provide the required flexibility, and it might ... obscure its purposes behind a veil of detailed provisions. ... One must be wary of using the doctrine of vagueness to prevent or impede state action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself."

91. The common law offence of misconduct in public office is necessarily cast in general terms because it is designed to cover many forms of misconduct on the part of public officers. An alternative way of dealing with misconduct by public officers would be to enact a statute formulating specific offences for particular categories of misconduct in public office. The adoption of that course would involve a loss of flexibility and run the risk that the net would fail to catch some forms of serious misconduct. To suggest that the offence requires further definition would be to pursue a degree of definition which is unattainable, having regard to the wide range of acts and omissions which are capable of amounting to misconduct by a public officer in or relating to his office. The offence serves an important purpose in providing a criminal sanction against misconduct by public officers.

92. The broad terms in which the offence is cast are sufficient to enable the public officer to regulate his conduct. The elements of the offence, quite apart from its title or description, alert the public officer to the risk that he runs by engaging in misconduct and that is all that art. 39 of the Basic Law and art. 11(1) of the Bill require. The offence targets misconduct as the relevant act or omission to be avoided, thereby providing the necessary "guidance", to use the term used by Gonthier J in the *Nova Scotia* case. A public officer, familiar with his powers and duties, should have no difficulty in appreciating that neglecting to perform his duty with wilful intent and dishonestly, corruptly and maliciously exercising his powers and discretions constitute misconduct which is criminally culpable as already explained.

93. Mr Griffiths SC mounted a separate attack on the *R v. Ghosh* test, invoking the criticism made of that test by the English Law Commission. In *R v. Ghosh* [1982] QB 1053, the question was whether the trial judge's direction correctly instructed the jury as to the word "dishonestly" in s.1 of the Theft Act, 1968. The Court of Appeal held that the word described the state of mind and not the conduct of the accused and, therefore, the test of dishonesty was subjective but the standard of honesty to be applied was the "ordinary standards of reasonable and honest people" (at 1064). In the result, the jury should have first considered whether the appellant had acted dishonestly by the standards of ordinary and honest people.

94. It was that test that the trial judge applied in the present case and it was the subject of the Law Commission's criticism in its Consultation Paper No. 155 "Legislating the Criminal Code - Fraud and Deception". In paras 5.11-5.18 of the Paper, the Commission criticised the *Ghosh* test on the ground that it required fact-finders to set a moral standard of honesty by making a semantic and moral inquiry in circumstances where there is no single community norm or standard of dishonesty. The standard in *R v. Ghosh* is an objective standard. A similar standard has been applied in other areas of the law without attracting adverse comment (see, for example, *Twinsectra Ltd v. Yardley* [2002] 2 WLR 802). Granted the difficulty of ascertaining what are the ordinary standards of reasonable and honest people, it is nonetheless a task which is not so imprecise or vague as to violate the relevant requirements of art. 39 of the Basic Law or of art. 11(1) in the Bill. Nor can it be characterized as an arbitrary standard. A further point to be made in relation to the Law Commission's criticism is that, in framing standards to be applied by tribunals of fact, the search for definition can be carried too far. A higher degree of definition of some standards - "reasonable" is in its various applications in both the civil and the criminal law an example - is often unattainable.

95. If, contrary to the conclusion I have reached, the offence were to be regarded as having been defined by Lord Widgery CJ in the terms which have been the target of Mr Griffiths' challenge, then the case of imprecision would have been stronger. Culpability of such a degree "that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment" might not provide an adequate "basis for legal debate and coherent judicial interpretation" and where judicial interpretation is not possible the law is constitutionally vague (*R v. Canadian Pacific Ltd* (1995) 99 CCC (3d) 97 at 140, per Gonthier J). That, however, is not the case on the conclusion I have reached.

96. This case is distinguishable from *R v. Withers* [1975] AC 842 where it was held that the law knew no such generalised offence as effecting a public mischief. There the House of Lords concluded, despite the existence of a considerable body of authority, that the so-called offence left too much to a jury because it lacked sufficient and judicial cogency and precision and because it was contrary to the spirit of the common law (see at 870 FG, per Lord Simon of Glaisdale). Their Lordships considered that, if they were to develop the law by creating a general offence of public mischief they would be creating a new offence, this being an undertaking that was impermissible (860 EF, per Viscount Dilhorne; 867 EF and 868 AB, per Lord Simon of Glaisdale; 877 GH, per Lord Kilbrandon, where their Lordships followed the authority of *R v. Knuller* [1973] AC 435).

97. *Hashman and Harrup v. United Kingdom* (1999) 30 EHRR 241 is to be distinguished from the present case for somewhat similar reasons. Conduct *contra bonos mores* lacked any sufficient precision to enable it to serve as a standard or guide by which people could regulate their conduct. It was, to use an expression employed by Lamer CJC in *R v. Morales* (1992) 77 CCC (3d) 91 at 101, no more than a "standardless sweep".

98. Mr Griffiths SC made the valid point that, in conformity with *R v. Withers* and *R v. Knuller*, it was not for this Court to create a new offence as an answer to a perceived problem of imprecise definition or

accessibility. That said, it is well established that, by employing accepted and traditional judicial techniques, a court is entitled, indeed bound, to clarify the existing law where clarification is needed so long as, in doing so, the court does not extend the boundaries of criminal liability. To do so would create retrospective criminal liability and offend the provision of art. 12(1) of the Bill. The offence of misconduct in public office, as I have explained it, is consistent with the existing authorities. The explanation amounts at most to a clarification which, even if it does not narrow the offence, does not expand it.

99. In this case, no issue was raised as to the meaning and scope of the expression "public office". The appellant clearly fell within the expression. Just how far it extends may perhaps be a question for the future. On the later authorities, the expression has been understood as having a wide application. See *Henly v. Lyme Corp* (1828) 5 Bing 91, 130 ER 995; *R v. Whitaker* [1914] 3 KB 1283; *R v. Bowden* [1995] 4 All ER 505.

Conclusion

100. The particulars given of the four charges and the facts found by the trial judge bring this case within the offence as it has been explained. The appellant was a public officer. The acts and omissions complained of took place in the course of that public office. His relevant duties and responsibilities, especially in relation to conflicts of interest and the obligation not to confer benefits on or favour relatives and friends were set out in the Circular. His departures from his duties and responsibilities were clearly established. In relation to these departures, the trial judge found that the appellant acted dishonestly, must have realised that what he was doing was dishonest and concluded that the reason for his non-disclosure of his connection with Onclever was "his desire to help and favour Onclever". Indeed, the trial judge found that his recommendation of Onclever for pre-qualification was "due to his hidden connection to Onclever". Accordingly, his conduct was wilful in that he was aware of his responsibilities, and realised that what he was doing was dishonest. And his conduct was culpable, being without reasonable excuse or justification and dishonest because his motive was to benefit and favour Onclever.

101. In the result the appeal should be dismissed.

CHIEF JUSTICE LI

102. The Court unanimously dismisses the appeal.

POWERS OF ANTI-CORRUPTION COMMISSIONS

Anti-Corruption Commission - Investigation of the six conduct of police officers by Special Investigator - Whether findings were within the power of Special Investigator - Whether the adoption of findings and recommendation by Commission ultra vires - Validity of the subsequent action by Commissioner of Police against the officers based on the findings and recommendation

PARKER & FIVE OTHERS v MILLER & OTHERS

Supreme Court of Western Australia

Malcolm CJ, Franklyn J, and Ipp J

22 April 1998; 8 May 1998

An application for a Writ of *Certiorari* against the Anti-Corruption Commission and Special Investigator Mr Geoffrey Miller, QC

and

An application for a Writ of *Certiorari* against Robert Falconer, Commissioner of Police and

An application for a Declaration and

Applications for interlocutory injunctions against Robert Falconer, Commissioner of Police and the Anti-Corruption Commission

The facts appear in the judgment of MALCOLM CJ.

Cases referred to in the judgment or cited

Annets v McCann (1990) 170 CLR 596

Commissioner of Police v Tanos (1958) 98 CLR 383

Fisher v Keane (1879) 11 Ch D 353

Forster v Jododex Aust Pty Ltd (1972) 127 CLR 421

Greiner v ICAC (1992) 28 NSWLR 125

Haoucher v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 648

Harrison v Pattison (1987) 14 ALD 570

Kioa v West (1985) 159 CLR 550

Mahon v Air New Zealand [1984] AC 808

Mayor, Councillors and Citizens of the City of Brighton v Selpam Pty Ltd [1987] VR 54

National Companies and Securities Commission v News Corporation Ltd (1984) 156 CLR 296

O'Sullivan v Farrer (1989) 168 CLR 210

R v Commissioner of Police of the Metropolis; Ex parte Blackburn [1968] 2 QB 118

Roderick v Australian and Overseas Telecommunications Corporation Ltd (1992) 39 FCT 134

Rose v Bridges (1997) 149 ALR 710

Russell v Duke of Norfolk [1949] 1 All ER 109

Russian and Commercial Industrial Bank v British Bank for Foreign Trade Ltd [1921] 2 AC 438

MALCOLM, CJ

Order Nisi

This is the return of an order *nisi* made by Steytler J on 17 December 1997 by which the learned Judge ordered the first respondent to show cause why a writ of *certiorari* should not be issued to remove into the Full Court for the purpose of being quashed the findings of the first respondent in relation to the

applicants and each of them that they were guilty of criminal conduct and/or criminal involvement and/or serious improper conduct and/or improper conduct as set out in a letter from the second respondent to each of the applicants dated 12 December 1997 ("the Findings") on the grounds that:

- (a) the Findings were made in breach of the rules of natural justice; and
- (a) disclosure of the Findings to the second respondent was *ultra vires* the powers of the third respondent and the first respondent.

The order *nisi* also ordered the second respondent to show cause before the Full Court why a writ of *certiorari* should not be issued to remove into the Full Court for the purpose of being quashed the notices of suspension issued by the second respondent to the first, second, third, fourth and fifth applicants on 12 December 1997 and the notice to take paid leave issued to the sixth applicant on 12 December 1997 (together "the Notices"), on the grounds that the Notices were issued in reliance upon the Findings which were made in breach of the rules of natural justice and are, therefore, void and were conveyed to the second respondent in excess of jurisdiction.

The applicants' motion also sought a declaration that the Findings were made in breach of the rules of natural justice. Although not stated to be so, the relief sought by way of declaration was in the alternative to the writs of *certiorari*. The order made on 17 December 1997 also restrained the second and third respondents from publishing the Findings of the first respondent and the recommendations contained in the Notices until the hearing and determination by this Court of the motion for writs of *certiorari* and declaration or until further order, whichever was the sooner.

The first five applicants are all non-commissioned police officers. The sixth applicant is a commissioned police officer. The first respondent was a Special Investigator appointed by the third respondent, which is the Anti-Corruption Commission, constituted by the Anti-Corruption Commission Act 1988 ("the ACC Act"). I shall refer to the first respondent as "the Special Investigator" and the third respondent as "the ACC". The second respondent is the Commissioner of Police whom I shall refer to as "the Commissioner".

Amendment of Grounds

During the course of the argument before us, senior counsel for the applicants sought leave to amend the grounds upon which the writ of *certiorari* was sought. There being no objection on behalf of the respondents, the application for relief against the Special Investigator was abandoned and relief by way of *certiorari* sought against the ACC on the grounds that:

- "(a) the making of the Findings was *ultra vires* the powers of the First Respondent and their adoption was *ultra vires* the powers of the Third Respondent;
- (b) the Findings were made in breach of the rules of natural justice; and
- (c) disclosure of the Findings to the Second Respondent was *ultra vires* the powers of the Third Respondent."

The ground upon which relief was sought against the Commissioner was amended so that it was contended that "the Notices were issued in breach of the rules of natural justice and *ultra vires* and are therefore void". The primary issue in these proceedings became, both as against the ACC and as against the Commissioner, whether the Findings of the Special Investigator and their adoption by the ACC were beyond their respective powers with the consequence that the notices of suspension issued by the Commissioner to the first five applicants and the notice to take paid leave issued to the sixth applicant were issued in breach of the rules of natural justice and beyond power.

Orders made by the Court

At the conclusion of the argument on 22 April 1998 the Court was unanimously of the opinion that the adoption by the ACC and the disclosure of the Findings to the Commissioner by the ACC were and each of them was beyond the power of the ACC. It followed that the order *nisi* against the ACC should be made absolute. In the light of the concession that no relief was now being sought against the Special Investigator, it was considered that the order as against the Special Investigator should be discharged. So

far as the order *nisi* against the Commissioner was concerned, the Court reserved its decision. It was indicated that the reasons for making the order absolute against the ACC would be published later. The Court also ordered that until further order there be no publication of the evidence contained in the application books or otherwise on the Court file in support of the applications, except to the extent that the Court considered it necessary for the purposes of the publication of the reasons for judgment in these proceedings. By way of clarification for the assistance of the media, it was made clear that the suppression order so made did not prevent publication of any of the matter which had been the subject of argument and debate in Court on the day of the hearing.

Relevant Facts

The relevant facts and circumstances were not in dispute. Between on or about 18 August 1997 and 4 September 1997 each of the applicants was served with a summons requiring him to attend at the offices of the ACC to give evidence between 18 August 1997 and 12 September 1997. Each of the applicants duly attended. With the exception of one of them, each of the applicants recalled being provided with a sheet of paper outlining various allegations. After being permitted to read the allegations the paper was taken from them. Three of the applicants recalled that the allegations were similar to the Findings as they related to them. The applicants were each directed to attend to give evidence before the Commission on a second occasion at various times between late September and early October 1997. One of the applicants was directed to give evidence on two further occasions. With one exception a Notice of Potential Adverse Findings was served on each of the applicants on or about 27 October 1997. In the case of one of the applicants the notice was served on or about 27 November 1997. These notices gave the applicants a period of between seven and ten days to respond. At that stage the applicants took their notices to their solicitors who sought from the ACC and were granted an extension of time of seven days in which to respond to the notices. The applicants, through their solicitors, responded to the notices by submissions variously lodged between 14 November and 2 December 1997. In the responses the applicants' solicitors referred to the difficulty faced by the applicants in preparing a response, given that they did not know the evidence on which the findings against them were based, nor had they been given the opportunity to test such evidence by cross-examination. In the case of five of the applicants, Counsel assisting the Special Investigator responded by letter dated 17 November 1997 stating that those applicants had been given a "full and fair opportunity" or alternatively a "full opportunity" to respond to the allegations.

Five of the police officers subsequently received letters dated 10 December 1997 from the Chairman of the ACC which were in similar form of which the following is an example (although the relevant particulars of the conduct referred to have been omitted):

"This Commission has now received from its Special Investigator a report into various matters relating to corrupt conduct, criminal conduct, criminal involvement and serious improper conduct by certain members of the Western Australian Police Service.

As you are aware, your conduct was the subject of consideration by the Special Investigator.

The Special Investigator has concluded in respect of you that:

1. You are guilty of criminal conduct and/or criminal involvement in that you ...
2. You are guilty of serious improper conduct in that you ...
3. You are guilty of improper conduct in that you:-

...

4. You are guilty of serious improper conduct in that you ...

The Special Investigator reports that because of the conclusions he has reached, you are unfit to hold office as a member of the Western Australian Police Service, and has recommended that pursuant to the provisions of Section 8 of the *Police Act 1892*, you should be summarily removed from office.

The Commission intends to publish this recommendation, including making a public statement detailing the above matters and stating that it believes you have been guilty of serious improper conduct.

Pursuant to Section 52(6) of the *Anti-Corruption Commission 1988* we write to give you the opportunity to appear before the Commission and make submissions, either orally or in writing, in relation to these matters.

If you wish to make a written submission, please have it delivered to this Commission by 5 pm on 18 December 1997. If you wish to make an oral submission, please telephone Miss Margaret

Potts at the Commission (Telephone 9221 3622) by 18 December. The Commission will sit on 19 December 1997 for the purpose of hearing oral submissions."

Letters containing findings of the kind set out above were sent to four of the applicants, although in one case the letter was dated 9 December 1997. In relation to the remaining two applicants, the letters informed the recipients that the Special Investigator had concluded in respect of them that they were guilty of "serious improper conduct" or "improper conduct" in a number of respects. These letters were also dated 10 December 1997 and stated that the Special Investigator "has recommended that pursuant to the provisions of Section 8 of the *Police Act 1892*, you should summarily be removed from office". On 12 December 1997 notices of suspension were issued by the Commissioner in respect of all of the applicants save for the sixth applicant, a commissioned officer, in respect of whom a Notice to Take Leave was issued. Each of the notices of suspension included the following:

"TAKE NOTICE that under the provisions of Section 8 of the *Police Act 1892-1982*, you will be suspended from duty in the Western Australia Police Service from 12 December, 1997 until further notice. My reasons for imposing the suspension is (*sic*) that:

As a consequence of the findings of the Anti-Corruption Commission Special Investigator Mr Geoffrey Miller QC, conveyed to you by notice dated December 10, 1997, I have lost confidence in your integrity and credibility and therefore your ability to perform the functions of your office.

Consideration is presently being given to withdraw your pay and allowances as of December 27, 1997. You are hereby afforded SEVEN (7) days from the date of service of this notice to show cause in writing why the withdrawal of your pay and allowances should not take place."

The reasons stated in the notice to take paid leave were identical. The applicants were not afforded any opportunity to be heard before the Notices were served on them. In the case of the sixth applicant, by a further letter dated 12 December 1997, he was informed by the Assistant Commissioner (Professional Standards) that:

"As a consequence of the findings of the special investigator Geoffrey Miller QC, conveyed to you by notice dated December 10, 1997, the Commissioner of Police lost confidence in your integrity and credibility and therefore your ability to perform the functions of your office. Accordingly, the Commissioner of Police recommended to the Hon Minister for Police that you be suspended from duty in the Western Australian Police Service.

By Executive Council Minute dated 12 December, 1997 the Governor suspended you from your office. I attach a copy of that minute.

Consideration is presently being given to withdraw your pay and allowances as of December 27, 1997. Therefore you are hereby afforded SEVEN (7) days from the date of service of this letter to show cause in writing why the withdrawal of your pay and allowances should not take place."

The Executive Council Minute enclosed shows that His Excellency the Governor was advised by the Council "under Section 6 of the *Police Act 1892* and Section 52 of the *Interpretation Act 1984* to suspend Inspector Christopher Gordon Cull from his office".

This letter was not referred to by counsel for the applicants or counsel for the Commission at the hearing. Section 6 of the *Police Act 1892* provides that:

"The Governor may appoint such officers of police as may be found necessary, who shall hold commissions under the hand of the Governor for such appointments; and such commissioned officers shall be subject to the control and discipline of the Commissioner of Police, and shall be respectively charged with the government and superintendence of such portion of the Police Force as such Commissioner may from time to time direct."

Section 52 of the *Interpretation Act 1984* provides that:

"(1) Where a written law confers a power or imposes a duty upon a person to make an appointment to an office or position, including an acting appointment, the person having such power or duty shall also have the power -

- (a) to remove or suspend a person so appointed to an office or position, and to re-appoint or reinstate, any person appointed in exercise of such power or duty;
- (b) where a person so appointed to an office or position is suspended or unable, or expected to become unable, for any other cause to perform the functions of such office or position, to appoint a person to act temporarily in place of the person so appointed during the period of suspension or other inability but a person shall not be appointed to so act temporarily unless he is eligible and qualified to be appointed to the office or position; and
- (c) to specify the period for which any person appointed in exercise of such a power or duty shall hold his appointment.

(2) For the purposes of subsection (1)(b), 'cause' includes -

- (a) illness;
- (b) temporary absence from the State; and
- (c) conflict of interest.

(3) The validity of anything done by a person purporting to act under an appointment made under subsection (1)(b) shall not be called in question on the ground that the occasion for his appointment had not arisen or had ceased.

(4) Where a written law confers a power or imposes a duty upon a person to make an appointment to an office or position and that power or duty is exercisable only upon the notification or recommendation, or is subject to the approval, concurrence, or consent of some other person, then the powers conferred by paragraphs (a) to (c) of subsection (1) shall only be exercisable upon such nomination or recommendation or subject to such approval, concurrence, or consent.

(5) Nothing in this section affects the tenure of office or position of any person under the express provisions of any written law."

Functions and Powers of the ACC: Relevant Statutory Provisions

The ACC was originally incorporated as the Official Corruption Commission under the *Official Corruption Commission Act 1988*. That Act was substantially amended and the change of name effected by the *Official Corruption Commission Amendment Act 1996* which came into force on 28 August 1996. The Commission is constituted as a body corporate under section 5(2) of the ACC Act and consists of three members appointed under section 5(3). One of the members is required to be a person who has held office as a Judge of the Supreme Court or a District Court Judge or is eligible for appointment as a Judge of the Supreme Court; who shall be the Chairman: section 5(3)(a) and (12). The functions of the ACC are set out in section 12 of the ACC Act as follows:

"(1) The functions of the Commission are -

- (a) to receive or initiate allegations of corrupt conduct, criminal conduct, criminal involvement or serious improper conduct about -
 - (i) police officers; and
 - (ii) other public officers;
- (b) to consider whether further action is needed in relation to an allegation and, if so, by whom that further action should be carried out;
- (c) to carry out further action in relation to allegations itself, if it is appropriate for it to do so, or to refer allegations to other authorities so that they can carry out further action;
- (d) to furnish reports and make recommendations on the outcome of further action taken in relation to allegations;
- (e) to furnish general reports and make general recommendations about matters relating to its functions;
- (f) to consult, co-operate and exchange information with independent agencies, appropriate authorities and -
 - (i) the Commissioner of the Australian Federal Police;
 - (ii) the Commissioner (however designated) of the police force of another State or a Territory;
 - (iii) the Chairman of the National Crime Authority established by the *National Crime Authority Act 1984* of the Commonwealth; and

- (iv) any authority or body of this State, the Commonwealth, another State or a Territory that is authorised to conduct inquiries or investigations in relation to conduct in the nature of corrupt conduct, criminal conduct, criminal involvement or serious improper conduct and is declared by the Minister to be an authority or body to which this paragraph applies;
- (g) to assemble evidence obtained in the course of its functions and -
 - (i) furnish to an independent agency or an appropriate authority, evidence which may be admissible in the prosecution of a person for a criminal offence against a written law or which may otherwise be relevant to the functions of the agency or authority; and
 - (ii) furnish to the Attorney General or a suitable authority of another State, a Territory, the Commonwealth or another country, evidence which may be admissible in the prosecution of a person for a criminal offence against a law of the jurisdiction concerned or which may otherwise be relevant to that jurisdiction;
- (h) to disseminate information to the public about matters relating to its functions; and
- (i) to do anything else that it is required or authorised to do under this Act or any other written law."

The term "further action" in section 12(b), (c) and (d) is defined in section 3(1) as having the meaning given by s17(1) which provides that:

"The Commission shall examine each allegation and decide whether or not, in its opinion, investigatory or other action, or both, (in this Act called 'further action') for the purposes of this Act in relation to the allegation is warranted on reasonable grounds."

Thus, the further action which the Commission may itself take includes the investigation of the allegation and in such a context when read with section 12(1)(g) includes or extends to the assembly of evidence obtained in the course of such an investigation which may be admissible in the prosecution of a person for a criminal offence. Under these provisions the results of the investigation and the evidence assembled could be furnished to the Director of Public Prosecutions of the State who since 1992 has the function of determining whether or not a prosecution should be commenced in respect of any alleged criminal offence under the law of the State: *Director of Public Prosecutions Act 1991 (WA)* sections 11, 12.

The exercise of the power to take further action is governed by section 17(2) of the ACC Act which provides that:

- "(2) When the Commission is deciding whether further action for the purposes of this Act in relation to an allegation is warranted on reasonable grounds, the matters to which it may have regard include the following -
- (a) the seriousness of the conduct or involvement to which the allegation relates;
 - (b) whether or not, in the case of an allegation under section 13(1)(a), (b) or (c), the allegation is frivolous or vexatious or is made in good faith;
 - (c) whether or not the conduct or involvement to which the allegation relates is or has been the subject of appropriate investigatory or other action otherwise than for the purposes of this Act;
 - (d) whether or not, in all the circumstances, the carrying out of further action for the purposes of this Act in relation to the allegation is justified or is in the public interest.
- (3) If the Commission decides that further action for the purposes of this Act in relation to an allegation is warranted on reasonable grounds, it shall decide whether further action should be carried out by the Commission itself or whether the allegation should be referred to an independent agency or appropriate authority for further action.
- (4) For the purpose of performing its functions under this section the Commission may -
- (a) make such preliminary inquiry, if any, as it considers necessary; and
 - (b) consult any independent agency or appropriate authority."

In my opinion, it is apparent from these provisions that the relevant function of the Commission, in the present context, is the investigation of allegations which it has received or initiated of corrupt conduct, criminal conduct, criminal involvement or serious improper conduct about police officers and other public officers as referred to in s12(1)(a), including the assembly of evidence under s12(1)(g) admissible in the prosecution of a person for a criminal offence and furnish reports and make recommendations on the outcome of any investigation carried out by the ACC.

By s3(1) the term "corrupt conduct" means conduct referred to in s13(1)(a)(i) or (ii). Section 13(1)(a) relevantly provides that:

"Subject to subsection (3), the Commission shall -

- (a) receive information furnished to it by any person who alleges that a public officer has -
 - (i) corruptly acted or corruptly failed to act in the performance of the functions of his or her office or employment; or
 - (ii) corruptly taken advantage of his or her office or employment as a public officer to obtain any benefit for himself or herself or for another person."

A police officer is a "public officer" as defined by section 3(1). The term "criminal conduct" means conduct referred to in section 13(1)(a)(iii), (iv), (v) or (vi), namely:

- "(iii) committed a scheduled offence while acting or purporting to act in his or her official capacity; or
- (iv) committed an offence under section 552 of *The Criminal Code* by attempting, whilst acting or purporting to act in his or her official capacity, to commit a scheduled offence; or
- (v) committed an offence under section 553 of *The Criminal Code* by inciting, whilst acting or purporting to act in his or her official capacity the commission of a scheduled offence; or
- (vi) committed an offence under section 558 of *The Criminal Code* by conspiring, whilst acting or purporting to act in his or her official capacity, to commit a scheduled offence."

The term "scheduled offence" is defined by section 3(1) to mean an offence specified in the schedule to the ACC Act. These offences include an offence under section 60 or section 61 of the *Criminal Code* or any section in Chapters XII, XIII, XVI, XX, XXXIIIA, XXXVI, XXXVII, XL, XLI, XLII, XLIVA or LV of the Code.

The term "criminal involvement" means involvement referred to in s13(1)(b) which relevantly provides that:

"Subject to subsection (3), the Commission shall -

- (b) receive information furnished to it by any person who alleges that another person has been involved in criminal conduct engaged in by a public officer in such a manner that the other person could be regarded under Chapter II of *The Criminal Code*, as having taken part in committing an offence, or as having committed an offence or as being an accessory after the fact to an offence." The term "serious improper conduct" means conduct referred to in s13(1)(c), namely, conduct engaged in by a public officer (other than corrupt conduct or criminal conduct) that -
 - "(i) adversely affects, or could adversely affect, directly or indirectly, the honest or impartial performance of the functions of a public body or public officer; or
 - (ii) constitutes or involves the performance of the public officer's functions in a manner that is not honest or is not impartial; or
 - (iii) constitutes or involves a breach of the trust placed in the public officer by reason of his or her office or employment as a public officer; or
 - (iv) involves the misuse of information or material that the public officer has acquired in connection with his or her functions as a public officer, whether the misuse is for the benefit of the public officer or another person, and constitutes or could constitute -
 - (v) an offence against the *Statutory Corporations (Liability of Directors) Act 1996* or any other written law; or
 - (vi) a disciplinary breach providing reasonable grounds for the termination of a person's office or employment as a public officer under the *Public Sector Management Act 1994* (whether or not the public officer to whom the allegation relates is a public service officer or is a person whose office or employment could be terminated on the grounds of such conduct);"

Upon receiving information under section 13(1)(a), (b) or (c) the ACC is empowered by section 13(1)(d) to:

"consider, in the light of its own experience and knowledge and independently of any allegation referred to in paragraph (a), (b) or (c) whether or not the Commission ought itself to allege -

- (i) that a public officer has engaged in corrupt conduct, criminal conduct or serious improper conduct; or
- (ii) that another person has been involved, in a manner described in paragraph (b), with criminal conduct engaged in by a public officer."

The latter is the power to initiate an allegation.

Section 14(2) of the ACC Act provides that:

"A person to whom this section applies shall report to the Commission any matter -
(a) which that person suspects on reasonable grounds concerns or may concern corrupt conduct, criminal conduct, criminal involvement or serious improper conduct; and
(b) which, in the case of a person referred to in subsection (1)(b) or (c) is of concern to that person in his or her official capacity."

Section 14(3) requires such a matter to be reported as soon as reasonably practicable after the person becomes aware of it. The obligation to report is imposed upon a person who is the Parliamentary Commissioner, the principal officer of a notifying authority or an officer who constitutes a notifying authority, but does not apply to the Director of Public Prosecutions: section 14(1). The term "notifying authority" is defined in section 14(8) and includes any department or organisation under the *Public Sector Management Act 1994*, a statutory authority within the meaning of the *Financial Administration and Audit Act 1985*, a government department or other authority to which the *Parliamentary Commissioner Act 1971* applies and certain other persons or bodies or holders of an office under whom a public officer holds office or by whom or which a public officer is employed. By section 15(1)(a) the Director of Public Prosecutions is required to report to the ACC any matter which the Director suspects on reasonable grounds concerns or may concern corrupt conduct, criminal conduct, criminal involvement or serious improper conduct on the part of the Deputy Director of Public Prosecutions or of a member of the staff of the Director. Notwithstanding any secrecy provisions imposed under a written law, section 16 provides that any person, including a public officer, may report to the ACC any matter which that person suspects on reasonable grounds concerns or may concern corrupt conduct, criminal conduct, criminal involvement or serious improper conduct.

Further Action by Special Investigator

If the ACC decides under section 17(3) that it should itself carry out further action in relation to an allegation, section 21(1) provides that the section applies. Section 21(2) provides that:

"If an investigation is carried out -
(a) Part IV has effect if the investigation is carried out by a special investigator; and
(b) sections 44 to 47 in Part IV have effect if the investigation is carried out by officers of the Commission."

The ACC or a special investigator may consult any independent agency or appropriate authority about the allegation: section 21(3). The ACC may at any time (whether or not the carrying out of further action by the Commission has been completed) decide to refer the allegation to an independent agency or appropriate authority for further action: section 21(4).

In this case it is apparent that the Commission decided that further action was warranted by way of an investigation by a special investigator under Part IV of the Act. Part IV of the Act is headed "Investigations". Section 39 provides that in Part IV "investigation" means an investigation under Part II Division 5 in which section 21 appears. Section 40 of the ACC Act provides that:

"(1) For the purpose of carrying out investigations, and furnishing reports to the Commission, a special investigator has the powers of a Royal Commission and the Chairman of a Royal Commission under the applied provisions.
(2) The applied provisions have effect as if they were enacted in this Act with such modifications as are set out in this Part or are otherwise required, and in terms made applicable to investigations and reporting by a special investigator."

By section 3(1) of the ACC Act the "applied provisions" means sections 7, 9 to 17, 18(2) to (11), 19(1), 19A to 22, 24 to 30, 31(2) and (3) and 32 to 34 of the *Royal Commissions Act 1968*.

Section 41 of the ACC Act provides that:

"In the applied provisions as they have effect under this Act -
(a) a reference to a Royal Commission, a Commissioner or the Chairman of a Royal Commission is a reference to a special investigator;
(b) a reference to a Royal Commission's inquiry is a reference to an investigation by a special investigator;
(c) a reference to a person appointed by the Attorney General to assist a Royal Commission is a reference to a person appointed or engaged by the Commission to assist a special investigator or whose services are used by a special investigator; and
(d) 'documents' includes things that are documents within the meaning of section 79B of the *Evidence Act 1906*."

By virtue of section 7(1) of the *Royal Commissions Act 1968* a special investigator acting as a Royal Commission "may do all such things as are necessary or incidental to the exercise of its function as a Commission and to the performance of its terms of appointment, if any ...". These include the power to summon witnesses, the duties of witnesses to attend, the power to examine on oath or affirmation and the imposition of penalties and the arrest of persons failing to appear under sections 9 to 17 of the *Royal Commissions Act*. The power to obtain a search warrant from a Judge of the Supreme Court is conferred under section 18. Section 42(1) of the ACC Act provides that any evidence taken under the applied provisions in the course of an investigation shall be taken in private. Section 19A of the *Royal Commissions Act* provides that:

"If a Commission is taking evidence in private, or conducting an inquiry in private, a person who is not expressly authorised by the Commission to be present shall not be present and, notwithstanding any other law -
(a) the Commission is not required to authorise the presence of any person except that when evidence is being taken from a witness in private a person authorised by the Commission to appear before it for the purpose of representing that witness is entitled to be present;
(b) the Commission is not required to make known to any person, during the course of the inquiry, the content or nature of any evidence taken in private."

Section 42(2) of the ACC Act provides that:

"Section 19A(a) of the applied provisions has effect as if 'authorised by the Commission to appear before it for the purpose of representing that witness is entitled to be present' were deleted and the following were inserted - 'is entitled to be present for the purpose of representing that witness'."

Significantly, section 20 of the *Royal Commissions Act* has the effect that a statement or disclosure made by a witness in answer to any question put to him by a special investigator is not (except in contempt proceedings or proceedings for an offence against the *Royal Commissions Act*) admissible in evidence against him in any civil or criminal proceedings in any court in Western Australia.

It is relevant to note the longstanding practice in relation to an inquiry by way of a Royal Commission that where evidence is given which tends to show that a person has committed a criminal offence, the published report of the Royal Commission would not express any finding of guilt or other conclusion which may prejudice the fair trial of any subsequent proceedings, but the Commission would forward to the appropriate authorities an unpublished or secret report for consideration by the appropriate authority whether to commence a prosecution. Where evidence is given in civil proceedings which tends to show that a person has committed an offence, the presiding Judge is entitled to refer the matter to the Director of Public Prosecutions for consideration whether to commence a prosecution. In both cases the reason for the non-publication is to avoid prejudice to the prosecution or fair trial of the person in the event that it is decided to institute proceedings.

So far as a Royal Commission is concerned, this issue was canvassed by the Hon Justice Kennedy, the Hon Sir Ronald Wilson AC KBE CMG QC and the Hon Peter Brinsden QC in the *Report of the Royal Commission into Commercial Activities of Government and Other Matters* Part 1 Vol 1 paras 1.2.4 to 1.2.7 at pp1-6 to 1-7 as follows:

"1.2.4 The terms of reference in paragraph 1 required the Commission to 'inquire whether there has been:

(a) corruption;

(b) illegal conduct; or

(c) improper conduct,

by any person or corporation in the affairs, investment decisions and business dealings of the Government of Western Australia or its agencies, instrumentalities and corporations in respect of the matters referred to in Schedule 1, and to report whether -

(d) any matter should be referred to an appropriate authority with a view to the institution of criminal proceedings; or

(e) changes in the law of the State, or in administrative or decision making procedures, are necessary or desirable in the public interest.'

Paragraph 2 related to Schedule 2, but was in substantially similar terms.

1.2.5 It will be observed that both paragraphs require the Commission to 'inquire whether there has been (a) ... (b) ... (c) ...' but then to 'report whether (d) ... or (e) ...'. This distinction between 'inquire' on the one hand and 'report' on the other gave rise to contention as to the precise scope of the obligation resting on the Commission. It was argued by Counsel appearing for some of the parties represented before the Commission that with respect to corruption, illegal conduct and improper conduct, that is, paragraphs (a), (b) and (c), the Commission was bound to inquire but was not empowered to report the result of that inquiry. Notwithstanding the apparent absurdity of the outcome of such an interpretation of the terms of reference, the submission was pressed on the Commission. Thereafter, the Parliament enacted the abovementioned Act. The Act provided, in relation to both paragraphs 1 and 2, that the Commission shall inquire and report as required by the terms of reference, but as though each paragraph commenced with the words 'To inquire *and report* [our emphasis] whether there has been -

(a) corruption;

(b) illegal conduct; or

(c) improper conduct,

by any person or corporation ...'.

1.2.6 It would now seem to be perfectly clear that the Commission is required to inquire and report whether there has been, in the context of the specified terms of reference, corruption, illegal conduct or improper conduct. Nevertheless, these words require careful consideration. The Commission believes it to be imperative, if the interests of justice are to be observed and protected, that proper notice be taken of the nature of this Commission. It is an administrative body, or perhaps now, in the light of the Act, an administrative body with a statutory flavour. It is not a court of criminal justice charged with the determination of the guilt or innocence of persons prosecuted for breaches of the law. It is not bound by the rules of evidence. The fact that this Commission has been conducted by present and former members of the judiciary should not be seen as constituting it a 'judicial' inquiry or giving it the status of a court. While it is the function of a judge or a jury to determine issues, at least as far as the law is concerned, the purpose of a Royal Commission is to find facts and report them, and often, as in this case, to make recommendations. It has no power to affect the legal rights of individuals.

1.2.7 In these circumstances, the Commission has sought to determine, through the words of the Act, the true intention of the legislature. Careful consideration has led us to conclude that we are required, by the Commission as affected by the Act, *inter alia*, to report whether there is material which should be considered by the appropriate authority charged with responsibility for the institution of criminal proceedings. It is for that authority, not this Commission, to determine whether there is a *prima facie* case warranting prosecution. Far less is it the task of this

Commission to make an express finding of the commission of a criminal offence. Such a finding would have no consequence in law and could be highly prejudicial."

Section 21 of the *Royal Commissions Act* relates to the powers to inspect, retain and make copies of documents or extracts of documents produced.

Section 22 of the *Royal Commissions Act* provides that:

"A person appointed by the Attorney General to assist a Commission, or authorised by a Commission to appear before it for the purpose of representing any person, may, so far as the Commission thinks proper, examine or cross-examine any witness on any matter which the Commission deems relevant to the inquiry, and any witness so examined or cross-examined shall have the same protection and be subject to the same liabilities as if examined by a Commissioner."

Section 42(3) of the ACC Act provides that s22 of the applied provisions has effect as if "authorised by a Commission to appear before it" were deleted and the following were inserted:

"entitled or authorised under section 19A to be present".

Sections 24 to 30 of the *Royal Commissions Act* relate to giving false testimony, bribery of a witness, fraud on a witness, destroying books or documents, preventing a witness from attending, injury to a witness and dismissal of a witness by an employer. Section 31(2) and (3) provide for protection and liabilities of witnesses and the immunity of a person appointed to assist the special investigator or representing another person. Section 31(3) of the *Royal Commissions Act* provides that:

"A person appointed by the Attorney General to assist a Commission or authorised by the Commission to appear before it for the purpose of representing another person has the same protection and immunity as a barrister has in appearing for a party in proceedings in the Supreme Court and, where the person so appointed or authorised is a barrister or solicitor, he is subject to the same liabilities as he would be in appearing before that Court."

By s42(4) of the ACC Act, s31(3) of the applied provisions has effect as if -

"(a) 'authorised by the Commission to appear before it' were deleted and the following were inserted - 'entitled or authorised under section 19A to be present';
and
(b) after 'so appointed' the following were inserted - ', entitled'."

Section 43 of the ACC Act provides that before the evidence of a witness is taken on oath under the applied provisions in the course of an investigation, the witness is entitled to be informed of the general scope and purposes of the investigation. In carrying out an investigation the Commission or a special investigator may, by notice in writing, request a public authority or public officer to produce a statement of information: section 44(1). Any objection based upon public interest immunity is excluded by section 44(5). For the purposes of carrying out an investigation, the Commission or a special investigator may at any time enter any premises occupied or used by a public authority or public officer in that capacity and inspect the premises and anything in or on them and take copies of any documents in or on the premises: section 45(1). Section 46 provides that:

"Any requirement of the applied provisions or section 44 or 45 to answer questions, give evidence, produce documents, books, writings or information or make facilities available has effect despite any duty of secrecy or other restriction on disclosure imposed under written law, whether enacted before or after the commencement of section 21 of the *Official Corruption Commission Amendment Act 1996*, and a person who complies with such a requirement does not commit any offence by reason of that compliance."

An exception to the requirements under the applied provisions or sections 44 or 45 is contained in section 47(1) which provides that, subject to sub-section (2), nothing in the Act prevents a person from claiming

legal professional privilege as a reason for not complying with a requirement under the applied provisions or sections 44 or 45. Section 47(1), however, does not apply to any privilege of a public authority or public officer in that capacity: section 47(2).

The powers of the ACC are far-reaching. It is apparent that Parliament considered that these powers were necessary to ensure that allegations of corrupt and other conduct covered by the ACC Act could be independently investigated by a body given powers not available to the police, similar to the powers of a Royal Commission to compel persons to attend and answer questions for the purposes of the investigation. The secrecy provisions are justified on the ground that publication or disclosure of matters relevant to the investigation may not only prejudice the investigation, but may also prejudice the prosecution and fair trial of any criminal proceedings which may be justified in the opinion of the Director of Public Prosecutions in the event that the allegation is referred to him by the ACC for further action. They are also justified to protect the reputation of persons who have been the subject of investigation.

Section 22(1) provides that if the ACC decides under section 17(3) of the ACC Act that an allegation should be referred to an independent agency or appropriate authority for further action, it shall, as soon as practicable after making that decision, refer the allegation by forwarding a report on the allegation to the independent agency or appropriate authority. Section 22(2) provides that:

"If an allegation is referred to an appropriate authority under subsection (1) the Commission may, in the report, or by subsequent written notice -

- (a) recommend that the appropriate authority initiate and carry out an investigation into the allegation;
- (b) make a recommendation to the appropriate authority as to the period within which an investigation should be carried out; and
- (c) make such other recommendations to the appropriate authority as it thinks fit in relation to further action which should be carried out in relation to the allegation and the period within which it should be carried out."

In the present case, the only evidence before this Court of any communication by the ACC to the Commissioner is contained in the notices of suspension and the notice to take leave which referred to the findings of the Special Investigator conveyed to the relevant officers by the letters dated 10 December 1997 from the Chairman of the ACC.

It was submitted by senior counsel for the ACC that it was implicit from the provisions for the making of a report and recommending further action to an independent agency or appropriate authority, that the ACC was entitled to express its conclusion concerning the outcome of the investigations carried out by it or on its behalf, by way of an opinion regarding the guilt or otherwise of the person investigated of relevant conduct and decide what recommendations to make regarding "further action".

In my opinion, the various provisions of the ACC Act to which I have referred demonstrate that the ACC is primarily an investigative body and is not a body which is empowered to make decisions with reference to the commencement or conduct of criminal prosecutions. In the context of the criminal process its function is to receive or initiate allegations of criminal conduct, investigate them and to assemble evidence obtained in the course of its functions and furnish, to an appropriate authority, evidence which may be admissible in the prosecution of a person for a criminal offence, or which may otherwise be relevant to the functions of an agency or authority. In this respect, I am of the opinion that the powers of the Commission are limited in the same way as the Independent Commission against Corruption of New South Wales as they stood in 1990 and as referred to in *Balog v Independent Commission against Corruption* (1990) 169 CLR 625. In that case, the High Court held that the Independent Commission against Commission ("ICAC") was primarily an investigative body, the investigations of which were intended to facilitate the actions of others in combating corrupt conduct. It was not a law enforcement agency and it exercised no judicial or quasi-judicial functions. Its investigative powers carried with them no implication, having regard to the manner in which it was required to carry out its functions, that it should be able to make findings against individuals of corrupt or criminal behaviour. In *Balog*, it was submitted that the power of ICAC to report a finding concerning the liability of a person to be prosecuted or convicted of a criminal offence was limited to a finding of the kind referred to in section 74(5) of the *Independent Commission against Corruption Act 1988* (NSW) which provided that:

"A report may include a statement of the Commission's findings as to whether there is or was any evidence or sufficient evidence warranting consideration of -
(a) the prosecution of a specified person for a specified offence; or
(b) the taking of action against a specified person for a specified disciplinary offence; or
(c) the taking of action against a specified public official on specified grounds, with a view to dismissing, dispensing with the services of or otherwise terminating the services of the public official."

It was submitted that the ICAC was precluded from reporting a finding that any offence was or may have been committed and was also precluded from reporting that corrupt conduct involving the appellants or either of them may have occurred, may be occurring or may be about to occur. In dealing with those submissions Mason CJ, Deane, Dawson, Toohey and Gaudron JJ said at 632-633:

"Since the broad function of the Commission under section 13(1)(c) is to communicate the results of its investigations concerning corrupt conduct to appropriate authorities, it is apparent that its primary role is not that of expressing, at all events in any formal way, any conclusions which it might reach concerning criminal liability. Not only does corrupt conduct extend beyond the commission of a criminal offence, but the appropriate authorities (an expression which is not defined) to whom the Commission is to communicate its results, obviously extend beyond those agencies concerned with law enforcement. Indeed, under section 14(2) the Commission may report, with appropriate recommendations, to the Minister responsible for any public authority if it considers it desirable to do so, if necessary under the protection of the secrecy provisions of section 111. Also, the Commission may refer a matter to any person or body under section 53 and may take steps under sections 54 and 55 to see that proper action is taken in relation to it.

The one function expressly given to the Commission which directly relates to criminal proceedings (and it is not a principal function) is that referred to in section 14(1), where it is required to assemble evidence that may be admissible and to pass it on to either the Director of Public Prosecutions or the Attorney-General. It is significant that this sub-section speaks of evidence in this way, because it is apparent that the Commission in the exercise of its other functions is not required to confine itself to evidence that may be admissible in a court of law. It may proceed upon the basis of hearsay or privileged evidence, being able to inform itself as it considers appropriate. Not only does this, together with the other matters which we have mentioned, indicate that the Commission is intended to be primarily an investigative body and not a body the purpose of which is to make determinations, however preliminary as part of the criminal process, but it also indicates how inappropriate it would be for the Commission to report a finding of guilt or innocence. Because it speaks of prosecution, the evidence referred to in section 74(5)(a) is by implication admissible evidence. It is hardly to be supposed that if the Commission were to reach a finding that there was insufficient admissible evidence to warrant consideration of the prosecution of a specified person for a specified offence, the section nevertheless contemplates that it should go on to express a finding, upon inadmissible evidence, that the same person had committed the offence in question.

Moreover, the quite guarded way in which section 74(5) is phrased lends support to the construction for which the appellants contend. The use of the expression 'any evidence or sufficient evidence warranting consideration' suggests that it is someone else's evaluation of the evidence - that of the person who is to consider it - which is to determine whether a person is to be prosecuted or not and that the function of the Commission is to investigate and assemble the evidence rather than to evaluate it for itself, save for the limited purpose of deciding whether it warrants further consideration."

Section 74(5)(a) of the ICAC Act has a parallel in section 12(1)(g) of the ACC Act save that the latter refers specifically to "evidence which may be admissible in the prosecution". This suggests that an evaluation of that evidence would need to be made by the independent agency or appropriate authority which, in the present case, would be the Director of Public Prosecutions in relation to a criminal offence and the Commissioner in relation to any disciplinary or administrative action available to him. In this context, the function of the Director of Public Prosecutions would be to determine whether a person

should be prosecuted or not. The function of the ACC is to investigate and assemble the evidence rather than to evaluate it for itself, save for the limited purpose of deciding whether it warrants further action by the Director. The function is similar in the case of a reference to the Commissioner for further action, the purpose is to enable the Commissioner to consider whether any, and if so what, disciplinary or administrative action should be taken based on the material included in the report.

In *Balog v ICAC* at 633-634 their Honours said:

"If the legislature had intended, by allowing or requiring the Commission to report, to confer upon it a power to express a finding concerning the criminal liability of a specified person, then it would have been unnecessary to include sub-section (5) of section 74. The reason for the inclusion of the sub-section in the limited form in which it is expressed is not difficult to discern. The expression of a finding of guilt or innocence of an offence or even of a prima facie case against an individual, in a report which is bound to be made public, must be likely to have a damaging effect on the reputation of the person concerned. And while such a finding may not necessarily have a tendency to interfere with the due administration of justice in the event of a subsequent trial, the possibility cannot be disregarded. Under section 18 the Commission may furnish reports in connection with an investigation despite any proceedings that may be made before any court (presumably proceedings in relation to a matter under investigation). But in the event of there being proceedings before a court the Commission is under the same section to defer making a report to Parliament during the currency of the proceedings. Clearly the legislature was aware of the dangers of a report which would be made public and was concerned to protect proceedings before a court from interference arising from the publication of such a report. The concern of the legislature for the potentially damaging effect of a report is also to be seen in section 74 itself. Sub-section (8) of that section allows the Commission to defer making a report (not being a report as to a matter referred by Parliament) where it is desirable to do so in the public interest, particularly, under sub-s(9), where the matter is before a court. It would at least be consistent with that concern. We conclude that the relevant limits on section 74 are defined by sub-section (5) and to construe the section as conferring no other power to make findings as to the liability of an individual to conviction or even prosecution.

For all of those reasons it seems to us, simply as a matter of construction, that the only finding which the Commission can properly make in a report pursuant to section 74 concerning criminal liability is that referred to in sub-section (5), namely, whether there is or was any evidence or sufficient evidence warranting consideration of the prosecution of a specified person for a specified offence."

Their Honours went on to conclude that the ICAC did not have power to determine whether corrupt conduct may have occurred, may be occurring or may be about to occur but only had power:

"... to make a finding of a tentative kind only which, together with the limited nature of the findings which may be expressed pursuant to section 74(5), indicates that the Commission was intended to have only a restricted capacity to make findings, its principal roles being to investigate, educate and advise and to enlist and foster public support against corrupt conduct.

It follows that while the Commission may, and in some instances, must, report the results of its investigations to Parliament, it may not make any findings apart from those which it is empowered to make under section 13(2)(a) and section 74(5). At least in theory there may be a fine line between making a finding and merely reporting the results of an investigation. But in practice the line should not be difficult to draw. It is clear enough that there is a distinction between the revelation of material which may support a finding of corrupt conduct or the commission of an offence and the actual expression of a finding that the material may or does establish those matters. And in this case it is possible to observe that the only finding which the Commission may include in its report in relation to the appellants is a finding whether there is any evidence or sufficient evidence warranting consideration of the prosecution of them or either of them for a specified offence or specified offences. It may not include a finding that any corrupt conduct on their part occurred or may have occurred."

Their Honours also went on to make it clear at 635 that:

"Although the pernicious practices at which the Act is aimed no doubt call for strong measures, it is obvious that the Commission is invested with considerable coercive powers which may be exercised in disregard of basic protections otherwise afforded by the common law. Where the functions of the Commission to extend to the making of findings, which are bound to become public, that an individual was or may have been guilty of corrupt or criminal conduct, there would plainly be a risk of damage to that person's reputation and of prejudice in any criminal proceedings which might follow. If the legislation admits of a wider interpretation than that which we have given to it (and we do not think that it does) then the narrower construction is nevertheless to be adopted upon the basis that where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred: *Smorgon v Australia & New Zealand Banking Group Ltd* (1976) 134 CLR 475 at 487. See also *Hamilton v Oades* (1989) 166 CLR 486 at 494; *Potter v Minahan* (1908) 7 CLR 277 at 304; *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177; and *Baker v Campbell* (1983) 153 CLR 52 at 123."

In my opinion, the reasoning and conclusions in *Balog v ICAC* are equally applicable to the ACC Act. Indeed, in some respects, the powers of the ACC are more expressly circumscribed than the powers of the ICAC, the subject of the High Court decision. Thus, where the ACC decides under section 17(3) that an allegation should be referred to an independent agency or appropriate authority for further action, it is empowered to "refer the allegation by forwarding a report on the allegation to the independent agency or appropriate authority": section 22(1). Section 22(2)(c) empowers the ACC in the report or subsequent written notice to make such other recommendations to the appropriate authority as the ACC thinks fit in relation to further action that should be carried out. These provisions are contained in Division 5 of the Act. Division 6 refers to reports to Parliament or the Minister on specified matters after the ACC has carried out further action in relation to an allegation (section 27) and after considering a report forwarded to it by an appropriate authority (section 28(1)(a)) and any request by a person to whom the alleged conduct in the first report relates that "the facts disclosed in the first report be publicly disclosed" (section 28(1)(b)). A report may also be made after the carrying out of further action by an appropriate authority. Section 30(1) provides that before reporting "any facts adverse to a person or body in a report under Division 6, the ACC shall give the person or body a reasonable opportunity to make representations to it concerning those facts". This provision is consistent with the role of the ACC as investigating an allegation of facts adverse to a person or body but not making findings of fact or findings of guilt. Section 30(2) expressly provides that:

"A report under this Division is not to include a recommendation or opinion that a specified person should be prosecuted for a specified or unspecified criminal offence against a written law."

The prohibition of the inclusion of such a recommendation is entirely consistent with the view that the ACC has no power to make a finding that a person is guilty of a criminal offence or express an opinion that the evidence is sufficient to warrant a prosecution or otherwise recommend a prosecution.

A special investigator appointed by the ACC cannot be given greater powers than the ACC, itself, has. It follows that the special investigator appointed under section 8(1) of the ACC Act to investigate and report on specified allegations has no power to include in the report findings or conclusions that any person is guilty of "criminal conduct", "criminal involvement", "serious improper conduct" or "improper conduct". Consistently with the limitation of the power to the conduct of an investigation, evidence may be assembled which, if the Commission considers it would warrant further action by the Director of Public Prosecutions, may be referred to him for further action. Alternatively, or additionally, the matter may be referred to the Commissioner of Police to take further action including disciplinary proceedings.

Alternatively, in the case of a police officer, the allegation may be referred to the Parliamentary Commissioner under and in accordance with section 23 of the ACC Act. The allegation may not be referred to the Parliamentary Commissioner without first consulting with him: section 23(1). Significantly, when an allegation is referred to the Parliamentary Commissioner under section 22(1), the reference is to be treated by the latter as if it were a complaint duly made under section 17 of the *Parliamentary Commissioner Act 1971*. In this context, section 23(3) of the ACC Act provides that:

"Despite the proviso to section 14(1a) of the *Parliamentary Commissioner Act 1971*, when an allegation about a member of the Police Force or Police Department is referred to the Parliamentary Commissioner under section 22(1), the Parliamentary Commissioner may proceed to investigate that allegation whether or not the Commissioner of Police has had a reasonable opportunity to investigate the matter to which the allegation relates."

This again strengthens the conclusion that upon the proper interpretation of the ACC Act it is not for the ACC to make findings.

Section 26 of the ACC Act provides that:

"The Commission may inform a person to whom an allegation relates as to the outcome of any investigation carried out by the Commission or an appropriate authority in relation to the allegation if -

(a) the person requests the information; or

(b) the Commission considers that giving the information to the person is in the person's best interests,

and the Commission considers that giving the information to the person will not prejudice the carrying out of any further action in relation to the allegation."

In my opinion, "the outcome of any investigation" does not extend to the expression of findings of guilt in respect of any conduct within the purview of the Act. Such findings can only be made by a relevant court, tribunal or statutory authority having the relevant jurisdiction. There is nothing in the ACC Act to suggest that persons could be found guilty of criminal conduct otherwise than by the application of the due processes of the criminal law leading to a conviction. Significantly, by the application of section 20 of the *Royal Commissions Act* to an investigation by a special investigator, a statement or disclosure by a witness in answer to any question put to him by a special investigator is not admissible in evidence against that person in any criminal proceedings, except in contempt proceedings or proceedings for an offence against the *Royal Commissions Act*: see section 20 of the *Royal Commissions Act*.

Section 52(1) contains a wide provision against disclosure by the Commission and a range of connected persons of information received except for specified purposes which include under section 52(2)(c) for the purposes of proceedings for an offence instituted as a result of an investigation, (d) for the purposes of proceedings for perjury or any offence under the *Royal Commissions Act* or under the ACC Act, or (e) for the purposes of consultation with an independent agency or appropriate authority about a matter relevant to the functions of the Commission. The prohibition on general disclosure in section 52(1) of the ACC Act is subject to a number of exceptions. Section 52(3) provides that:

"Sub-section (1) does not prevent the Commission from divulging information, or making a statement, about the performance of the functions of the Commission to any person or to the public or a section of the public if the Commission considers that it is in the interests of any person, or in the public interest, to divulge that information, or make that statement, in that manner."

Where an investigation is one of a kind which may lead to prosecution for a criminal offence or disciplinary action in respect of conduct falling short of a criminal offence, the publication of the results of the investigation to the general public or a section of the public, prior to the commencement or conclusion of relevant proceedings, may prejudice a fair trial or the fair conduct of the relevant proceedings. This possibility is envisaged by section 52(4) which provides that the Commission shall not divulge information or make a statement under sub-section (3) with respect to a particular allegation where the disclosure of that information, or the making of that statement, is likely to interfere with the carrying out of investigatory or other action in relation to that or any other allegation or the making of a report under this Act.

A further limitation is contained in section 52(5) which provides that:

"The Commission shall not, in disclosing information or making a statement under sub-section (3) with respect to a particular allegation -

- (a) set out opinions that are, expressly or impliedly, critical of any person unless the Commission has complied with sub-section (6); or
- (b) disclose the name of a person who made the allegation or any other matter that would enable a person who made the allegation to be identified unless it is fair and reasonable in all the circumstances to do so."

Section 52(6) provides that where the Commission proposes to disclose information or make a statement setting out opinions referred to in sub-section (5)(a) it shall, before doing so, afford the person to whom the opinions relate the opportunity to appear before it and to make submissions, either orally or in writing, in relation to the matter. This provision was observed in the present case.

It is noted that section 54(1) of the ACC Act provides that:

- "Subject to sub-section (2) a person shall not publish or cause to be published in any newspaper or other written publication or by radio or television -
- (a) the fact that the Commission has received or initiated; or
 - (b) any details of, any information or allegation referred to in section 13(1), unless that fact or those details -
 - (c) is or are so published; or
 - (d) has or have already been publicly disclosed, under, or in connection with the execution of, this Act."

Sub-section (2) provides that nothing in section 54 prevents the compilation and publication by the Commission of statistics relating to the number and types of allegations or other non-identifying information of a general nature or the publication by a standing committee of any report.

Findings of the Special Investigator and Adoption and Consideration of them by the ACC Beyond Power

In my opinion, given that the ACC had no power to make findings of guilt or unfitness for office, it follows that it was beyond the power of the Special Investigator to make any such findings. It was also beyond the power of the ACC to adopt such findings and communicate them to the applicants and to the Commissioner of Police including the conclusion of the Special Investigator that each of the applicants was unfit to hold office as a member of the Western Australian Police Service and his recommendation that the officer should be summarily removed pursuant to the provisions of s8 of the *Police Act*. The communication of the purported findings and conclusions to the Commissioner was also beyond power. Furthermore, the proposed publication of the recommendation regarding removal including the making of "a public statement detailing the above matters and stating that it believes you have been guilty of serious improper conduct", all confirm that the ACC adopted the findings and recommendations as its own. In these circumstances, the communication and the threatened publication of them were, likewise, beyond power.

Senior counsel for the ACC contended that the ACC only proposed to publish its belief that the applicants were guilty of "serious improper conduct". The relevant portion of the letter makes it clear that the Commission intended to publish the recommendation regarding summary removal from office, "including making a public statement detailing the above matters and stating that it believes you have been guilty of serious improper conduct". It was submitted by senior counsel for the ACC that only the belief of the Commission that each applicant was guilty of "serious improper conduct" (being neither criminal nor corrupt conduct) was proposed to be published. On the face of it, the Commission proposed to make a public statement "detailing the above matters" and stating such belief. In my opinion, this implied that all of the matters found against the relevant applicant were intended to be published. If this was not the intention, the drafting of the letter left a great deal to be desired.

In my opinion, the provisions of section 52(4) stand firmly in the way of acceptance of the submission on behalf of the ACC that it was empowered to publish its belief in terms of the letters to the applicants of 10 December 1997. Section 52(4) provides that:

"The Commission shall not divulge information or make a statement under subsection (3) with respect to a particular allegation where the disclosure of that information, or the making of that statement, is likely to interfere with the carrying out of investigatory or other action in relation to that or any other allegation or the making of a report under this Act."

In my view, the ACC is prohibited by this provision from the publication of a statement of its belief, conclusion or finding, however, described, that a named person was unfit to hold office as an officer in the Western Australian Police Service in circumstances where it was anticipated that the further action anticipated was administrative or disciplinary action by the appropriate authority which might be prejudiced by the publication. The prohibition would also apply to any case in which there was evidence of a criminal offence which would require further action by way of the consideration of a prosecution by the Director of Public Prosecutions. In each case the publication would have the tendency to prejudice both the fairness of the administrative or disciplinary action and the fair trial of the prosecution of any alleged criminal offence. As I understand it, senior counsel for the ACC accepted that this was so. I would also add that any such publication would contradict the presumption of innocence which applies until a verdict of guilty is recorded and a judgment of conviction entered after a trial or a plea of guilty.

The next sentence of the letter read:

"Pursuant to Section 52(6) of the *Anti-Corruption Commission Act 1988* we write to give you the opportunity to appear before the Commission and make submissions, either orally or in writing, in relation to *these matters*." (my italics)

In my view, the references to "the above matters" and "these matters" are references to all of the Findings of the report and recommendations of the Special Investigator and, in the case of "these matters" the intended publication as well.

Senior counsel for the ACC placed some reliance on s31 of the ACC Act which provides that:

"If, following the making by the Commission of a report under this Division, either House of Parliament or a standing committee approves the public disclosure of facts disclosed in the report, a person may, despite section 54, publicly disclose those facts, whether by publication in any newspaper or other written publication or by radio or television or otherwise."

The heading to section 31 is "Public disclosure of findings". This was relied upon in support of the implied power to make findings within the express power to report of the kind contained in the letter of 10 December 1997. Section 31 is in Division 6 of the Act which deals with reports by the ACC to Parliament or the Minister on particular matters. Section 27 empowers the ACC to report in writing to each House of Parliament on the facts disclosed as a result of "further action" taken by it. I have already referred to the ambit or scope of the ACC's power, itself, to take "further action". By section 28(2) the ACC may also report to Parliament that it considers that further action is not being, or has not been, properly, efficiently or expeditiously carried out by an appropriate authority to whom an allegation has been referred under section 22(1). Section 29 provides that reports of the kind referred to in sections 27 and 28 may also be made to the Minister. The contents of such reports are restricted by the provisions in section 30(2), to which I have already referred. Senior counsel for the ACC rightly accepted that the effect of section 30(2) was that, by implication, a report under Division 6 could not lawfully contain a finding by the ACC that a person was guilty of criminal or corrupt conduct.

For these reasons, I am of the opinion that the making of the relevant findings by the Special Investigator, including the finding of unfitness, and the recommendation for removal, the communication of such findings and recommendation to the Commissioner of Police and their proposed publication were in each case beyond the powers of the ACC. It is for these reasons that I joined in the conclusion that the order *nisi* should be made absolute as against the ACC.

Natural Justice

These conclusions make it unnecessary to consider the question whether the procedures adopted by the ACC involved a denial of natural justice. It was accepted by counsel for the applicants that if the Court concluded that the ACC was limited in its powers to the making of an investigation and assembling

evidence to the extent to which I have referred, the requirements of natural justice had no application except as provided in the Act or the circumstances required. It was conceded by senior counsel for the applicants that, on that basis, the ACC had complied with the relevant requirements of natural justice which, in the context of an investigation which could not lead to findings, did not include a right of cross-examination, for example.

Decision of the Commissioner to Suspend

I turn now to consider the decision of the Commissioner to suspend the first five applicants and to give notice to the sixth applicant to take paid leave. Each of these notices was dated 12 December 1997, namely, two days after the letters dated 10 December 1997 from the ACC to the officers concerned.

It was common ground that the relevant notices were given to the first five applicants under section 8 of the *Police Act 1892* which provides that:

"The Governor may, from time to time as he shall see fit, remove any commissioned officer of police, and upon any vacancy for a commissioned officer, by death, removal, disability, or otherwise, the Governor may appoint some other fit person to fill the same; and the Commissioner of Police may, from time to time, as he shall think fit, suspend and, subject to the approval of the Minister, remove any non-commissioned officer or constable; and in the case of any vacancy in the Police Force by reason of the death, removal, disability or otherwise of any non-commissioned officer or constable, the Commissioner of Police may appoint another person to fill such vacancy."

The contention on behalf of the applicants regarding the exercise of the Commissioner's power may be very shortly stated. As to the non-commissioned officers it was accepted that the Commissioner had a discretion under section 8 of the *Police Act*. That discretion was expressly exercised "As a consequence of the findings of" the Special Investigator conveyed to the officer concerned by the letter dated 10 December 1997 on the basis of which the Commissioner said he had lost confidence in the officer's integrity and credibility and therefore his ability to perform the functions of his office. It was submitted that by suspending the applicants on the basis of the Findings the Commissioner not only had regard to, but gave conclusive weight to, a factor to which he was not entitled to have regard, with the result that his discretion miscarried. In other words, because those findings were beyond power, they could not constitute a relevant consideration let alone constitute a basis for the exercise of discretion: *Pearlow v Pearlow* (1953) 90 CLR 70 at 77-78 per Dixon CJ; *The Queen v Anderson; Ex parte Ipec Air Pty Ltd* (1965) 113 CLR 177 at 189 per Kitto J; *The Queen v The Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45; *Minister for Aboriginal Affairs v Peko Wallsend* (1986) 162 CLR 24 at 39-40 per Mason J; and *Environmental Protection Agency and Minister for the Environment; Ex parte Coastal Waters Alliance of Western Australia*, unreported; FCt SCt of WA; Library No 960159; 26 March 1996 per Malcolm CJ at 9-10, Rowland J at 20-21 and Franklyn J at 15.

Given that the findings by the Special Investigator and their adoption by the Commission as well as the conclusion of unfitness and recommendation for removal were each invalid as being beyond power, they were incapable of constituting a relevant consideration for the purposes of the exercise of the power of suspension under section 8 of the *Police Act*.

No criteria for the exercise of the discretion conferred by section 8 are set out. Consequently, the discretion is an open one of the kind referred to by Dixon J in *Swanhill Corporation v Bradbury* (1937) 56 CLR 746 at 758; and *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J. In *The Queen v Australian Broadcasting Tribunal* at 49 Stephen, Mason, Murphy, Aicken and Wilson JJ said in their joint judgment:

"Here the problem lies in ascertaining what are the proper limits of the discretion. In the absence of some positive indication of the considerations on which a grant or refusal of consent is to depend, the discretion is 'unconfined except insofar as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislation could have had in view', to use the words of

Dixon J in *Browning* (1977) 74 CLR at 505. In that case his Honour went on to remark, (as he had done earlier in *Swanhill Corporation v Bradbury* (1937) 55 CLR 746 at 758), 'on the impossibility when an administrative discretion is undefined, of a court's doing more than saying this or that consideration is extraneous to the power'."

I have no hesitation in holding that the exercise of an open discretion based upon invalid findings of guilt and invalid conclusions of unfitness for office and an invalid recommendation for removal as being beyond the powers of the Special Investigator and the ACC were irrelevant and extraneous considerations so far as the exercise by the Commissioner of his discretion under section 8 of the *Police Act* was concerned. In other words, his purported exercise of power was infected by the invalidity and absence of any statutory force of those conclusions. It was not suggested before us that the Commissioner had before him the report of the Special Investigator, or any report of the ACC in relation to that investigation, which might have contained material relevant to the exercise of his discretion and the question whether he could continue to have confidence in the integrity and credibility of the officer concerned and his ability to perform the functions of his office. Counsel for the Commissioner accepted that, in these circumstances, the Court could only proceed on the basis that the information before the Commissioner consisted of the contents of the letters dated 10 December 1997 which had been addressed to the officers. In these circumstances I consider that, on the face of it, *certiorari* will lie to quash the decision of the Commissioner: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564. The findings, conclusion and recommendation by the Special Investigator, as adopted by the ACC, were intended to be a step in the process of altering rights, interests or liabilities in the sense referred to in *Ainsworth v Criminal Justice Commission* at 580 per Mason CJ and Dawson, Toohey and Gaudron JJ. See also *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 162 per Brennan CJ, Gaudron and Gummow JJ.

It was submitted on behalf of the Commissioner, however, that the power conferred by section 8 of the *Police Act* to suspend any non-commissioned officer or constable was a statutory formulation of the Crown's prerogative power to dismiss or suspend its servants at pleasure and may be exercised in the same manner. Accordingly, so it was submitted, the power to suspend conferred by section 8 was exercisable at will, without notice and for any reason or for no reason. Reliance was placed upon the decision of Anderson J in *Menner & Ors v Commissioner of Police* (1997) 74 IR 472. In that case each of the plaintiffs is, or was, a police constable who was suspended without pay by the Commissioner. Each claimed a declaration, in effect:

- (a) that the Commissioner did not have the power to suspend him without pay, and
- (b) that the decision to suspend without pay was anyway null and void,
 - (i) for want of procedural fairness;
 - (ii) because it was an improper exercise of discretion.

The suspensions occurred immediately before or immediately after the laying of criminal charges against each plaintiff. In the case of the first plaintiff the charge was perjury arising out of evidence given by him in court. The charges against the second plaintiff were of driving under the influence of drugs and having a prohibited substance in his blood, which charges followed a traffic accident in which the second plaintiff was involved while off duty. The charge against the third plaintiff was of perjury arising out of evidence given by him in court. The charges against the fourth plaintiff were similarly of perjury and also of assault occasioning bodily harm. The charge against the fifth plaintiff was of perjury arising out of evidence given by him in court. At the time of these suspensions, none of the charges had proceeded to trial. The suspensions were not said to be for disciplinary reasons. They were not said to be to punish the constables for misconduct. The notices did not in fact purport to state any reason. None of the plaintiffs was given an opportunity to be heard on the issue whether he should be suspended.

Section 10 of the *Police Act* provides that no person shall be capable of holding any office, or appointment in the Police Force, or of acting in any way therein, until he shall have subscribed the engagement set out in the section. This contains an engagement and promise that the officer will well and truly serve the Queen in the relevant office until legally discharged. The engagement is to be subscribed in the presence of and attested by a Justice or commissioned officer of the Force. Section 11 of the Act provides that:

"Every person, on subscribing such engagement, shall thereby be bound to serve Her Majesty as a member of the Police Force, at the current rate of pay for such member, and until legally discharged, from the day on which such engagement shall have been subscribed: Provided that no such engagement shall be set aside for the want of reciprocity: Provided further, that such engagement may be cancelled at any time by the lawful discharge, dismissal or removal from office of any such person, or by the resignation of such person being accepted by the Commissioner of Police."

The *Police Act* contains a number of provisions relating to discipline. The Commissioner or an officer appointed by him may examine on oath any member of the Police Force upon a charge of an offence against the discipline of the Police Force being made against any member: section 23(1). Where the member against whom a charge is alleged is an officer, such examination is required to be conducted by an officer of the rank of Chief Superintendent or above: section 23(2). The Commissioner or officer conducting such examination has the same power to summon and examine witnesses and to administer oaths as a Justice of the Peace: section 23(3). Section 23(4) provides where the Commissioner or officer conducting such an examination determines that any other member of the Police Force has committed an offence against the discipline of the Force, he shall record that determination in writing and subject to sub-section (5) may thereupon caution such member or by order in writing impose on him one or more of the following punishments:

- (a) a reprimand;
- (b) a fine not exceeding \$200;
- (c) a reduction to a lower rank;
- (d) reduction in salary to a specified rate within the limits of salary fixed in relation to the rank held by him;
- (e) suspension from duty;
- (f) discharge or dismissal from the Force.

An order made under sub-section (4) for reduction in rank or salary, suspension from duty, discharge or for dismissal does not have effect unless or until:

- (a) in the case of a member who is not an officer, it is imposed or confirmed by the Commissioner; or
- (b) in the case of an officer, it is confirmed by the Governor: section 23(5).

Section 23(6) provides that an order under sub-section (4) which is subject to confirmation by the Governor shall not be submitted to the Governor for such confirmation unless or until:

- (a) the time with which an appeal to the Board against the punishment, decision or finding to which the order relates may be made under this Act has elapsed and no such appeal has been instituted; or
- (b) such an appeal to the Board has been instituted and has been determined by the Board in accordance with the provisions of the Act.

While the term "Board" is defined to mean the Police Appeal Board constituted under Part IIA of the *Police Act*, it is to be implied that it has that meaning in section 23 which appears in Part II of the Act. Section 33E confers a right of appeal on a member of the Police Force who has been convicted upon a summary investigation by the Commissioner or other officer appointed by the Commissioner of an offence against the discipline of the Police Force. The right is available only if that member has been punished by the Commissioner or other officer by being discharged or dismissed, suspended from duty, reduced in rank, fined or transferred by way of punishment.

As noted by Anderson J in *Menner* at 473, it was contended that the power of suspension under section 8 of the Act could not be exercised without giving to a constable an opportunity to be heard why he should not be suspended. It was also contended that there was no power to suspend without pay. Anderson J said at 473-474:

"Members of the Police Force enter into an engagement to serve by taking and subscribing an oath. In Western Australia the form of the oath is set out in section 10 of the *Police Act*. The engagement involves a concurrence between the officer and the Crown. On taking and subscribing the oath he or she is bound to serve the Crown as a member of the Force until legally

discharged. The relationship thus established is that of servant and master notwithstanding that the constable has specified powers and duties which he must execute as a matter of independent responsibility: *Dixon v Perpetual Trustee Co Ltd* (1951) 85 CLR 237 at 248-249, 252. But the engagement is a unilateral engagement in the sense that the officer promises to serve as long as it pleases the Crown to employ him. The engagement does not include a mutuality or reciprocity of contract and liability. It binds the officer to serve but does not oblige the Crown to retain him. By its prerogative the Crown may dismiss him at will. The prerogative of the Crown to dismiss at pleasure is not confined to police officers but (except, of course, to the extent modified by statute) extends to all persons who hold office under the Crown. The power derives from a principle of public policy that the continued employment of a particular person in the service of government might be detrimental to the interests of the people and the State; and that the power to dismiss should therefore be exercisable summarily and without any obligation to prove cause or to divulge reasons: *Shenton v Smith* [1895] AC 229; *Rider v Foley* (1906) 4 CLR 422; *Power v The Queen* (1873) 4 AJR 144; *Fletcher v Nott* (1938) 60 CLR 55; *Kaye v Attorney General for Tasmania* (1956) 94 CLR 193; *Reedman v Hoare* (1959) 102 CLR 177; *Coutts v The Commonwealth* (1984) 157 CLR 91.

The prerogative power to dismiss an officer of the Police Force, being a power to dismiss at pleasure, may be exercised at any time and for any reason, or for no reason or for a mistaken reason. In this sense a police officer has no security of appointment: *Coutts v The Commonwealth* per Brennan J at 105. From this it follows that (unless statute otherwise provides, either expressly or by implication) there is no right in the officeholder to be heard as a condition of the lawful exercise of the power to dismiss him: *Ridge v Baldwin* [1964] AC 40 per Lord Reid at 65-66; *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578 per Lord Wilberforce at 1597; *Coutts v The Commonwealth* especially per Dawson J at 121.

The Crown prerogative has always been held to extend to or include the power to suspend at will as well as to dismiss. As Dixon J pointed out in *Fletcher v Nott* at 77: 'Its existence [the power of removing members of the Police Force from office] is due to the simple fact that the Police Force is ... a regular service of the Crown. It is a disciplined force in the service of the Crown. Unless statute otherwise provides, either expressly or by implication, those who serve in such capacity hold office at the pleasure of the Crown. The general rule of the common law is that the King may refuse the services of any officer of the Crown and suspend or dismiss him from office.'

See also *Kaye v Attorney General for Tasmania* at 198; *Hunkin v Siebert* (1934) 51 CLR 538 at 541."

In the proceedings before Anderson J it was submitted that the Commissioner was not the Crown and the exercise by him of the power of suspension under section 8 of the *Police Act* was not an exercise of the prerogative powers of the Crown, but an exercise of statutory power, the limits and manner of exercise of which were to be found in the proper construction of the *Police Act*. It was further submitted that there was nothing in the Act negating the requirement of administrative law that anyone whose rights and legitimate expectations may be directly adversely affected by an administrative decision in relation to him or her be accorded procedural fairness before that decision is made. So far as those submissions were concerned, Anderson J said at 475:

"I accept the submission that these suspensions were an exercise of statutory power, but in my opinion that is immaterial. The provisions of the *Police Act* are in all material respects relating to the relationship between the Crown and members of the Police Force and to the powers of dismissal and suspension of constables perfectly consistent with the common law position. The purpose of s8, in relation to constables, is to invest the Commissioner with the same power of suspension at pleasure as belongs to the Crown, as to which see *McVicar v Commissioner for Railways (NSW)* (1951) 83 CLR 521 at 529; *Lee v Fletcher* [1967] Tas SR 142. That s8 is intended to confer on the Commissioner the prerogative power of the Crown to suspend at pleasure is clear from the words of the section. It is true that it is not expressly stated in the Act that an appointment of a constable by the Commissioner is an appointment 'during pleasure only'; and it is also true that the words of s8 conferring the power to suspend do not include words such as 'at pleasure' or 'at will' but there is no difference between a power which may be exercised by

governmental authority 'as he shall think fit', which are the words of s8 and a power that may be exercised 'at pleasure' or 'at will', which is how the prerogative power is often defined."

His Honour then referred to *O'Rourke v Miller* (1984) 156 CLR 342 which concerned a provision in section 9(1) of the *Police Regulation Act 1958* (Vic) that "the Chief Commissioner may ... dismiss or discharge any police cadet at any time". Anderson J said that this was accepted by Gibbs CJ at 349 and Wilson J at 356 as giving the Chief Commissioner an unfettered power of dismissal, notwithstanding the absence of a provision that the appointment was "during pleasure" and notwithstanding the absence from the dismissal provisions of words expressing the powers exercisable "at will" or "at pleasure". This was accepted by Gibbs CJ at 349, but, in my view, it was not accepted by Wilson J at 356. Gibbs CJ said at 349 that the provisions of s9(1) and 112 of the Act "give the Commissioner an unfettered power to dismiss a police cadet or a police reservist". Wilson J set out the terms of s9(1) at 356, but made no comment on their interpretation or application, except to say at 358:

"In arguing that he may dismiss or discharge a constable on probation at any time, the Chief Commissioner is asserting the same power as is given to him expressly by s9(1). In my opinion it is not possible to imply such a power from s8 of the Act."

The comments regarding the unfettered power of the Commissioner under s9(1) were, of course, *obiter dicta* and not an essential step in the reasoning leading to the decision in *O'Rourke v Miller*. After referring to *O'Rourke v Miller*, Anderson J at 475-476 said:

"Whether the power of suspension is regarded as deriving from the prerogative power of the Crown or as being purely statutory the result is therefore the same. It may be exercised at any time and for no reason or for a mistaken reason, just as the prerogative power. That this is the legislative intent embodied in s8 is reinforced by consideration of the Act as a whole, especially the provisions relating to discipline. Section 23 confers on the Commissioner power to suspend for disciplinary purposes and contains procedures clearly designed to afford every opportunity to officers in respect of whom that step might be taken, to state their case.

Accepting that the power to suspend in s8 is exercisable at will without notice and for any reason or for no reason, I am not persuaded that a constable has any right to be heard before the power is exercised in relation to him. As Taylor J observed in *Reedman v Hoare* at 181 such a contention '... assumes that the right ... is a right to dismiss for cause. It is, of course, nothing of the kind; it is a right to dismiss at pleasure and, accordingly, is not subject to any such condition or restriction ...'. See also *Ridge v Baldwin* per Lord Reid at 65; *Coutts v The Commonwealth* especially per Brennan J at 105.

This is not to say that a decision under section 8 to suspend is in no circumstances reviewable. I suppose the decision would have to be made honestly and in bona fide pursuit of the purposes of the power. No such issues arise in this case.

Cases such as *Malloch v Aberdeen Corporation* and *R v Commissioner of Police; Ex parte Ramsay* [1993] 2 Qd R are distinguishable from this case. They belong to a category of cases in which, in the particular legislation, the power to dismiss the government officer was not unfettered but required an adverse opinion to be formed of the officer thus implying a right in him to be heard as to that opinion, or required particular procedures to be followed which implied a right in the officer to put his case, or are cases in which for one reason or another, including the conduct of superior officers, the dismissed officer was held to have a legitimate expectation that he would be heard before dismissal. In my opinion none of those features are present in this case."

Save for minor amendments by section 3 of the *Police Act Amendment Act 1969*, section 8 remains in the form in which it was originally enacted in 1892. The original provision of the Act relating to inquiries into misconduct and penalties included provision for the Commissioner or other commissioned officer to inquire into any charge of misconduct against the discipline of the force: section 23. The evidence taken by any such officer was to be referred to the Commissioner and if he considered the charges to be satisfactorily proved he may recommend to the Minister that one of various penalties be imposed, including discharge or dismissal. A similar provision was made in respect of a constable similarly

charged: section 24. Specific provision was made for any charge against a commissioned officer of breach of duty or any conduct rendering him to be unfit to remain in the Police Force which the officer denied to be inquired into by three or more persons (of whom only one was to be a member of the Police Force) to conduct an inquiry and report to the Governor in Council: section 25. Any non-commissioned officer or constable was given the right to demand an inquiry by a Board appointed by the Governor instead of being dealt with under sections 23 or 24.

It would be an odd circumstance if it were the case that the Minister could discharge on the basis of an invalid finding by the Commissioner under the original section 23, or the Commissioner could validly recommend dismissal on the basis of an invalid decision by him in the event of a denial of natural justice at the inquiry. It would be equally odd if the Governor in Council could validly dismiss on the basis of an invalid decision, recommendation or report by a Board under section 25.

In *R v Commissioner of Police; Ex parte Ramsay* [1993] 2 Qd R 171 the Queensland Full Court held that although the Commissioner purported to act under a provision similar to section 8 of the *Police Act*, namely, section 10(1) of the *Police Act 1937* (Qd), the Commissioner of Police was not the Crown and his action in discharging a police officer could not be equated with termination by the Crown as an act done at will or at the pleasure of the Crown: *Director General of Education v Suttling* (1987) 162 CLR 427 at 442 per Brennan J. It was held that the statutory power of dismissal conferred on the Commissioner was distinct from resort to the Crown prerogative so that *Reedman v Hoare* (1959) 102 CLR 177 had no application: McPherson ACJ at 173-174; Shepherdson J at 181. In my opinion, this reasoning is of equal application to section 8 of the *Police Act*, particularly when read with section 23.

In my opinion, the decision in *Menner* does not deal with the question in this case where the Commissioner has purported to suspend "as a consequence" of the invalid findings and recommendations of the Special Investigator and the invalid adoption and communication of those findings and recommendations to him by the ACC which were each invalid because they were beyond power. It follows that as against the applicants the Findings and recommendations were a nullity.

No fault can be attributed to the Commissioner for acting as he did. He was entitled to assume that the findings and recommendations of the Special Investigator and their adoption by the ACC were within power and made as a result of a proper investigation by or on behalf of the ACC. Had the relevant evidence been assembled and referred to him for further action the Commissioner may well have concluded that the further action which was appropriate was to institute an inquiry under section 23 of the *Police Act*. The discretion whether or not to suspend pending the outcome of the inquiry would then fall to be exercised in that context. In the event that the Commissioner was informed that the ACC had referred the matter to the Director of Public Prosecutions for further action by way of consideration whether the person concerned should be prosecuted, would also be a relevant factor to be considered.

I note that in England there has been a significant departure from the previous position that the prerogative powers of the Crown were beyond the scope of judicial review. Such powers were traditionally regarded as conferring a discretion which no court could question: H R Wade, *Administrative Law* (6th ed. 1988) at 391; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 418 per Lord Roskill. In that case, however, it was held that the Crown's power to dismiss civil servants was reviewable, so that it was subject to the principles of natural justice, notwithstanding that the power was ascribed to the Royal Prerogative. A naval officer's disqualification from promotion has been held potentially reviewable: *Bradley v Attorney-General* [1986] 1 NLLR 176. This approach may be relevant to commissioned police officers whose appointments are at pleasure, but there is a question whether non-commissioned officers hold office at pleasure even though their engagement is by the Crown. As Anderson J properly concluded in *Menner*, the power given to the Commissioner under section 8 of the *Police Act* is not part of the prerogative, but a statutory power. In my opinion, it follows that section 8 must be read in the context of the disciplinary provisions in section 23 of the Act and the requirements of natural justice which are clearly imported into disciplinary proceedings under that section.

In the particular circumstances of this case I consider that the decision to suspend the officers was invalid as being expressly based upon findings and a recommendation which were themselves invalid, as being beyond the powers of the Special Investigator and the ACC. For these reasons the order *nisi* in respect of the Commissioner should also be made absolute.

While the matter was not raised in the grounds or in the argument by senior counsel for the appellants, the evidence before the Court shows that on the same day as the sixth applicant was given notice to take leave by the Commissioner, as appears from the letter from the Assistant Commissioner (Professional Standards) to the sixth applicant dated 12 December 1997, the Commissioner also recommended his suspension to the Minister which, in turn, led to advice being tendered to His Excellency the Governor in Council to suspend the sixth applicant. This step was expressed to be pursuant to section 6 of the *Police Act* when read with section 52 of the *Interpretation Act*, apparently on the basis that the power of the Governor to appoint under section 6 carried with it an implied power to suspend or dismiss by virtue of section 52 of the *Interpretation Act*.

The question whether the recommendation of the Commissioner to the Minister was itself invalid, as expressed to be made as a consequence of the Findings which have been held to be invalid or beyond power, was not raised before the Court. Consequently, the question of the impact of the invalidity of the Findings on the Commissioner's recommendation to the Minister, the advice to His Excellency and the decision of the Governor in Council to suspend are not matters which fall to be decided in these proceedings. They may raise issues related to those in *FAI Insurances Ltd v Winneke* (1992) 151 CLR 342, in which it was held that, in certain circumstances, a decision of the Governor in Council was subject to judicial review. They also raise issues regarding the availability of prerogative relief, as distinct from declaratory relief. Relief by way of declaration would be available: *Tonkin v Brand* [1962] WAR 2; *Marks v Commonwealth* (1964) 111 CLR 549; *O'Day v Commonwealth* (1964) 111 CLR 399; *NSW Mining Co Ltd v Attorney-General* (1967) 67 SR (NSW) 341; and *FAI Insurances Ltd v Winneke*, above.

FRANKLYN, J

The reasons published by His Honour the Chief Justice and Ipp J sufficiently express my reasons for discharging the order *nisi* made in respect of the findings of the first respondent ("the Special Investigator"), for making absolute that made in respect of the third respondent ("the ACC") and for concluding that the adoption by the ACC of the findings of the Special Investigator and the disclosure thereof to the second respondent ("the Commissioner") were each beyond the power of the third respondent.

The relief sought by the order *nisi* against the Commissioner, as amended by leave, is that the notices of suspension issued by him to the first, second, third, fourth and fifth applicants ("the non-commissioned officers") and the notice to take paid leave issued to the sixth applicant ("the commissioned officer") on 12 December 1997 be quashed on the grounds that they were issued in breach of the rules of natural justice, are *ultra vires* and consequently void. It is not necessary that I here set out the text of the notices. They are sufficiently set out in the reasons for judgment of Malcolm CJ.

All such notices were sent to the applicants following notification to the Commissioner of the findings and recommendations of the Special Investigator and the proposed course of action by the ACC as set out in a letter to each applicant from the Chairman of the ACC dated 10 December 1997.

Later on 12 December 1997 the commissioned officer was served with a notice of suspension, relevantly in the terms following:

"As a consequence of the findings of the special investigator Geoffrey Miller QC, conveyed to you by notice dated December 10, 1997, the Commissioner of Police lost confidence in your integrity and credibility and therefore your ability to perform the functions of your office. Accordingly, the Commissioner of Police recommended to the Hon Minister for Police that you be suspended from duty in the Western Australia Police Service.

By Executive Council Minute dated 12 December, 1997 the Governor suspended you from your office. I attach a copy of that minute.

Consideration is presently being given to withdraw your pay and allowances as of December 27, 1997. Therefore you are hereby afforded SEVEN (7) days from the date of service of this letter to show cause in writing why the withdrawal of your pay and allowances should not take place.

... "

It is apparent from the Executive Council Minute that the commissioned officer, who had been appointed to hold his commission by the Governor under the authority of section 6 of the *Police Act 1892*, was suspended on 12 December 1998 by the Governor as authorised by section 52 of the *Interpretation Act 1984*. The order *nisi* does not seek relief in respect of that suspension.

The particulars of the alleged breaches of natural justice and of "*ultra vires*" relied on by each of the applicants is as follows:

" Particulars of Breaches of Natural Justice

- (a) the Applicants were not informed, or adequately informed, of the nature of the adverse material on which the findings of the Special Investigator were based;
- (b) the Applicants were not informed or adequately informed of the nature of the case against them;
- (c) The Applicants were not informed of the evidence against them;
- (d) The Special Investigator failed to permit the Applicants to challenge by cross-examination the evidence called against them on which the findings of the Special Investigator were allegedly based.
- (e) The Notices were issued in consequence of the findings of Mr Geoffrey Miller QC, which findings were, for foregoing reasons, in breach of the rules of natural justice.
- (f) The Applicants were not afforded an opportunity to be heard before the issuing of the Notices.

Particulars of Ultra Vires

- (a) Further, or in the alternative;
 - (i) in making the findings and/or in forwarding the Findings to the Second Respondent the First Respondent exceeded the powers conferred on him by the Anti-Corruption Act 1988;
 - (ii) the Notices were issued in reliance upon the Findings which were made in breach of the rules of natural justice and are therefore void and were conveyed to the Second Respondent in excess of jurisdiction."

The issue so far as the Commissioner is concerned is whether, - the findings of the Special Investigator, their adoption by the ACC and the forwarding of those findings to the Commissioner with a recommendation for removal from office in each case each being beyond their respective powers, - the said notices issued by the Commissioner breach the rules of natural justice and/or were beyond power.

As to the particulars of alleged breaches of natural justice, only (e) and (f) are referable to the actions of the Commissioner in issuing the said notices. As to (a), (b), (c) and (d), each matter there relied upon was properly open to the Special Investigator by reason of the provisions of the *Anti-Corruption Commission Act 1988* and the applied provisions of the *Royal Commissions Act 1968*. They only form the basis for a claim of breach of natural justice because, having so acted within power, the Special Investigator exceeded his authority by making the findings of guilt set out in the letters of 10 December 1997, which findings were then adopted by the ACC. The reasons why those findings and their adoption constituted breaches of natural justice require no further elaboration, having been sufficiently dealt with in the reasons for decision of their Honours the Chief Justice and Ipp J. Insofar as the particulars in support of the allegation of *ultra vires* are concerned, having regard to our conclusion in respect of the ACC, it is only particular (a)(ii) that is relevant to the order *nisi* made against the Commissioner.

It is apparent from the notices of suspension issued to the non-commissioned officers and the notice to take paid leave issued to the commissioned officer, that they were issued because of the Commissioner's loss of confidence in the integrity, credibility and ability to perform the function of each of their office "in consequence of the findings" of the Special Investigator as conveyed by the notice from the Chairman of the Anti-Corruption Commission on 10 December 1997. That notice of 10 December 1997 was in the following terms (the names of the recipients and particulars of the Special Investigator's conclusions omitted):

"This Commission has now received from its Special Investigator a report into various matters relating to corrupt conduct, criminal conduct, criminal involvement and serious improper conduct by certain members of the Western Australian Police Service.

As you are aware, your conduct was the subject of consideration by the Special Investigator. The Special Investigator has concluded in respect of you that:

...

The Special Investigator reports that because of the conclusions he has reached, you are unfit to hold office as a member of the Western Australian Police Service, and has recommended that, pursuant to the provisions of Section 8 of the *Police Act 1892*, you should be summarily removed from office.

The Commission intends to publish this recommendation, including making a public statement detailing the above matters and stating that it believes you have been guilty of serious improper conduct.

Pursuant to Section 52(6) of the *Anti-Corruption Commission Act 1988* we write to give you the opportunity to appear before the Commission and make submissions, either orally or in writing, in relation to these matters.

If you wish to make a written submission, please have it delivered to this Commission by 5pm on 18 December 1997. If you wish to make an oral submission, please telephone Miss Margaret Potts at the Commission (Telephone (9221 3622) by 18 December. The Commission will sit on 19 December 1997 for the purpose of hearing oral submissions."

It was conceded by counsel for the Commissioner that this Court should proceed on the basis that, in issuing the respective notices to the various applicants, the inference was open that the Commissioner had had made known to him the contents of the letter of 10 December 1997. That is the inference which I draw, as do their Honours the Chief Justice and Ipp J.

The suspension of each of the non-commissioned officers was "until further notice". The Executive Council minute whereby the Governor suspended the commissioned officer from his office does not identify the period of suspension.

Although the expressed reasons of the Commissioner for the suspensions and notice to take paid leave reveal them to be based on the *ultra vires* findings of the Special Investigator, it does not follow, in my opinion, that the suspensions themselves were beyond power or were imposed in the wrongful exercise of the discretionary power to suspend pursuant to section 8 of the Act. By section 5 of the *Police Act 1892* the Commissioner is appointed by the Governor and is "charged and vested with the general control and management of the Police Force". Commissioned officers are appointed to their office by the Governor pursuant to section 6 of the *Police Act* and are "subject to the control and discipline of the Commissioner of Police". By section 7 of the *Police Act* the Commissioner may appoint as many non-commissioned officers and constables of different grades as he deems necessary for preservation of peace and order. As section 10 of the *Police Act* makes clear, each member of the Police Force, as a condition of appointment, has "engaged and promised" *inter alia* that he "will see and cause Her Majesty's peace to be kept and preserved and that [he] will prevent, to the best of [his] power, all offences against the same; and that while [he] shall continue to hold the said office, [he] will to, the best of [his] skill and knowledge, discharge all the duties thereof faithfully according to law". The necessary inference from those provisions is that the *Police Act* contemplates and requires the observance of the law by each member of the Force and the discharge of his duties according to law. That in itself requires the Commissioner, in whom the general control and management of the Police Force is vested, to be concerned that its members do so behave and are seen to so behave and, if necessary, to act, in accordance with the powers conferred on him, to instil and/or maintain public confidence that that is the case.

The suspension of the non-commissioned officers was effected by the Commissioner pursuant to the powers conferred by section 8 and it is conceded that it is a power to be exercised in his discretion. It is the extent of that discretion which is the matter of concern. It is clear from section 52 of the *Interpretation Act* that the Governor has the power to remove or suspend a person appointed as a commissioned

officer. As already mentioned, there is no challenge to the suspension of the commissioned officer. The sole challenge in relation to him is in respect of the notice to take paid leave. No direct argument was addressed to that notice, it being treated as if it were equivalent to a suspension under section 8.

The discretion to exercise the powers under section 8, in my opinion, clearly extends beyond offences against the discipline of the Force which may be the subject of disciplinary action under section 23 of the *Police Act*. That this is so is seen in the fact that s8 is not within Part II of the Act, which comprises sections 9 to 33 inclusive and is entitled "Part II - As to the Regulations, Duties and Discipline of the Police Force". Section 9 authorises the Commissioner of Police, with the approval of the Minister, to frame rules, orders and regulations for the general government of the members of the Police Force and cadets in respect of certain matters and "all such other rules, orders and regulations relative to the Police Force and cadets, and the control, management, and discipline thereof as may be necessary for rendering the same efficient for the discharge of the several duties thereof, and for the purpose of preventing neglect or abuse." Regulations 601-626 made under the *Police Act* are entitled "General Rules Relating To Discipline" and, in general, are directed to the conduct and performance of police officers by way of prohibiting specified conduct (some of which would constitute criminal offences) and requiring that certain things be done or observed.

Regulation 1601 provides "a member or cadet who fails to comply with or who contravenes any of the provisions of these regulations commits an offence against the discipline of the Force". Section 23 of the Act is concerned with disciplinary measures in respect of charges of an offence against the discipline of the Police Force.

Regulation 626 provides:

- "(1) Where any proceeding, whether civil or criminal (not being a charge for an offence against the discipline of the Force) is brought against a member or cadet, the member or cadet shall, as soon as possible after the commencement of the proceedings, report the fact to the officer-in-charge of the region or the branch in which he is stationed.
- (2) An officer-in-charge of a region or branch who receives a report pursuant to sub-regulation (1) shall immediately report the matter to the Commissioner."

The inference from that regulation, in my opinion, is that such matters are to be reported to the Commissioner so that he may take such action in relation to them, as is within the powers conferred on him by the *Police Act*, as he considers appropriate in the circumstances. That may result in him acting under section 8.

An offence against the discipline of the Force is a creature of the regulations created under the authority of the Act. To proceed under section 23 to deal with such an offence, the allegation that it has been committed is required to be firstly investigated by an officer designated for that purpose who, on completing his investigation, reports the result and, as a result of that, a charge of an offence against the discipline of the Force may or may not follow. It is apparent that such a proceeding takes time. Regulation 625 sets out the procedure to be followed when proceedings are taken in respect of such an offence pursuant to section 23 of the Act. It involves a written charge, service of the same, the subsequent taking of a plea, the taking of "reasonable steps" to secure the attendance at the hearing of all persons whose names and addresses have been supplied by the accused member as witnesses on his behalf, and then, of course, the examination on oath on the hearing of the charge of the various witnesses and of the accused officer. If the charge is proven, the offender may be cautioned, reprimanded, fined, reduced in rank, suffer a reduction in salary, be suspended or discharged or dismissed from the Force. An order for reduction in rank or salary, suspension, discharge or dismissal in the case of a non-commissioned officer, if not made by the Commissioner, must be approved by him. In the case of a commissioned officer it must be confirmed by the Governor.

The provisions of section 23 are set out in the reasons for decision of His Honour the Chief Justice. It can be seen from those provisions, in my view, that if some urgent step to remove an officer from the performance of his duties is required to be taken, either by suspension, discharge or dismissal, then proceedings under section 23 are inadequate to that end. It is clear, in my opinion, having regard to the provisions of section 23 of the Act and the regulations to which I have referred, that the Commissioner

has power, whether or not in respect of offences against the discipline of the Police Force, to suspend in an appropriate case pursuant to the powers conferred by section 8.

Section 8 empowers the Commissioner to suspend any non-commissioned officer or constable from "time to time as he shall think fit". It is a power clearly independent of the power to deal with offences against the discipline of the Force under section 23. Its exercise does not require the laying of any charge. The power conferred on him by section 8 is not, however, in my opinion, a statutory embodiment of a royal prerogative as discussed by Anderson J in *Menner v The Commissioner of Police* (1997) 74 IR 472. It is not expressed so to be by the section and indeed the need to obtain the approval of the Minister before removal of an officer, in my view, makes that clear. Nevertheless, it is a power the exercise of which is conditioned by the words creating it, ie "as he shall think fit". The *Police Act*, by Part IIA, provides for an appeal from a conviction of an offence against the discipline of the Police Force. It is significant that there is no provision in the *Police Act* for an appeal against a suspension or removal by the Commissioner pursuant to section 8. In my opinion, the words "as he shall think fit" require qualification in the sense that, for the Commissioner to so "think fit", the decision to suspend must be rationally founded on an exercise of his power with regard to the responsibilities of his appointment. Implicit in those responsibilities, in my view, having regard to the purposes of the Act as evidenced by its overall content and specifically the sections to which I have earlier referred, there is the responsibility to act to maintain public confidence in the Force and its members and to take prompt action to that end if seen by him as necessary or desirable. Essential to public confidence is that members of the Police Force truly act in accordance with the engagements which they have undertaken pursuant to section 10. It follows that, essential to public confidence, is the perceived integrity of the members of the Force and, in the event of that integrity being ostensibly responsibly challenged, the perception that the Commissioner, in whom the control of the Force is vested, has acted or will act appropriately to protect that integrity and so public confidence in it. Any decision taken to that end, in my view, can be said to be founded in the vesting in the Commissioner of the general control and management of the Force and the disciplinary powers conferred on him by the Act. Subject to his decision being rationally so founded, his discretion to suspend, in my opinion, is unfettered. As I have already mentioned, unlike penalties imposed under section 23, which may be by way of suspension or removal, a suspension or removal under s8 is not subject to appeal. In *O'Rourke v Miller* (1984) 156 CLR 342, Gibbs CJ, with whose reasons Mason J agreed, said at 349 in respect of a power conferred on the Chief Commissioner of Police by section 9(1) of the *Police Regulations Act 1958 (Victoria)* to "dismiss or discharge a cadet at any time" that "it was an unfettered power to dismiss a police cadet". Wilson J, at 358, expressed, indirectly, a similar view when he said "in arguing that he may dismiss or discharge a constable on probation at any time, the Chief Commissioner is asserting the same power as is given to him expressly, in relation to police cadets, by section 9(1)". Deane J, at 361, expressed himself in general agreement with the analysis of the effect of the relevant provisions of the Act "contained in the reasons of Wilson J". Dawson J agreed with the reasons of Gibbs CJ. It may well be that those observations as to the construction of section 9(1) of that Act were obiter. They are, nevertheless, persuasive. They become even more persuasive, in my view, with recognition that the power in that section was not expressed to be exercised, as it is in section 8 of the *Police Act*, as "the Commissioner of Police ... from time to time ... shall think fit".

In discussion with the court, senior counsel for the applicants conceded that it would be open to the Commissioner to suspend an officer under section 8 "upon the receipt of serious allegations supported by facts which at least raised serious concern". It was his contention, however, that that was not what the Commissioner did in acting "in consequence of" the Special Investigator's findings. I find that distinction difficult to understand, having regard to what, objectively, could be the reasons for a suspension under s8. In my opinion, the reason can only be that the Commissioner has serious concerns either as to the fitness of an officer to continue to exercise the duties of a police officer, or as to the public perception as to such fitness. In the present case, the Commissioner was made aware of the contents of the letter of 10 December 1997 from the Chairman of the ACC to each of the applicants. His response was to issue the notices now challenged. It is not disputed that he did so because of his loss of confidence in the officers as a consequence of those findings. Urgent action on his part, in my view, was clearly necessary as that letter announced the intention of the ACC to make a public statement detailing the findings and the Commission's belief that each officer was guilty of serious improper conduct. It also informed the Commissioner that the statement would include the Special Investigator's recommendation that the officers be summarily dismissed under section 8 of the *Police Act*. The findings of the Special Investigator, even if regarded as no more than allegations, are undeniably of conduct of such a nature

that, if proven, would justifiably warrant dismissal from the Force. Publication of such matters by the ACC, with no action by way of suspension taken on his part, was more likely than not to seriously erode public confidence not only in the Police Force as a whole but also in its control and management. In respect of four of the applicants the findings related to an investigation in which they were each involved as part of a team and in respect of which the findings included that of "criminal conduct and/or criminal involvement."

In my opinion, it was not for the Commissioner to concern himself with whether or not the findings of the Special Investigator so conveyed to him were within the power of the Investigator or the ACC. He was not to know the extent of the Special Investigator's investigations, or the nature of the evidence obtained. The letter reported purported findings of most serious matters of concern not only to the Commissioner but also to the Police Force as a whole and to the public. They were conveyed to the Commissioner as having been reached following an investigation by a senior counsel acting as Special Investigator appointed by the ACC, one of the functions of which was to investigate allegations of corrupt conduct, criminal conduct, criminal involvement and serious improper conduct about police officers. In my opinion, the receipt of that advice was sufficient to cause the Commissioner to lose confidence in those officers as expressed in the notices issued by him. It does not follow, however, that that loss of confidence would necessarily be permanent. Indeed the evidence is to the contrary. It is significant that, in issuing the notices, the Commissioner did not accept the recommendation for summary dismissal of the officers. Instead, he suspended the non-commissioned officers and put the commissioned officer on paid leave. The suspensions were until further notice. The non-commissioned officers were given time to make submissions as to why they should not lose their pay and allowances during the period of suspension. The fact that he so acted leads to the inference, in my view, that he had not determined that the officers should be dismissed. That carries the implication that he proposed to investigate the matters further and was suspending the officers to protect the integrity and good name of the Force pending the result of further inquiries. That such is so is supported by the fact that, having put the commissioned officer on paid leave, he recommended to the Minister only suspension rather than removal, which suspension was effected forthwith by the Governor. In my opinion, the Commissioner was entitled to view the notification to him from the ACC in the same light as he would view an allegation from any other responsible authority which he had good reason to believe was supported by sufficient evidence to warrant relevant concern. In my view, on receipt of the content of the letter of 10 December 1997, the Commissioner had virtually no option, having regard to the advice there contained, and having the management and control of the Force vested in him, but to act as he did.

In all of those circumstances, it cannot be said that the Commissioner's discretion under section 8 miscarried or that the suspensions are beyond power. In my view, in acting as he did, he demonstrated a proper and appropriate concern for the purposes and intent of the *Police Act* and for the public perception of its integrity, both as to the conduct of its members and its management and control. For those reasons I am of the view that the exercise of the discretion was not "definitely extraneous to any objects the legislature could have had in view". It was not exercised "in the absence of some positive indication of the considerations on which" its exercise was justified. (*The Queen v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45). In that I disagree with the reasons for decision of their Honours the Chief Justice and Ipp J.

For the above reasons I would discharge the order *nisi* against the second respondent.

IPP, J

I have had the advantage of reading in draft form the reasons to be published by Malcolm CJ. I agree with those reasons and the orders proposed by his Honour. I shall, however, express my own reasons for coming to the same conclusions as the learned Chief Justice.

On 9 December 1997 the third respondent ("the ACC") wrote a letter to the fourth applicant and on 10 December 1997 wrote letters to the other five applicants in which it referred to a report which it had received from its special investigator, the first respondent (to whom I shall refer as "the Special Investigator"). I shall refer to these letters as "the December letters". Each of the December letters advised the particular applicant to whom it was addressed that his conduct had been the subject of consideration by the Special Investigator. Each such letter set out various findings ("the Findings") the

Special Investigator had made in respect of the applicant concerned. By the December letters, the ACC adopted the Findings as its own.

In regard to all the applicants, save for the fifth applicant, the Findings included a finding that each was guilty of "criminal conduct and/or criminal involvement". The December letters set out the respects which constituted that criminal conduct and criminal involvement. All the applicants were informed thereby that the Findings included a finding that each was guilty of serious improper conduct and some were informed that the findings in respect of them included a finding that they were guilty of improper conduct. The respects which constituted that serious improper conduct and improper conduct were set out.

The ACC proceeded by the December letters to inform each applicant that:

"The Special Investigator reports that because of the conclusions he has reached, you are unfit to hold office as a member of the Western Australian Police Service, and has recommended that pursuant to the provisions of section 8 of the Police Act 1892, you should be summarily removed from office.

The Commission intends to publish this recommendation, including making a public statement detailing the above matters and stating that it believes you have been guilty of serious improper conduct.

Pursuant to section 52(6) of the Anti-Corruption Commission Act 1988 we write to give you the opportunity to appear before the commission and make submissions, either orally or in writing, in relation to these matters."

The term "Findings", as used in these reasons, also includes the opinions expressed by the Special Investigator and adopted by the ACC as to the unfitness of the applicants for office and the recommendation that each be removed summarily from office.

On 12 December 1997 each applicant, save for the sixth applicant, was given a notice of suspension signed by the second respondent ("the Commissioner") in which each applicant was informed that he was suspended from duty in the Western Australian Police Service until further notice. Each notice of suspension stated that the reason of the Commissioner for imposing the suspension was that:

"As a consequence of the findings of the Anti-Corruption Commission special investigator Mr Geoffrey Miller QC, conveyed to you by notice dated December ... , I have lost confidence in your integrity and credibility and therefore your ability to perform the functions of your office."

On 12 December 1997 the Commissioner gave notice to the sixth applicant that as from that date he would be required to take paid leave until he was further advised. The Commissioner's reasons for directing the sixth applicant to so take leave were also that, as a consequence of the Findings, he (the Commissioner) had "lost confidence in your integrity and credibility and therefore your ability to perform the functions of your office".

The inference to be drawn from the evidence before the court is that the Commissioner gave the notices of 12 December 1997 suspending the first five applicants and requiring the sixth applicant to take paid leave solely because he was persuaded to do so by the Findings, on which he relied.

At the conclusion of argument, the learned Chief Justice stated:

"The court is unanimously of the opinion that the adoption by the third respondent and the disclosure of such findings to the second respondent by the third respondent were, and each of them was, beyond the power of the third respondent. It follows that the order nisi against the third respondent should be made absolute. It was conceded before us that no relief was now being sought against the first respondent. The order nisi as against the first respondent should therefore be discharged. So far as the order nisi against the second respondent is concerned the court will reserve its decision."

I set out below my reasons for joining in the decision that the adoption by the ACC of the Findings and its disclosure of them to the Commissioner were beyond the power of the ACC.

The long title of the *Anti-Corruption Commission Act 1988* ("the ACC Act") is illuminating. According to the long title, the ACC Act is:

"An Act to provide for an Anti-Corruption Commission to receive or initiate allegations of corruption, or of criminal or improper conduct of certain kinds, against police officers and other public officers and certain other people, to provide for the way in which such allegations are to be inquired into, investigated or otherwise dealt with, and for related purposes."

The functions of the ACC are defined by section 12 of the ACC Act and are consistent with the long title. They comprise the following:

- (a) Receiving or initiating allegations of corrupt conduct, criminal conduct, criminal involvement or serious improper conduct about police officers and other public officers (section 12(1)(a));
- (b) Considering whether further action is needed in relation to an allegation and, if so, by whom that further action should be carried out (section 12(1)(b));
- (c) Carrying out further action in relation to allegations itself, if it is appropriate for it to do so, or referring allegations to other authorities so that they can carry out further action (section 12(1)(c));
- (d) Furnishing reports and making recommendations on the outcome of further action taken in relation to allegations (section 12(1)(d));
- (e) Furnishing general reports and making general recommendations about matters relating to its functions (section 12(1)(e));
- (f) Consulting, co-operating and exchanging information with independent agencies, appropriate authorities including the Commissioner of the Australian Federal Police, the Chairman of the National Crime Authority and certain other authorities and bodies (section 12(1)(f));
- (g) Assembling evidence obtained in the course of its functions; and
 - (i) furnishing to an independent agency or an appropriate authority, evidence which may be admissible on the prosecution of a person for a criminal offence against a written law or which may otherwise be relevant to the functions of the agency or authority; and
 - (ii) furnishing evidence to the Attorney-General or other suitable authorities, evidence which may be admissible in the prosecution of a person for a criminal offence (section 12(1)(g));
- (h) Disseminating information to the public about matters relating to the functions of the ACC (section 12(1)(h)); and
- (i) The doing of anything else that the ACC is required or authorised to do under the ACC Act or any other written law (section 12(1)(i)).

The "further action" contemplated by ss12(b), (c) and (d) is (by s3(1)) that referred to in s 17(1), which provides that the ACC:

"... shall examine each allegation and decide whether or not, in its opinion, investigatory or other action, or both, (in this Act called 'further action') for the purposes of this Act in relation to the allegation is warranted on reasonable grounds."

It is to be noted that section 17(1) expresses the "further action" to be action "in relation to the allegation", and not action directed against a person in respect of whom allegations are made. In its context, the "further action" which the ACC may take is action that is part of or related to its functions in investigating allegations of the kind set out in section 12(1)(a), assembling evidence in that connection, and in ensuring

that appropriate action concerning particular allegations is taken by any investigatory or prosecuting or like authority - once such allegations have been referred by the ACC to such an authority.

In order to carry out its function of investigating corrupt conduct, criminal conduct, criminal involvement and serious improper conduct, Parliament has provided the ACC with a multitude of investigatory powers, some of which are coercive. Corruption by public officials is often difficult to detect and Parliament has attempted to provide appropriate means by which conduct of this kind can be investigated vigorously and efficiently by an independent and appropriately qualified body.

The investigatory powers of the ACC are set out in detail in the exhaustive analysis made by Malcolm CJ in his reasons. I shall, merely for illustrative purposes, refer to some of them.

In terms of section 37(1) of the *ACC Act*, the ACC may request any person to supply it with specified information and a person who fails, without reasonable excuse, to comply with such a request commits an offence, the penalty for which is \$8,000 or imprisonment for two years. In terms of section 37(4) the section has effect, despite any duty of secrecy or other restriction on disclosure imposed under a written law. In terms of section 38, the ACC may request any person to produce to it any document or other thing and a person who fails, without reasonable excuse, to comply with such a request commits an offence and is similarly liable to a penalty of \$8,000 or imprisonment for two years. Again, this section has effect despite any duty of secrecy or other restriction on disclosure imposed under a written law. In terms of s55(1)(b), a person who wilfully makes a false statement to or misleads or attempts to mislead the ACC is liable to a penalty of \$8,000 or imprisonment for two years. Section 55(2) prohibits the wilful destruction of documents or other things required in connection with an inquiry or an investigation carried out under the auspices of the ACC.

To ensure that persons of appropriate professional experience and skill are employed in an investigation, the ACC is empowered, by section 8, to appoint a barrister or solicitor of not less than five years' standing and practice to be a special investigator. In terms of section 40 of the *ACC Act*, a special investigator appointed under section 8 has the powers of a Royal Commission and the chairman of a Royal Commission under "the applied provisions". By section 40(2), the applied provisions have effect as if they were enacted in the *ACC Act* with such modifications as are set out in the *ACC Act* or are otherwise required, and in terms made applicable to investigations and reporting by a special investigator.

Accordingly, a special investigator acting as a Royal Commission has the power to summon and require persons to attend, the power to examine witnesses on oath or affirmation, and is given particular coercive powers in that connection. These are set out in detail in the reasons to be published by the learned Chief Justice. It is sufficient to note that, by section 42(1) of the *ACC Act*, any evidence taken under the applied provisions in the course of an investigation shall be taken in private. Further, a person who is not expressly authorised by the special investigator to be present at an inquiry "shall not be present", and this enables a special investigator to exclude others from being present when a witness is being examined, save for a person who is representing the witness (section 19A of the *Royal Commissions Act* read with sections 41 and 43 of the *ACC Act*). Nothing in the *ACC Act* or the *Royal Commissions Act* gives a special investigator greater powers than those accorded to the ACC itself.

The ACC contended that the Findings were merely expressions of opinion and not findings of guilt in the legal sense. However, the fact that the Findings were expressions of opinion is not material. The verdict of a jury, or the judgment of a properly constituted judicial officer, is, in effect, merely the expression of the opinion of the jury or the judicial officer. The unstated implication of the proposition that the Findings were not findings of guilt in the legal sense is that, because the Findings have no force in law - unlike findings of guilt by a jury or other properly constituted court - they have no material effect. But the Findings, if published, are capable of causing far-reaching prejudice to those affected thereby; the prejudice would result from the weight that others may attach thereto. As can be seen, in the present case, the Commissioner acted immediately upon the Findings to suspend five of the applicants and to direct the sixth applicant to take paid leave. The harm brought about by the suspension is obvious. There is also the potential of harm to the reputation of the applicants. For these reasons, prerogative relief is available against the ACC: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *Annetts v McCann* (1990) 170 CLR 596.

The procedure in fact adopted by the Special Investigator and the ACC in arriving at and adopting the Findings gives body and context to the legal arguments advanced on behalf of the applicants.

The Special Investigator directed that the proceedings of the investigation were to remain confidential. The applicants were "summonsed" to appear before him. They were not told when being summonsed what the allegations were against them. When they arrived in the hearing room, they were shown a "piece of paper" which contained the allegations. These came as a "complete surprise" to the applicants. After each applicant had been shown the paper containing the allegations, counsel assisting the Special Investigator retrieved it. The hearing commenced and general questions were asked of each applicant. No further reference to the allegations was made at that hearing and the questions did not appear to be directed to those allegations.

Some time later, each applicant was directed to attend on the Special Investigator again. Each was asked questions relating to specific events which bore on the allegations that had previously been made. The applicants were not again shown the list of the allegations and no particulars of the allegations were provided. The applicants were not afforded a copy of the transcript of their evidence and they were unable to recall the questions they were asked or their answers.

Thereafter, the ACC informed each applicant of the potential adverse findings which the Special Investigator had identified as being capable of being made against them. The applicants responded in writing to those potential findings and stated:

"All officers face the difficulty that they do not know on what evidence the potentially adverse findings against them by the ACC may be based; nor have they had the opportunity of testing any such evidence by cross-examination; nor have they been given the opportunity to counter any such evidence by adducing further evidence on rebuttal.

To describe this as a 'difficulty' is, patently, an understatement. It is respectfully submitted on their behalf that to make any adverse findings against them, on the basis of evidence which they have had no opportunity to test or to counter would be manifestly unfair."

According to letters written by the ACC in reply, the responses to the notices of potential adverse findings were "comprehensive" and it was said that it was clear from the responses that the applicants had:

"... been made aware of the matters put to each officer during their testimony at the special investigation. Each officer was made aware of the allegations against him, the detail of the evidence adduced about his conduct, and the conclusions that might be open on the evidence. A full and fair opportunity was given to each officer to respond. The contention that the officers do not know on what evidence the potential adverse findings may be made against them is incorrect. Further, no restrictions were imposed upon any of the officers identifying or adducing any additional factual material in relation to the matters that were put to them. It is therefore incorrect to contend that any of the officers has been prevented from having the opportunity to counter evidence by adducing further evidence in rebuttal. By reason of the requirement of confidentiality of the proceedings before the special investigation, it was neither desirable nor possible that your clients be given the opportunity to cross-examine other witnesses who had appeared before the special investigation."

Each applicant was then given the opportunity to make oral submissions at a later time. This opportunity was declined. The next communication from the ACC was the December letters.

Irrespective of whether each applicant was given adequate details of the evidence against him, the procedure adopted would not ordinarily be regarded as being appropriate for the purposes of making the Findings. The unusual manner in which the allegations were presented to each applicant would inevitably have made it difficult for each to appreciate properly what he was being charged with, and what the details of each particular charge were. None of the applicants was present, either personally or by legal representation, when the witnesses who gave adverse evidence against them testified. Thus, those witnesses were not cross-examined on the applicants' behalf. Accordingly, the evidence against the applicants was not tested by them in the customary way that occurs in a criminal trial. Moreover, in the particular circumstances, there would inevitably have been problems for them in leading evidence in

rebuttal. Often matters of credibility turn on matters of factual detail initially thought to be insignificant. Without a transcript of all the evidence given by the witnesses, it would have been difficult for the applicants to traverse and contradict the opposing testimony. There are other concerns. As, in this exercise, the ACC was both investigator and judge, there is a potential for a perception by the community that it might lack the qualities of objectivity and detachment that are ordinarily required by those who perform adjudicatory functions. The Special Investigator and, by adoption, the ACC, purported to find the applicants guilty of conduct, which included criminal conduct, after an investigation conducted in secrecy. This meant that there was no question of justice being seen to be done, which is a requisite of a fair criminal trial under our system.

No criticism could be made of the Special Investigator or the ACC for employing these procedures when investigating the allegations. It could not be said that there was any denial of natural justice in the way in which the investigations were carried out. But, in my view, when it came to making the Findings, the precepts of procedural fairness were not followed. This is relevant to the question of the powers of the ACC, as senior counsel for the ACC submitted, in effect, that the procedures utilised were authorised by the *ACC Act* for the purposes of acting as a quasi-judicial body and making the Findings. Once the facts demonstrate that findings of guilt by the ACC, based on evidence obtained by it through legitimate use of its investigatory powers, would be likely to result in failures of procedural fairness, the *ACC Act* would have to express very clearly the intention on the part of Parliament to empower such a consequence before the statute would be construed in accordance with the argument advanced on behalf of the ACC. Senior counsel for the ACC conceded, correctly, that there was nothing in the *ACC Act* that expressly empowered the ACC to make the Findings. Thus, any powers the ACC might have would have to be sought by implication from the *ACC Act*. This immediately calls attention to the common law approach to powers of this kind; the rule being that "where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred": *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635 to 636.

The common law has long had a deep aversion to tribunals making findings of guilt where elements of secrecy and arbitrariness are coupled with the lack of a proper opportunity on the part of an accused person to defend himself or herself. Such procedures, while not inappropriate for investigatory purposes, are contrary to the "basic protections" (*Balog* at 635) that have long been insisted upon by the common law when tribunals perform the function of determining whether persons are guilty of criminal or corrupt or other improper conduct, or otherwise make rulings affecting legal rights.

Senior counsel for the ACC sought to rely on those provisions of the *ACC Act* which empower it to report and to make recommendations and to publish certain information. He submitted that, by inference, such provisions impliedly authorised the ACC to make the Findings.

Insofar as it is a function of the ACC to furnish reports and make recommendations, such reports and recommendations are restricted to "the outcome of further action taken in relation to allegations" (section 12(1)(d)) and "matters relating to its functions" (section 12(1)(e)). Further the function to disseminate information to the public is restricted to information "about matters relating to its functions". Accordingly, the functions of reporting and making recommendations are ancillary to the investigatory function and do not empower the ACC to make findings of guilt or express opinions as to fitness for office or as to whether persons should summarily be dismissed.

Senior counsel for the ACC submitted further that section 52(3) of the *ACC Act* provided the requisite power to enable the ACC to publish its recommendation set out in the December letters "including making a public statement detailing the above matters and stating that it believes you have been guilty of serious improper conduct". He argued, in effect, that once the ACC was entitled to so publish these matters, it was implicitly entitled to make the Findings.

Section 52(3) provides:

"Subsection (1) does not prevent the [ACC] from divulging information, or making a statement, about the performance of the functions of the [ACC] to any person or to the public or a section of the public if the [ACC] considers that it is in the interests of any person, or in the public interest, to divulge that information or make that statement, in that manner."

This section must be seen in context. Section 52(1) prohibits various persons, including members of the ACC, from divulging or communicating any information received in their capacity as members of the ACC, but is subject to a number of exceptions, section 52(3) being one of them. Another exception is section 52(2) which provides that subs(1) does not prevent the divulging or communicating of information for a number of specified purposes relating, generally, to the performance of the ACC's statutory functions.

Section 52(3), itself, only authorises publication about the performance of the ACC's functions, and as section 12 does not empower the ACC to make findings of guilt (or express opinions of the kind set out in the December letters), section 52(3) takes the matter no further.

In any event, section 52(4) is an insuperable obstacle to the ACC's argument based on section 52(3). It provides:

"The [ACC] shall not divulge information or make a statement under subsection (3) with respect to a particular allegation where the disclosure of that information, or the making of that statement, is likely to interfere with the carrying out of investigatory or other action in relation to that or any other allegation or the making of a report under this Act."

As Malcolm CJ finds, according to the ordinary meaning of the language used in the December letters, the ACC intended to publish "all of the matters found against the relevant applicant[s]". It is patently obvious that such a publication would be "likely to interfere with the carrying out of investigatory or other action" in relation to the matters in respect of which it intended to make a public statement. As the learned Chief Justice observed in the course of argument, the ACC could not publish "a belief, conclusion or finding, however it is described, that a named person was unfit to hold office as an officer of the Western Australian Police Service" in the light of section 52(4), because, as his Honour pointed out, "if what was anticipated was administrative or disciplinary action by some other authority, that could be prejudiced by the publication". Furthermore, any prosecution for an offence would be prejudiced by such a public statement. Senior counsel for the ACC, quite correctly, agreed with these views. The same consequence would flow from the publication of the ACC's opinion as to the guilt of each applicant and its opinion that each applicant should be summarily removed from office. It is unnecessary to say anything further on this issue.

Senior counsel for the ACC also sought to place reliance on sections 22(1) and (2) of the *ACC Act*. These sections provide:

- "(1) If the [ACC] decides ... that an allegation should be referred to an independent agency or appropriate authority for further action it shall, as soon as is practicable after making that decision, refer the allegation by forwarding a report on the allegation to the independent agency or appropriate authority.
- (2) If an allegation is referred to an appropriate authority under subs(1), the [ACC] may, in the report or by subsequent written notice -
- (a) recommend that the appropriate authority initiate and carry out an investigation into the allegation;
 - (b) make a recommendation to the appropriate authority as to the period within which an investigation should be carried out; and
 - (c) make such other recommendations as to the appropriate authority as it thinks fit in relation to further action that should be carried out in relation to the allegation and the period within which it should be carried out."

Section 22(1) confines the ACC's power to report to an independent agency or appropriate authority, when referring an allegation for further action, to a report "on the allegation". Moreover, nothing in section 22(2) which stipulates what the ACC may recommend in such report, or by subsequent written notice, empowers the ACC to report other than in regard to the initiation and carrying out of an investigation into the allegation, the period within which the investigation should be carried out, and the further action that should be carried out "in relation to the allegation". Thus, these sections do not expand the powers of the ACC to report and recommend beyond its functions set out in section 12, or its duties as set out in section 17(1). Parliament has required the ACC to report and make recommendations into allegations. Parliament has not empowered the ACC to make reports and recommendations as to whether any person is guilty of

the allegations against him or her and as to the particular actions which should be taken against that person by way of punishment, or termination or suspension of employment (the latter matters being for decision by some other institution or authority).

Senior counsel for the ACC drew attention to the heading to section 31 which is "Public disclosure of findings". He submitted that this was some indication that Parliament intended that the ACC should make findings of the kind recorded in the December letters. Section 31 provides:

"If, following the making by the [ACC] of a report under this Division, either House of Parliament or a standing committee approves the public disclosure of facts disclosed in the report, a person may, despite section 54, publicly disclose those facts, whether by publication in any newspaper or other written publication or by radio or television or otherwise."

Section 31 falls within Division 6 of the *ACC Act*. This Division is concerned with reports by the ACC to Parliament or the Minister on specific matters. Section 27 empowers the ACC to report in writing to each House of Parliament on the facts disclosed as a result of further action taken by it. In terms of section 28(2) the ACC may also report to each House of Parliament that the ACC "considers that further action is not being, or had not been, properly, efficiently, or expeditiously carried out". In terms of section 29, reports of the kind mentioned in sections 27 or 28 may be made to the Minister. Section 30(2) provides:

"A report under this Division [i.e. Division 6] is not to include a recommendation or opinion that a specified person should be prosecuted for a specified or unspecified criminal offence against a written law."

As senior counsel for the ACC correctly conceded, the effect of section 30(2) is that by implication a report under Division 6 "cannot lawfully contain a finding of guilt of criminal or corrupt conduct". In context, therefore, there is nothing in the heading to section 31 that supports the contentions advanced on behalf of the ACC.

Accordingly, no implication of the kind contended for can be derived from the *ACC Act*. That is to say, the *ACC Act* does not impliedly empower the ACC to make findings of guilt or express opinions of the kind set out in the December letters.

In *Balog v Independent Commission Against Corruption* the High Court was concerned with the *Independent Commission Against Corruption Act 1988 (NSW)*. The question was whether the New South Wales Independent Commission Against Corruption ("ICAC") was entitled "to make any finding or state any conclusion that the plaintiff ... was guilty of a criminal offence, or of any conduct which may constitute a criminal offence ... ". The High Court stated at 635:

"At least in theory there may be a fine line between making a finding and merely reporting the results of an investigation. But in practice the line should not be difficult to draw. It is clear enough that there is a distinction between the revelation of material which may support a finding of corrupt conduct or the commission of an offence and the actual expression of a finding that the material may or does establish those matters. And in this case it is possible to observe that the only finding which [ICAC] may include in its report in relation to the appellants is a finding whether there is any evidence or sufficient evidence warranting consideration of the prosecution of them or either of them for a specified offence or specified offences. It may not include a finding that any corrupt conduct on their part occurred or may have occurred."

As Malcolm CJ points out "in some respects, the powers of the ACC are more expressly circumscribed than the powers of the ICAC." I agree, with respect, with the learned Chief Justice that the reasoning and conclusions in *Balog* apply to the *ACC Act*. Accordingly, the above-quoted remarks of the High Court elucidate the powers of the ACC with regard to the kind of findings it is entitled to make. In my view, the ACC was not entitled to make the findings and express the opinions set out in the December letters.

I turn now to the question whether the decisions of the Commissioner to suspend the five applicants from duty and to give notice to the sixth applicant to take unpaid leave were beyond power.

The only evidence as to the Commissioner's reasons for imposing the suspension in each case and for giving notice to the sixth applicant to take unpaid leave is that, as stated expressly by him, "as a consequence of the findings of the ... Special Investigator ... , conveyed to you by notice dated ... December 1997, I have lost confidence in your integrity and credibility and therefore your ability to perform the functions of your office". There is no evidence before us of the Commissioner having made any independent investigations of his own or of taking into account anything else other than what was contained in the December letters. In particular, there was no evidence that the report of the Special Investigator, or any other relevant material, was before the Commissioner when he made the decisions in question. The Commissioner expressly states that he took the action that he did "as a consequence of the [F]indings".

It was accepted by all parties that the Commissioner acted pursuant to section 8 of the *Police Act 1892* in taking the action that he did on 12 December 1997. This section relevantly provides:

"The Governor may, from time to time as he shall see fit, remove any commissioned officer of police ... ; and the Commissioner of Police may, from time to time, as he shall think fit, suspend and, subject to the approval of the minister, remove any non-commissioned officer or constable; ... ".

It is to be noted that section 8 does not authorise the Commissioner to direct an officer to take paid leave, but the parties have apparently assumed that it does.

Section 8 is part of a scheme incorporated in the *Police Act* and the *Police Force Regulations* that governs disciplinary measures applicable to members of the police force, including suspension and dismissal from the force. Of some present relevance is section 23 of the *Police Act*. Section 23(1) entitles the Commissioner or an officer appointed by him to examine on oath any member of the police force upon a charge of an offence against the discipline of the police force. Under reg 624 of the *Police Force Regulations*, however, where an allegation is made that a member of the force has committed an offence against the discipline of the force, an officer designated by the Commissioner shall cause an officer to make an investigation into the allegation. By section 23(3), the officer conducting an examination shall have the same power to summon and examine witnesses and to administer oaths as a Justice. Where the officer conducting an examination under section 23 determines as a result of the examination that a member of the police force has committed an offence against the discipline of the police force, he may impose a number of punishments, including suspension from duty, save that where the member is not an officer, the suspension does not have effect until it is confirmed by the Commissioner, and where the member is an officer, the suspension does not have effect until it is confirmed by the Governor.

No argument was addressed to this Court as to the circumstances under which the Commissioner might act under section 8; it was merely accepted that, for all purposes relevant to this application for prerogative relief, he had acted pursuant thereto. Senior counsel for the Commissioner submitted that, by acting pursuant to section 8, the Commissioner was thereby exercising a statutory formulation of the Crown's prerogative power to dismiss or suspend its servants at pleasure. This submission was based on *Menner v Commissioner of Police* (1997) 74 IR 472 where Anderson J observed at 475:

"The provisions of the *Police Act* are in all material respects relating to the relationship between the Crown and members of the police force and to the powers of dismissal and suspension of constables perfectly consistent with the common law position. The purpose of section 8, in relation to constables, is to invest the Commissioner with the same power of suspension at pleasure as belongs to the Crown ... That section 8 is intended to confer on the Commissioner the prerogative power of the Crown to suspend at pleasure is clear from the words of the section. It is true that it is not expressly stated in the Act that an appointment of a constable by the Commissioner is an appointment 'during pleasure only'; and it is also true that the words of section 8 conferring the power to suspend do not include words such as 'at pleasure' or 'at will'. But there is no difference between a power which may be exercised by a governmental authority 'as he shall think fit', which are the words of section 8, and a power that may be exercised 'at pleasure' or 'at will', which is how the prerogative power is often defined. Thus for example in *O'Rourke v Miller* (1984) 156 CLR 342 a provision (section 9(1) in the *Police Regulation Act 1958* (Vic)) that 'the Chief Commissioner may ... dismiss or discharge any police cadet at any time' was

accepted as giving the Commissioner an unfettered power of dismissal (per Gibbs CJ at 349; Wilson J at 356), notwithstanding absence of a provision that the appointment was 'during pleasure' and notwithstanding absence from the dismissal provisions of words expressing the power as exercisable 'at will' or 'at pleasure'. The point is that section 8 places no qualification on the exercise of the power to suspend. The power of suspension given by section 8 is not expressly or, in the context of the Act as a whole, impliedly conditioned on any requirement that any allegation be made against the constable or that an opinion be formed as to unfitness or unsuitability of the constable, or that there be any cause for suspension."

His Honour, later in his reasons, accepted that "that these suspensions were an exercise of statutory power", indicating that the power to suspend under section 8 was derived from the statute - but being of the view that section 8 was intended to be a statutory embodiment of the Crown's prerogative.

In *O'Rourke v Miller* (1984) 156 CLR 342 Gibbs CJ at 349 (but not, it seems to me, Wilson J) expressed the view that a power to the Chief Commissioner to "dismiss or discharge any police cadet at any time" under the *Police Regulation Act 1958 (Vic)* gave the Chief Commissioner an unfettered power of dismissal. This, however, was an *obiter* view, and was not a conclusion expressed after an examination of the issue. The learned Chief Justice was merely illustrating and emphasising the distinction in the relevant legislation between the security of tenure given thereby to police constables and the very wide discretionary powers to which the tenure of police cadets was subject. The question for determination in the case concerned the tenure given by the legislation to constables; that applicable to cadets was not in issue.

In *R v Commissioner of Police Ex parte Ramsay* [1993] 2 Qd R 171 the Full Court of the Supreme Court of Queensland considered whether the applicant was entitled to a hearing before he was discharged from the police force by the Queensland Commissioner of Police, acting in the exercise of power conferred by section 10(1) of the *Police Act 1937 (Queensland)*. That section relevantly provided:

"Every person who is appointed to be a constable shall be appointed in the first instance for one year only and if, at the expiration of that year, the Commissioner is of the opinion that circumstances warrant it, may be appointed for a further period of six months and may, if the Commissioner considers he is unsuitable for any reason whatsoever to continue in the police force, be discharged by the Commissioner at any time before the expiration of ... that [further period], and without assigning any reason other than that the Commissioner considers he is unsuitable to continue in the police force:

Provided further, that every constable who is not discharged before the expiration ... of that period shall, without re-appointment, be deemed to be appointed generally and without a limit of time and shall not be liable to be discharged against his own will or dismissed by the Commissioner, otherwise than after investigation of a charge of an offence or for unfitness as provided by this Act."

The applicant was appointed a constable and at the expiration of his first year, his appointment was extended for a period of six months. He suffered serious injuries in a motor vehicle accident and shortly before the expiration of the further six-month period the Queensland Commissioner terminated his appointment without prior warning and without the opportunity of making representations. The Commissioner purported to act under section 10(1). McPherson ACJ referred to the question whether "as a servant of the Crown in the character of a police constable, the applicant was liable to be dismissed at pleasure without being afforded a hearing, and whether he was validly so dismissed", and said, at 173:

"As regards the first question, the decision in *Reedman v Hoare* (1959) 102 CLR 177 applied to an inspector of police the rule that employment by the Crown is at the will of the Crown and so liable to be determined at any time and without notice. It is ancient law that discharge or dismissal from an office held from the Crown 'at pleasure' ... is not justiciable in a court of law ... "

His Honour proceeded at 174:

"These authorities have, however, no direct bearing on the present application. The applicant's discharge from the police force purported to have been effected by the commissioner of police

under s10(1) of the Act, and not, as in *Reedman v Hoare* (1959) 102 CLR 177, in the exercise of the prerogative powers of the Crown. The Commissioner is not the Crown, and his action in discharging the applicant cannot be equated with termination by the Crown of the employment of its officer as an act done at will or at the pleasure of the Crown: see *Director-General of Education v Suttling* (1987) 162 CLR 447, 442."

Shepherdson J at 181 also considered that *Reedman v Hoare* (1959) 102 CLR 177 had no application, as the Commissioner of Police utilised the procedure of s10(1) instead of relying on the Crown prerogative.

I would, with respect, adopt the reasoning of McPherson ACJ and Shepherdson J. While I accept that by section 8 Parliament was intended to confer a wide discretion indeed on the Commissioner, it does not necessarily follow, in my view, that Parliament intended the Commissioner, in exercising that power, to be cloaked with all the powers he would have were he to be exercising Crown prerogative. In my view the statutory power under section 8 is not to be construed as affording the Commissioner powers equivalent to the Crown prerogative. Further, in my view, the exercise of power to under section 8 is reviewable, as Anderson J recognised in *Menner v Commissioner of Police* (at 476).

In the course of argument, attention was drawn to the opinion expressed by Anderson J (at 475) that the power to suspend embodied by s8 could be "exercised at any time and for no reason or for a mistaken reason". There is no need to consider whether this view of section 8 should be followed (as was debated between counsel), as the basis of the applicants' case is not that the Commissioner acted for a wrong reason or a mistaken reason, but that he acted because of findings and opinions arrived at or adopted by a statutory body which did not have the statutory power to make or adopt them or to communicate them to the Commissioner or to anyone else. In other words, the Commissioner acted on what in law was a nullity. It is again to be emphasised that this is not a case where the Commissioner acted on the strength of allegations, or evidence of wrongdoing of any kind. On the evidence before this Court, the Commissioner acted solely on the Findings, that is to say, the *conclusions* arrived at by the Special Investigator and adopted by the ACC - not the allegations and evidence which led to those conclusions. Had the evidence been that the Commissioner acted on other material, the inquiry would have been different.

Senior counsel for the applicants referred to *The Queen v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd* (1979) 144 CLR 45 where the High Court said at 49:

"Here the problem lies in ascertaining what are the proper limits of the discretion. In the absence of some positive indication of the considerations on which a grant or refusal of consent is to depend, the discretion is 'unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view', to use the words of Dixon J in *Water Conservation and Irrigation Commission (New South Wales) v Browning* (1947) 74 CLR 492 at 505. In that case his Honour went on to remark, (as he had done earlier in *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 758, 'On the impossibility when an administrative discretion is undefined, of a courts doing more than saying that this or that consideration is extraneous to the power'."

In my view, the passage quoted is apposite. I agree with Malcolm CJ that "the discretion is an open one of the kind referred to by Dixon J in *Swanhill Corporation v Bradbury* (1937) 56 CLR 746 at 758; and *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J". In my opinion, the discretion afforded to the Commissioner in terms of section 8 of the *Police Act* is "undefined except in so far as the subject matter and scope and purposes of the [*Police Act*] may enable the court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view". The reasons given by the Commissioner were the Findings; in my view they were "definitely extraneous to any objects the legislature could have had in view".

In my opinion, Parliament could never have had intended by section 8 to empower the Commissioner to suspend a police officer on the basis of findings given and opinions expressed unlawfully and beyond power by the ACC; findings that in law were a nullity. After all, Parliament, itself, by not conferring the requisite powers on the ACC, did not intend the ACC to act in the manner that it did, and it was this

absence of power that rendered the Findings unlawful. Surely then, Parliament would not have intended section 8, broad as the discretion conferred thereby undoubtedly is, to allow the Commissioner to act on the strength of the Findings. Moreover, the action of the ACC in so acting beyond power does not merely have some abstract consequence of unlawfulness in administrative law. The very nature of the *ultra vires* conduct in question leads to the Findings being inherently open to question, as I have attempted to demonstrate above.

Accordingly, I would make the order *nisi* absolute. I think that I have said enough previously to make it clear that nothing in the views that I have expressed would prevent the Commissioner, if he thought fit, considering afresh what action, if any, should be taken against the applicants and coming to a decision based on other material, whether it be evidence collected by the Special Investigator, or other evidence - admissible in a court or otherwise - or mere allegations. That is a matter solely for him.

Anti-Corruption Commission - Report on outcome of investigation to Commissioner of Police - Whether power to comment on or evaluate the evidence - Whether a requirement to allow the persons affected to comment on proposed report

PARKER & OTHERS v ANTI-CORRUPTION COMMISSION

Supreme Court of Western Australia

Pidgeon J, Murray J, Wheeler J

3 December 1998, 31 March 1999

Application for a Writ of *Certiorari* against the Anti-Corruption Commission

The facts appear in the judgment of Murray, J

Cases referred to in judgment(s) or cited

Craig v South Australia (1995) 184 CLR 163

Criminal Police Credit Union Ltd v Criminal Justice Commission, unreported 1998

Forster v Jododex Aus Pty Ltd (1972) 127 CLR 421

Haoucher v Minister for Immigration Ethnic Affairs (1990) 169 CLR 648

In the Marriage of Bau (1986) 10 Fam LR 897

Independent Commission against Corruption v Chaffey (1993) 30 NSWLR 21

Johns v Australian Securities Commission (1993) 178 CLR 408

Mahon v Air New Zealand [1984 AC 808

National Companies and Securities Commission v News Corporation Limited (1984) 156 CLR 296

Prior v Sherwood (1906) 3 CLR 1054

R v Refshauge (1976) 11 ALR 471

Russian & Commercial Industrial Bank v British Bank for Foreign Trade Ltd [1921] 2 AC 438

PIDGEON, J

Subject to the qualification referred to in the reasons of Wheeler J, I am in agreement with the reasons of Murray J.

MURRAY, J

This is the return of an order *nisi* for a writ of *certiorari* and, in the alternative, an application for a declaration. The subject matter of the proceedings is certain reports about the applicants. They were issued by the Anti-Corruption Commission (ACC) to the Commissioner of Police on or about 12 June 1998 pursuant to the *Anti-Corruption Commission Act 1988 (WA)* section 22(1). The grounds upon which the remedies are sought are identical. It is alleged that the reports as made to the Commissioner of Police were beyond the powers conferred on the ACC by the Act section 22(1). Further, it is argued that to furnish the reports to the Commissioner of Police was in breach of the rules of natural justice in that the applicants were not shown the reports, nor were they consulted or given an opportunity to be heard in relation to their contents before they were forwarded to the Commissioner of Police. It was made clear for the applicants during argument that principal reliance was placed upon the *ultra vires* ground and only if the applicants did not succeed on that ground would they be concerned to have the Court deal with the allegation of breach of natural justice.

The history of these matters may be dealt with briefly. In late August and early September 1997, each of the applicants was summonsed to the office of the ACC to give evidence in relation to an investigation being conducted by a special investigator. Allegations were made against the applicants, but until they attended for examination they were not aware of any detail of those allegations. They were all required to give evidence more than once, after which notices of potential adverse findings, as they were described, were served on them. They were given a period of time to respond and with the assistance of their

solicitors they did so in written submissions. The submissions made the point that the applicants did not know what evidence there was in support of the potential adverse findings and they had not been given the opportunity to test by cross-examination what other evidence had been taken.

In December 1997 each of the applicants was sent a letter signed by the Chairman of the ACC, advising that the special investigator had concluded that in various respects the applicants were guilty of "serious improper conduct" or "improper conduct". In some cases the applicants were informed that in addition the special investigator had concluded that they were guilty of "criminal conduct and/or criminal involvement". They were advised that the special investigator had recommended that each of the applicants should be removed from his office as a member of the Police Force under the *Police Act 1892 (WA)* section 8. The Commissioner of Police was provided with the report of the special investigator and set in train the appropriate procedures to suspend the applicants and seek their removal from the Police Force.

Those procedures were challenged by an application for *certiorari*, or alternatively a declaration, that the findings of guilt made by the special investigator were beyond his powers, or alternatively in breach of the rules of natural justice. I will need to return to the case in question, *Parker & Ors v Miller & Ors*, [see page XX above] in due course. But for the moment it is sufficient to note that the court concluded that the order *nisi* for *certiorari* should be made absolute upon the ground that the findings of the special investigator and his recommendation for the applicants' removal from office, the communication of those findings and recommendation to the Commissioner of Police and their proposed publication, were in each case beyond the powers of the ACC. The allegation of breach of natural justice was therefore not dealt with. Nothing said in that case precluded further action in respect of the allegations against the applicants and their investigation within the powers of the ACC.

It is the result of such further action which brings the matter back before this Court. The proceedings challenge six reports dated 11 June 1998 forwarded under cover of a letter dated 12 June 1998 from the Chairman of the ACC to the Commissioner of Police. As I understand it, the reports are those originally made following the special investigation, amended in a minor respect. Each letter sets out the allegation made. In the case of the first four applicants it was that they were involved in a search of certain premises when \$2,000 was wrongly taken and that the four officers failed to seize cannabis material found during the search. The letter advises that the matter is forwarded pursuant to the Act section 21(4) for further action and that the ACC has provided Assistant Commissioner Mackaay with the relevant evidence taken during the special investigation. The report in each case to the Commissioner of Police itself says that it is made pursuant to the Act section 22(1) and that it is in respect of allegations made against the police officer with which it is concerned.

In respect of each applicant there is an internal Police Force memorandum dated 15 June 1998 from Assistant Commissioner Mackaay to the Commissioner. With it were forwarded unspecified "papers" relating to the allegations against the particular officer the subject of the inquiry by the special investigator. In each case it was suggested that there had been a breach of standard operating procedures and that the actions of the officer "as reflected by the evidence" were such as to demonstrate that the officer lacked the ability to maintain the professional standards required of a police officer, that he did not exercise credible and sound ethical judgement and has tarnished his integrity to the extent that he is unfit to remain a member of the WA Police Service. It was recommended that the officer be required to show cause why he should not be removed from the Police Force. Upon each such document underneath that recommendation and dated 16 June, the Commissioner of Police has written "I concur".

On 16 June 1998, each of the applicants was served with a notice under section 8 of the *Police Act* to remove the officer from the Police Force. The notice was signed by the Commissioner of Police. In the case of the first five applicants, the Commissioner advised that unless persuaded to a contrary view he intended to recommend to the Hon Minister of Police that he approve the officers' removal from the Police Force. Each officer was invited to advise why the Commissioner should not "confirm" his intention to make that recommendation. Because the sixth applicant is a commissioned officer, the notice was varied to advise the intention of the Commissioner to make his recommendation to His Excellency the Governor.

In each case the notice advised the grounds relied upon by the Commissioner. That advice was in similar terms. It is sufficient to set out the relevant portion of the notice to the first applicant:

"The grounds for my action are that the evidence, information and matters contained in a Report and associated papers which I have received from the Anti-Corruption Commission (ACC), an exact copy of which I have requested that the ACC provide to you, have caused me to lose confidence in -

- . your ability to maintain the professional standards required of a police officer;
- . your capacity to exercise credible and sound ethical judgement; and
- . your integrity."

The applicants subsequently sought from the Commissioner, and were provided with, further particulars of the grounds upon which the Commissioner relied.

It is clear that none of the applicants was shown the report made to the Commissioner by the ACC upon him before that report was provided to the Commissioner. When each was served with the notice dated 16 June 1998, he was also served with copies of the letter dated 12 June 1998 under the hand of the Chairman of the ACC to the Commissioner of Police, the report which was the annexure thereto, a copy of transcript of the evidence given during the special investigation, but not all of that evidence, and a copy of Mr Mackaay's memorandum dated 15 June 1998. Each applicant complains of what are described as "discrepancies" between the content of the report and the transcript provided. I shall return, at least briefly, to the imperfections perceived by the applicants in the reports, upon which they appear to rely as demonstrating the proposition that the making and furnishing of the reports went beyond the powers conferred by section 22(1) of the Act.

In respect of both the application for a writ of *certiorari* and the alternative application that the court should exercise its inherent jurisdiction to declare the rights of the applicants, it is necessary to start with a reference to the powers of the ACC conferred upon it by its Act. The functions of the ACC are provided for in section 12. So far as relevant to this case, they include the receipt or initiation of allegations of corrupt conduct, criminal conduct, criminal involvement or serious improper conduct by police officers. The nature of such allegations is described in more detail in section 13. Under sections 14 and 15 certain authorities are obliged to notify the ACC of their reasonable suspicions in relation to conduct of a relevant kind, but generally, under section 16, any person may make such allegations.

Upon its receipt, the ACC is obliged to consider whether further action is needed in relation to an allegation and, if so, by whom that further action should be carried out. Or it may carry out further action in relation to the allegation itself: section 12(1)(b) and (c). The provisions of Division 4 of Part II of the Act, section 17 and those following, provide more particularly for the ACC's consideration and the making of its decision whether in its opinion, investigatory or other action is warranted. In this case it appears that such further action by way of investigation was thought to be warranted, under section 8, and a special investigator was appointed to investigate and report to the ACC on the allegations.

Then by section 12(1)(d) it is a function of the ACC: "to furnish reports and make recommendations on the outcome of further action taken in relation to allegations;"

In addition, under section 12(1)(g) the ACC is to assemble evidence obtained in the course of its functions and furnish that, so far as it may be admissible, to an appropriate prosecuting authority whether of this State, another State or Territory, the Commonwealth, or another country. That is a function additional to the making of a report and recommendations on the outcome of the further action taken in respect of any allegation. And further, under section 12(1)(e) there is an obligation to furnish general reports and make general recommendations about matters relating to the functions of the ACC. That is a different task again, governed by the provisions of Part II, Division 7, section 32 and following.

As the papers in respect of this matter reveal, on the conclusion of the further action by way of investigation and report to the ACC on the allegations, the ACC in its turn, under section 21(4), apparently decided "to refer the allegation to an independent agency or appropriate authority for further action." In this case the Commissioner of Police was an appropriate authority to take further action as that term is defined by the Act section 3(1). Section 22(1) then provides that the ACC having taken that decision, it is to "refer the allegation by forwarding a report on the allegation" to the appropriate authority. By section 22(2) the ACC in its report may not only recommend further investigation, but under para (c) it may:

"make such other recommendations to the appropriate authority as it thinks fit in relation to further action that should be carried out in relation to the allegation and the period in which it should be carried out."

Those provisions in my opinion, provide more particularly for the manner in which the function of furnishing reports and making recommendations on the outcome of its further action under section 12(1)(d) may be discharged by the ACC. The question in this case is the extent of the power of the ACC to report and make recommendations on the outcome of its further action by way of investigation and on the allegation in question.

The relevant provisions of the Act were subjected to a comprehensive and very useful analysis by the Full Court in *Parker v Miller* [see page XX above]. It was held that a report which went so far as to make findings that a person was guilty of the conduct alleged, went too far and was beyond the statutory power. At 30-3 of his judgment, Malcolm CJ expressed the view that the powers of the ACC were limited in the same way as were the powers of the Independent Commission Against Corruption of NSW in 1990. Those powers were the subject of the judgment of the High Court in *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625. The power there under consideration was to report on allegations of corruption. Such a report

"may include a statement of the Commission's findings as to whether there is, or was, any evidence or sufficient evidence, warranting consideration of ... the prosecution of a specified person for a specified offence."

The Chief Justice saw a parallel between that provision and section 12(1)(g) of our Act. His Honour quoted from the High Court's judgment in *Balog*, a passage which included the following (at 633):

"The use of the expression 'any evidence or sufficient evidence warranting consideration' suggests that it is someone else's evaluation of the evidence - that of the person who is to consider it - which is to determine whether a person is to be prosecuted or not and that the function of the Commission is to investigate and assemble the evidence rather than to evaluate it for itself, save for the limited purpose of deciding whether it warrants further consideration."

At 33, Malcolm CJ continued:

"This suggests that an evaluation of that evidence would need to be made by the independent agency or appropriate authority which, in the present case, would be the Director of Public Prosecutions in relation to a criminal offence and the Commissioner in relation to any disciplinary or administrative action available to him. In this context, the function of the Director of Public Prosecutions would be to determine whether a person should be prosecuted or not. The function of the ACC is to investigate and assemble the evidence rather than to evaluate it for itself, save for the limited purpose of deciding whether it warrants further action by the Director. The function is similar in the case of a reference to the Commissioner for further action, the purpose is to enable the Commissioner to consider whether any, and if so what, disciplinary or administrative action should be taken based on the material included in the report."

In expressing his own reasons for his agreement with the conclusion reached by Malcolm CJ, Ipp J at 15, after referring to section 12(1)(d) and (e) concluded that, "the functions of reporting and making recommendations are ancillary to the investigatory function and do not empower the ACC to make findings of guilt or express opinions as to fitness for office or as to whether persons should summarily be dismissed." Dealing specifically with the reporting function detailed in section 22(1), at 17-8 of his reasons, Ipp J said:

"Section 22(1) confines the ACC's power to report to an independent agency or appropriate authority, when referring an allegation for further action, to a report 'on the allegation'. Moreover, nothing in section 22(2) which stipulates what the ACC may recommend in such report, or by subsequent written notice, empowers the ACC to report other than in regard to the initiation and carrying out of an investigation into the allegation, the period within which the investigation should be carried out, and the further action that should be carried out 'in relation to the allegation'. Thus,

these sections do not expand the powers of the ACC to report and recommend beyond its functions set out in section 12, or its duties as set out in section 17(1). Parliament has required the ACC to report and make recommendations into allegations. Parliament has not empowered the ACC to make reports and recommendations as to whether any person is guilty of the allegations against him or her and as to the particular actions which should be taken against that persons by way of punishment, or termination or suspension of employment (the latter matters being for decision by some other institution or authority)."

Parker v Miller and *Balog v Independent Commission Against Corruption* are authority for the proposition that the reporting power of the ACC may not be properly exercised so as to make findings or express conclusions about the guilt of any person of criminal or improper conduct, and the recommendations, if any, made in such a report, may not properly be as to the particular action which should be taken by way of prosecution or disciplinary action, or what should occur in relation to the employment of any person, because all those matters are matters to be considered and decided upon by the appropriate authority or independent agency to which the report is made. Such a report goes beyond the statutory power

In *Parker v Miller*, relief by way of *certiorari* was granted and the offending reports were quashed. There is little discussion of the availability of prerogative relief in the judgments, but at 10-11 of his reasons, Ipp J rested his view that prerogative relief was available against the ACC upon the proposition that the reports made were available and were indeed relied upon by the appropriate authority to support the disciplinary action which was taken.

Before us, in this regard reliance was placed particularly upon the decision of the High Court in *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149. Reference may be made particularly to the joint judgment of Brennan CJ, Gaudron and Gummow JJ at 158-162. The court held that in a case such as this, where the decision under challenge is not that ultimately to be made in the decision-making process, which of itself directly affects legal rights, then to be amenable to *certiorari* the decision of a recommendatory or preliminary character must be one connected with the final decision affecting the rights in question. Reliance was placed upon the previous decision of the High Court in *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 where, at 580, Mason CJ, Dawson, Toohey and Gaudron JJ said:

"The function of *certiorari* is to quash the legal effect or the legal consequences of the decision or order under review. The report made and delivered by the Commission has, of itself, no legal effect and carries no legal consequences, whether direct or indirect. It is different when a report or recommendation operates as a precondition or as a bar to a course of action, or as a step in a process capable of altering rights, interests or liabilities."

Section 12(1)(d) confers power to furnish reports and make recommendations as to the outcome of the investigatory action taken by the ACC, and when the ACC decides under section 21(4) to refer the allegation to an independent agency or appropriate authority for further action, then under section 22(1) the ACC is required to refer the allegation by forwarding a report on the allegation to the independent agency or appropriate authority. In those circumstances, in my opinion, such a report, with or without recommendations, may be seen, if not as a precondition, as a step in the process capable of affecting the rights of the individual who is the subject of the report as a consequence of further action which may be taken by the independent agency or appropriate authority to which the allegation is referred. In these cases as has been seen, the Commissioner of Police expressly grounded his action of giving notice of his intention to seek the removal of the applicants from the Police Force on the evidence, information and matters contained in the reports and associated papers received from the ACC. *Certiorari* will lie to quash such a report or recommendation if made in terms beyond the statutory power.

For the applicants it is argued that the report will be beyond power if it contains any evaluation or summary of the evidence taken during the process of investigation by the ACC with or without the assistance of a special investigator, or any comment upon that evidence. As has been seen, each of the applicants complains that the report with respect to that person does not merely report the evidence gathered in the course of the investigation, but does in some respect purport to summarise it, evaluate it and comment upon it. It does so in specified instances, so the applicants assert, in ways that are inaccurate or incorrect. For myself however, I would not propose to review those particular assertions because it seems to me that the relevant question for the purpose of considering the availability of

certiorari or a declaration upon the ground that the content of the reports goes beyond the statutory power is whether, as a matter of statutory construction, the power conferred includes a power in a report to summarise the outcome of the investigation to make an evaluation of the evidence gathered, and to comment upon it.

It is not a sustainable proposition that if such powers are available, the fact that the summary was inaccurate, the evaluation inappropriate, or the comment was not accepted, would give rise to the grant of prerogative relief, although reliance might have been placed upon the summary and allegedly inaccurate evaluation or comment to the detriment of the person the subject of the report. In other words the question is one of statutory power, not in this regard, and putting to one side any question of procedural unfairness, the manner of its exercise.

In my opinion, neither *Balog v ICAC*, nor *Parker v Miller* is authority for the proposition that a report may not contain any matter of summary, comment or evaluation, but that it should merely forward the evidence gathered in the course of the investigation. It will be noted that although the ground of application that the reports were beyond the powers conferred by the Act section 22(1) is unparticularised, the argument presented in support of that ground is not, as in the case of *Parker v Miller*, concerned with the nature or particular character of the finding made, but with the fact that the reports contained matters of summary, evaluation and comment at all. The argument is that the reports were taken beyond power because they included summaries of the evidence gathered, evaluation of the evidence and comments upon it.

In my opinion that submission cannot be sustained. The function of making the report is one which the ACC may not delegate: section 11(3)(b), and so the importance of its exercise is made manifest. The ACC having examined the allegations in a preliminary way and decided that further action was warranted under section 17(1), carried out a process of investigation by the special investigator. It then decided under section 21(4) to refer the allegation to the Commissioner of Police, the appropriate authority, for further action. It was to do so under section 22(1) by forwarding a report on the allegation to the Commissioner. That is a report of the kind contemplated by section 12(1)(d) making it a function of the Commission to furnish a report "and make recommendations on the outcome of further action" taken in relation to an allegation. That provision makes it clear that the subject of the report and recommendations is the result of the investigatory process which the ACC has undertaken. That must be a different function from the process of furnishing evidence under section 12(1)(g).

In a case such as this, it would no doubt be useful and appropriate, as appears to have been done in this case, to provide in addition to the report, or within it, the evidence relating to the allegation in question and the outcome of the ACC's investigation. To do so would not appear to breach any secrecy provision of the Act. But I see no reason why the content of the report should be limited in that way. It seems to me that the language used in the relevant sections of the Act carries the necessary implication that to report on an allegation, and the outcome of the investigation by the ACC, may involve an account of the process, evaluation of, and comment upon, the outcome of the investigation and the evidence assembled, if thought to be helpful, including the presentation of a summary of what has been discovered and a discussion of the perceived merit or lack of merit in the allegation.

As *Parker v Miller* and *Balog v ICAC* make clear, the limitation upon that process if the report is to be a valid exercise of statutory power, is that it should not contain findings, comment or conclusions which relate not to the investigatory function of the ACC, the allegation and the action taken with respect to it, but to the statutory functions and decision-making processes which are the province and are required of the independent agency or appropriate authority to whom the report is made.

The function to make recommendations provided for in section 12(1)(d) and section 22(2) is similarly limited. In particular, whilst the ACC may make a recommendation to the appropriate authority as to the further action, investigatory or otherwise, which in its opinion that authority should carry out, it must take care not to prescribe in any way the final outcome of such further action in accordance with the exercise by the relevant appropriate authority of its powers. That the power to make a recommendation is limited in this way, is in my opinion consistent with the following provisions of section 30:

" (2) A report under this Division is not to include a recommendation or opinion that a specified person should be prosecuted for a specified or unspecified criminal offence against a written law.

- (3) Subject to subsection (2), the Commission may make any recommendation that it thinks fit in a report made under this Division.
- (4) Without limiting subsection (3), the Commission may, in a report made under this Division -
- (a) recommend that further inquiry or investigation into any matter be carried out by a Royal Commission, or by an Inquiry Panel appointed under the Local Government Act 1995, or in such other manner as the Commission may recommend; and
 - (b) recommend the terms of reference of any such inquiry or investigation."

For those reasons I would not uphold the argument that having regard to their content, the reports in this case were beyond power. I turn then to the second contention grounding the application for a writ of *certiorari* or a declaration, that the making of the reports was in breach of the rules of natural justice in that the applicants were not shown the reports and were not consulted or given an opportunity to be heard in relation to the content of the reports before they were made to the Commissioner of Police.

If such an obligation is encompassed within the rules of procedural fairness applicable to this case, then there is no doubt that the court will so declare and that *certiorari* will issue upon the ground of the breach of the rules of natural justice: *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509. In my opinion, under the common law, an obligation in the terms asserted by the applicants might arise as part of the duty to act fairly and to accord a hearing in a case such as this unless, at least by clear implication, the existence of any such obligation is proscribed by the Act. As Mason J put it in *Kioa v West* (1985) 159 CLR 550 at 584:

"The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention."

The same point was made by Mason CJ, Deane and McHugh JJ in *Annetts v McCann* (1990) 170 CLR 596 at 598:

"It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment".

In my opinion, it may be accepted for present purposes that the decision of the ACC under section 21(4) to refer the allegations to the Commissioner of Police for further action by way of the reports required by section 22(1), was one affecting the rights and interests of the applicants because the reports when made were to be seen as a step in the decision-making process which might ultimately adversely affect the applicants' rights and interests in respect of their continuing capacity to hold office as members of the Police Force. The question then becomes whether there is a clear manifestation of intention in the statutory scheme to negate any obligation which might arise to acquaint the applicants with the content of the reports and to give them the opportunity to make submissions on their content before they were sent to the Commissioner of Police. It was upon this aspect that the respondent's argument concentrated.

In this case, as has been seen, the investigation was carried out by a special investigator. Part IV of the Act therefore applied: section 21(2)(a). To that investigation were applied nominated provisions of the Royal Commissions Act 1968 (WA): section 3(1), the definition of "applied provisions" and sections 40 and 41. By the ACC Act section 42(1), evidence taken under the applied provisions in the course of an investigation is to be taken in private. The ACC Act section 42(2) and the Royal Commissions Act s.19A make it clear that the applicants were not entitled to hear the evidence taken from others during the course of the investigation, but they were entitled to be represented whenever evidence was taken from them, although the special investigator could authorise wider representation. Under the ACC Act section 42(3) and the Royal Commission Act section 22, the right to examine or cross-examine a witness is limited accordingly. The ACC Act section 43 provides:

"Before the evidence of a witness is taken on oath under the applied provisions in the course of an investigation, the witness is entitled to be informed of the general scope and purpose of the investigation."

I gather that occurred in respect of each of these applicants. So it may be seen that there are specific rules affecting the content of the duty to afford a hearing to the applicants as witnesses during the course of the investigation.

Turning now to the reporting function itself, the Act makes it clear that the process of reporting and the content of the report remains confidential. Section 52 contains comprehensive provisions proscribing the disclosure of, or making use of, information derived from the exercise of functions under the statute. Specifically as to the reporting function, section 30(1) provides:

"Before reporting any facts adverse to a person or body in a report under this Division, the Commission shall give the person or body a reasonable opportunity to make representations to it concerning those facts."

As I have already noted, that was done in this case by serving in October 1997, upon each of the applicants, a confidential document headed "Notice of Potential Adverse Findings". In each case they were findings with respect to matters canvassed when evidence was taken from the applicants, but in each case the applicant was invited to provide written submissions to the special investigator in respect of those matters. Each applicant availed himself of that opportunity with the assistance of his solicitors. Each was then invited in November 1997 to make further oral submissions, but as I understand it, none took up that opportunity.

In my opinion, it is clear from the relevant documents that in so acting, the special investigator was effectively acting for the Commission and what was done at that time, may be regarded as discharging the duty imposed upon the ACC by section 30(1) without the need to consider whether that duty might already have been discharged during the course of taking the evidence of particular applicants. It will be noted that the argument of the applicants that they were denied procedural fairness, is not a complaint about any failure to comply with section 30(1).

As to the complaint that the duty of procedural fairness required that the applicants be shown the reports and given an opportunity to comment upon them before their submission to the Commissioner of Police, that in my opinion is a proposition which may not be sustained because to my mind, the provisions of the Act to which I have referred make abundantly clear the extent to which the process of investigation and reporting thereon is to involve exposure to the applicant of the reporting process. They are to be afforded a reasonable opportunity to make representations concerning any adverse matter which may be contained therein, not upon the content of the report as such.

Of course the extent to which the applicants may again be exposed to the substance of any factual material adverse to them in the context of any disciplinary or other administrative action affecting them, will depend upon the application of the common law to that process as it may be affected by the express provisions of any statute governing that process, no doubt in this case the *Police Act* and any relevant subordinate legislation made thereunder. It is sufficient for present purposes to note that the requirement of the *ACC Act* is, before the reporting function is undertaken, to give any person affected thereby knowledge of, and reasonable opportunity to make representations about, any adverse facts which may be contained in the report. There is no evidence, and the applicants do not argue, that they were denied procedural fairness in that regard.

For those reasons I would discharge the order *nisi* for certiorari and decline to make the declarations sought.

WHEELER, J

I agree generally with the reasons and conclusions of Murray J, and wish only to add a brief comment.

In agreeing with his Honour's view that to report upon an allegation may involve "an account of the process, evaluation of, and comment upon the outcome of the investigation ...," I do not intend to depart from the observation of the High Court in *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 633-4 applied to the ACC by Malcolm CJ in *Parker & Ors v Miller & Ors* that the function of the Commission is to "investigate and assemble the evidence rather than to evaluate it for itself" (at 33) The "evaluation" referred to by Malcolm CJ is, it appears to me, an evaluation which trespasses upon the decision making function of the authority to which the report is made, most usually by suggesting what view should be taken or what action should result.

So far as its own functions are concerned, the ACC must evaluate the evidence to the extent necessary to decide whether to report, and to whom. Provided that its evaluation goes no further, and is not directed to the issues of what view should be formed or what action should be taken by the authority to whom the report is made, the ACC would not have exceeded its power. As the High Court recognised in *Balog* (at 633-4), there may in theory be a fine line to be drawn in making this distinction, but it should not be too difficult in practice.

Practically, the concern of the present applicants is that what they see as an inaccurate summary of evidence may influence the Commissioner to a view which he would not otherwise take. There is, however, a risk of inaccuracy or distortion whenever information is transmitted from one person to another. The existence of such a risk - or even its realisation in an inaccurate report of the evidence - does not affect the power of the ACC, provided it has confined itself to reporting and has not intruded upon the decision making function of the Commissioner.

22. Further action by another agency or authority

(1) If the Commission decides under section 17 (3), 20 (3) or 21 (4) that an allegation should be referred to an independent agency or appropriate authority for further action it shall, as soon as is practicable after making that decision, refer the allegation by forwarding a report on the allegation to the independent agency or appropriate authority.

(2) If an allegation is referred to an appropriate authority under subsection (1), the Commission may, in the report or by subsequent written notice --

- (a) recommend that the appropriate authority initiate and carry out an investigation into the allegation;
- (b) make a recommendation to the appropriate authority as to the period within which an investigation should be carried out; and
- (c) make such other recommendations to the appropriate authority as it thinks fit in relation to further action that should be carried out in relation to the allegation and the period within which it should be carried out.

(3) The Commission may from time to time, by written notice, amend a recommendation referred to in subsection (2).

(4) Despite having referred an allegation to an independent agency or appropriate authority under subsection (1), the Commission may at any time decide to itself carry out further action in relation to the allegation.

(5) Where an allegation has been referred to the Parliamentary Commissioner, subsection (4) does not apply unless the carrying out of further action by the Commission has been requested or agreed to by the Parliamentary Commissioner.

[Section 22 inserted as section 7HF^{1b} by No. 29 of 1996 s.18.]