



1993 - 2003

ten years fighting corruption

Cases and Materials Relating to Corruption Issue 3 – May 2003

Editor John Hatchard

A joint project of the Commonwealth Legal Education Association, The Commonwealth Magistrates' and Judges' Association, The Commonwealth Secretariat and Transparency International – Centre for Innovation and Research

Funded by the United Nations Development Programme

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ISSUE 3: EDITORIAL REVIEW

Once again, this issue contains cases from a variety of Commonwealth jurisdictions. By way of assistance, prior to each judgment I have included a short comment about the case and, where appropriate, a background note.

One general point that is expressly noted in *R v Musuota* but is implicit in several judgments in this series concerns the need for counsel to be fully apprised of the relevant cases and materials when arguing cases involving allegations of corruption. Indeed in *Musuota* the trial judge makes some trenchant remarks about the need for counsel to adequately research such cases. It is hoped that these cases and materials will also be used to assist in this regard.

Constitutional and Administrative Law

This section contains two sets of related cases. The first set involves allegations of corruption against parliamentarians and judges and raise a plethora of constitutional and administrative law issues. In *Attorney General v Jones* the issue is the effect of a successful appeal against a conviction on corruption charges by a sitting member of Parliament. In *R v Musuota* there is an extremely useful discussion on the constitutionality of laws restricting the giving of gifts to and by political leaders, in this case a member of Parliament and a serving Cabinet Minister. The third case, that of *Zardari and Bhutto*, concerns judicial corruption and is noted later in this Review.

The second set of cases usefully examine the scope of judicial review in relation firstly, to the constitutionality of a Commission of Inquiry set up to investigate allegations of corruption against a senior police officer in Mauritius and secondly, on the content of its subsequent report (*Dayal v President of the Republic* and *Dayal v Yeung Sik Yuen*).

Criminal Law, Evidence and Procedure

The first case in this section, *R v Rockall*, discusses the relationship between a statutory conspiracy to make corrupt payments and substantive offences of corruption. In *Chan Sze Ting*, the Court of Final Appeal of the Hong Kong Special Administrative Region considers the appropriate interpretation of an anti-corruption statute providing special powers to the Independent Commission Against Corruption. Finally, the case of *R v Musuota* (noted earlier) examines firstly, the issues of whether and, if so, when, it is appropriate to proceed with multiple counts all based on one overt act of corruption and secondly, whether a corruption offence can be created in a constitution.

Proceeds of Crime

A key strategy for tackling corruption is putting in place mechanisms designed to ensure that those involved in corrupt practices (and their families) do not derive financial benefit from their unlawful actions as their assets will be traced, frozen and confiscated no matter

where in the world they seek to deposit them. This is potentially an invaluable deterrent in that it hits where it hurts most: in their pocket.

The decision of the Constitutional Court of South Africa in *National Director of Public Prosecutions and Another v Mohamed and Others* examines the very topical issue of the constitutionality of a provision empowering the freezing of the assets of a person (or third party) through an *ex parte* procedure. Whilst noting that this might infringe on constitutional rights, the Constitutional Court recognises the importance of taking into account public interest objectives in such cases.

Whilst the issue of proceeds of crime extends much wider than those involving corruption, the case neatly demonstrates the manner in which a court can address competing interests within a constitutional framework.

The responsibility of judicial officers

The case of *Zardari and Bhutto* provides an extreme example of the apparent bribery of members of the judiciary in order to obtain the conviction on corruption charges of political opponents. The case is particularly notable in that it provides the Supreme Court of Pakistan with the opportunity to undertake an exhaustive examination of the scope of judicial "bias".

The responsibility of judicial officers in upholding their independence and integrity was noted in the Kenyan context in the last issue of the Bulletin. This issue contains the *Bangalore Principles of Judicial Conduct*. These represent the most recent and most impressive attempt to establish a statement of judicial ethics. The Principles draw on the rules and principles already articulated in the national codes of many (mainly) common law countries as well as international and regional instruments. They were originally formulated by the Judicial Group on Strengthening Judicial Integrity comprising the Chief Justices of Bangladesh, Karnataka State in India, Nepal, Nigeria, South Africa, Sri Lanka, Tanzania and Uganda under the chairmanship of Judge Christopher Weeramantry, Vice-President of the International Court of Justice. They were then disseminated widely and revised in the light of the comments and criticisms received.

The Principles are set out in full overleaf.

THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT

Preamble

WHEREAS the Universal Declaration of Human Rights recognizes as fundamental the principle that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of rights and obligations and of any criminal charge.

WHEREAS the International Covenant on Civil and Political Rights guarantees that all persons shall be equal before the courts, and that in the determination of any criminal charge or of rights and obligations in a suit at law, everyone shall be entitled, without undue delay, to a fair and public hearing by a competent, independent and impartial tribunal established by law.

WHEREAS the foregoing fundamental principles and rights are also recognized or reflected in regional human rights instruments, in domestic constitutional, statutory and common law, and in judicial conventions and traditions.

WHEREAS the importance of a competent, independent and impartial judiciary to the protection of human rights is given emphasis by the fact that the implementation of all the other rights ultimately depends upon the proper administration of justice.

WHEREAS a competent, independent and impartial judiciary is likewise essential if the courts are to fulfil their role in upholding constitutionalism and the rule of law.

WHEREAS public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.

WHEREAS it is essential that judges, individually and collectively, respect and honour judicial office as a public trust and strive to enhance and maintain confidence in the judicial system.

WHEREAS the primary responsibility for the promotion and maintenance of high standards of judicial conduct lies with the judiciary in each country.

AND WHEREAS the United Nations Basic Principles on the Independence of the Judiciary are designed to secure and promote the independence of the judiciary, and are addressed primarily to States.

THE FOLLOWING PRINCIPLES are intended to establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the judiciary a framework for regulating judicial conduct. They are also intended to assist members of the executive and the legislature, and lawyers and the public in general, to better understand and support the judiciary. These principles presuppose that judges are

accountable for their conduct to appropriate institutions established to maintain judicial standards, which are themselves independent and impartial, and are intended to supplement and not to derogate from existing rules of law and conduct which bind the judge.

**Value 1:
INDEPENDENCE**

Principle:

Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

Application:

1.1 A judge shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

1.2 A judge shall be independent in relation to society in general and in relation to the particular parties to a dispute which the judge has to adjudicate.

1.3 A judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to a reasonable observer to be free therefrom.

1.4 In performing judicial duties, a judge shall be independent of judicial colleagues in respect of decisions which the judge is obliged to make independently.

1.5 A judge shall encourage and uphold safeguards for the discharge of judicial duties in order to maintain and enhance the institutional and operational independence of the judiciary.

1.6 A judge shall exhibit and promote high standards of judicial conduct in order to reinforce public confidence in the judiciary which is fundamental to the maintenance of judicial independence.

**Value 2:
IMPARTIALITY**

Principle:

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.

Application:

2.1 A judge shall perform his or her judicial duties without favour, bias or prejudice.

2.2 A judge shall ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants in the impartiality of the judge and of the judiciary.

2.3 A judge shall, so far as is reasonable, so conduct himself or herself as to minimise the occasions on which it will be necessary for the judge to be disqualified from hearing or deciding cases.

2.4 A judge shall not knowingly, while a proceeding is before, or could come before, the judge, make any comment that might reasonably be expected to affect the outcome of such proceeding or impair the manifest fairness of the process. Nor shall the judge make any comment in public or otherwise that might affect the fair trial of any person or issue.

2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where

2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 the judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:

Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

**Value 3:
INTEGRITY**

Principle:
Integrity is essential to the proper discharge of the judicial office.

Application:
3.1 A judge shall ensure that his or her conduct is above reproach in the view of a reasonable observer.
3.2 The behaviour and conduct of a judge must reaffirm the people's faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done.

**Value 4:
PROPRIETY**

Principle:
Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.

Application:
4.1 A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities.

4.2. *As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.*

4.3. *A judge shall, in his or her personal relations with individual members of the legal profession who practise regularly in the judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favouritism or partiality.*

4.4 *A judge shall not participate in the determination of a case in which any member of the judge's family represents a litigant or is associated in any manner with the case.*

4.5 *A judge shall not allow the use of the judge's residence by a member of the legal profession to receive clients or other members of the legal profession.*

4.6 *A judge, like any other citizen, is entitled to freedom of expression, belief, association and assembly, but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary.*

4.7 *A judge shall inform himself or herself about the judge's personal and fiduciary financial interests and shall make reasonable efforts to be informed about the financial interests of members of the judge's family.*

4.8 *A judge shall not allow the judge's family, social or other relationships improperly to influence the judge's judicial conduct and judgment as a judge.*

4.9 *A judge shall not use or lend the prestige of the judicial office to advance the private interests of the judge, a member of the judge's family or of anyone else, nor shall a judge convey or permit others to convey the impression that anyone is in a special position improperly to influence the judge in the performance of judicial duties.*

4.10 *Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties.*

4.11 *Subject to the proper performance of judicial duties, a judge may:*

4.11.1 *write, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters;*

4.11.2 *appear at a public hearing before an official body concerned with matters relating to the law, the legal system, the administration of justice or related matters;*

4.11.3 *serve as a member of an official body, or other government commission, committee or advisory body, if such membership is not inconsistent with the perceived impartiality and political neutrality of a judge; or*

4.11.4 *engage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.*

4.12 *A judge shall not practise law whilst the holder of judicial office.*

4.13 *A judge may form or join associations of judges or participate in other organisations representing the interests of judges.*

4.14 *A judge and members of the judge's family, shall neither ask for, nor accept, any gift, bequest, loan or favour in relation to anything done or to be done or omitted to be done by the judge in connection with the performance of judicial duties.*

4.15 *A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favour in*

relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.

4.16 *Subject to law and to any legal requirements of public disclosure, a judge may receive a token gift, award or benefit as appropriate to the occasion on which it is made provided that such gift, award or benefit might not reasonably be perceived as intended to influence the judge in the performance of judicial duties or otherwise give rise to an appearance of partiality.*

Value 5:

EQUALITY

Principle:

Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.

Application:

5.1 *A judge shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes ("irrelevant grounds").*

5.2 *A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias or prejudice towards any person or group on irrelevant grounds.*

5.3 *A judge shall carry out judicial duties with appropriate consideration for all persons, such as the parties, witnesses, lawyers, court staff and judicial colleagues, without differentiation on any irrelevant ground, immaterial to the proper performance of such duties.*

5.4 *A judge shall not knowingly permit court staff or others subject to the judge's influence, direction or control to differentiate between persons concerned, in a matter before the judge, on any irrelevant ground.*

5.5 *A judge shall require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on irrelevant grounds, except such as are legally relevant to an issue in proceedings and may be the subject of legitimate advocacy.*

Value 6:

COMPETENCE AND DILIGENCE

Principle:

Competence and diligence are prerequisites to the due performance of judicial office.

Application:

6.1 *The judicial duties of a judge take precedence over all other activities.*

6.2 A judge shall devote the judge's professional activity to judicial duties, which include not only the performance of judicial functions and responsibilities in court and the making of decisions, but also other tasks relevant to the judicial office or the court's operations.

6.3 A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges.

6.4 A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.

6.5 A judge shall perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

6.6 A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence, direction or control.

6.7 A judge shall not engage in conduct incompatible with the diligent discharge of judicial duties.

IMPLEMENTATION

By reason of the nature of judicial office, effective measures shall be adopted by national judiciaries to provide mechanisms to implement these principles if such mechanisms are not already in existence in their jurisdictions.

DEFINITIONS

In this statement of principles, unless the context otherwise permits or requires, the following meanings shall be attributed to the words used:

"Court staff" includes the personal staff of the judge including law clerks. "Judge" means any person exercising judicial power, however designated.

"Judge's family" includes a judge's spouse, son, daughter, son-in-law, daughter-in-law, and any other close relative or person who is a companion or employee of the judge and who lives in the judge's household.

"Judge's spouse" includes a domestic partner of the judge or any other person of either sex in a close personal relationship with the judge.

JOHN HATCHARD
Editor

CONSTITUTIONAL AND ADMINISTRATIVE LAW ISSUES

In Attorney General v Jones the issue for the court was the consequences arising when a serving member of Parliament, whose seat was ordered vacated following her conviction for a corruption offence, had successfully appealed against that conviction. Here the court undertakes a useful overview of the possible alternatives and, in holding that the member could resume her seat, emphasised that “when a conviction is set aside on appeal, all penalties imposed at the time of conviction should also, as far as possible, be set aside”.

ATTORNEY GENERAL v JONES

Queen’s Bench Division
Kennedy, LJ and Mitchell, J

30 April 1999

P Sales appeared as Amicus Curiae
R Amlot QC and G Millar for the Defendant

The facts appear in the judgment

Case referred to in the judgment:

R v Cripps, ex parte Muldoon [1983] 3 All ER 72, [1983] 3 WLR 465

KENNEDY, LJ (reading the judgment of the court):

This matter comes before us by way of an originating summons issued on the application of the Attorney General representing the Speaker and authorities of the House of Commons. The Attorney General seeks the determination by the court of this question:

“In the following circumstances:

1. The Defendant was elected Member of Parliament for Newark on 1 May 1997;
2. The Defendant was convicted at first instance on 19 March 1999 of the offence of knowingly making a false declaration as to election expenses

- (section 82(6) of the Representation of the People Act 1983) in the course of her election campaign;
3. On 15 April 1999 the Defendant's conviction was quashed by the Court of Appeal, Criminal Division;
 4. No writ has been moved for a by-election for Newark, and the parliamentary seat for that constituency remained unfilled by any other person as at the date when the Defendant's conviction was quashed; is the Defendant now entitled, according to the proper construction of the Representation of the People Act 1983, to resume her seat in Parliament as Member of Parliament for Newark?"

As we indicated yesterday, we answer that question in the affirmative. The Attorney General also seeks a declaration to that effect and again, as we indicated yesterday, we grant that declaration. As we promised yesterday, we now give our reasons for our decision.

The Facts

The material facts for present purposes are sufficiently set out in the question posed for our consideration, which we have already recited, with this addition: that the Speaker of the House having been notified of the conviction, she on 22 March 1999 informed the House that the seat for Newark was vacated.

Malpractice

Originally allegations of malpractice such as the offence now set out in section 82(6) of the 1983 Act were matters for the House of Commons, not for the courts, but over the last century Parliament has given the criminal courts jurisdiction in relation to allegations of corruption. The result is that today, if an allegation of corruption is made, the matter can be considered in one of three ways:

- (1) by an election court established under the 1983 Act to which a Parliamentary election petition is referred by the High Court;
- (2) by the High Court itself if the case raised by the petition can conveniently be stated as a special case (see section 146);
- (3) by a criminal court, as happened in this case.

Election Court Procedure

Because of the structure of the Act, although the election court procedure was not invoked in this case, it is necessary to look at that procedure in order to understand the nature of the procedure which was invoked.

An election court has the authority of the High Court and is a court of record (see section 123(2)). The proceedings before it constitute the trial of a Parliamentary election petition, and section 144(1) of the Act provides:

“At the conclusion of the trial of a parliamentary election petition, the election court shall determine whether the member whose election or return is complained of, or any and what other person, was duly returned or elected or whether the election was void, and the determination so certified shall be final to all intents as to the matters at issue on the petition.”

There is therefore no appeal from a decision of an election court. There may be a possibility of judicial review (see *R v Cripps, ex parte Muldoon* [1983] 3 All ER 72, [1983] 3 WLR 465, page 83f-j of the former report), but for present purposes that is not a matter with which we need be concerned. By contrast there is a right to appeal against a conviction before a criminal court.

An election court has to certify its determination in writing to the Speaker (see section 144(2)) and the report of the election court must state:

“whether any corrupt or illegal practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at the election, and the nature of the corrupt or illegal practice.” (see section 158(1)).

Section 159(1) provides:

“If a candidate who has been elected is reported by an election court personally guilty or guilty by his agents of any corrupt or illegal practice his election shall be void.”

Section 159(2) provides amongst other things that a candidate reported personally guilty of a corrupt practice cannot for ten years be elected to the House of Commons or sit as a Member of Parliament for the constituency in question. Finally, so far as the election court procedure is concerned, section 160(4) provides that:

“... a candidate or other person reported by an election court personally guilty of a corrupt practice shall for five years from the date of the report be incapable -- (a) of being registered as an elector or voting at any parliamentary election in the United Kingdom or at any election in Great Britain to any public office, and (b) of being elected to and sitting in the House of Commons, and (c) of holding any public or judicial office, and, if already elected to the House of Commons or holding such office, shall from that date vacate the seat or office.”

The difference between s.159(2) and s.160(4)(b) is that a lesser period of incapacity applies if the candidate seeks election to a different seat.

Criminal Court Procedure

We turn now to what happens upon conviction before a criminal court. The power to fine or imprison is set out in section 168(1), and section 173(a) provides that in addition:

"a person convicted of a corrupt practice...shall be subject to the incapacities imposed by section 160(4) above as if at the date of the conviction he had been reported personally guilty of that corrupt practice...."

That begs the question which is at the heart of these proceedings, namely, what are the incapacities set out in section 160(4) which are invoked by section 173(a)? Clearly they are those identified as (a), (b) and (c) in sub-section 160(4), but does section 173(a) also invoke the final part of section 160(4), and, if so, what is the result where, after conviction, there is a successful appeal? Does the seat remain vacated or does the decision of the appellate court result in the seat, if still vacant, being automatically refilled? Section 174 provides for what may happen if there are proceedings both in an election court and in a criminal court. Any incapacity resulting from a report of an election court can be removed if there is an acquittal in a criminal court (see section 174(1)). If a person is subject to incapacity by virtue of a conviction or as a result of a report of an election court obtained by means of the evidence of someone subsequently convicted of perjury in respect of that evidence, then the person incapacitated can seek relief from the incapacity in the High Court (see section 174(5)).

Preferred Solution

The approach to the statute which Mr Sales for the applicant invites us to adopt is that when there is a conviction so that section 173(a) operates to make the candidate subject to the incapacities imposed by section 160(4), those words trigger the whole of section 160(4) so that for the time specified the candidate is incapable of being elected to and sitting in the House of Commons and, if already elected, the candidate shall (from the date of conviction) vacate the seat. But the vacation of the seat is, Mr Sales submits, merely machinery, a consequence of the incapacity to sit, which is itself a consequence of the conviction. If the conviction is overturned capacity to sit is restored and the seat, if not already filled, ceases to be vacant.

It is noteworthy that whereas the adverse report of an election court will, in many if not in all cases, render an election void (see section 159(1)), a conviction does not have that effect. That is probably because section 120(1) of the 1983 Act makes it clear that:

“no Parliamentary election and no return to Parliament shall be questioned except by a petition.”

But in any event the result is that, even after the defendant in these proceedings was convicted on 19 March 1999, her election on 1 May 1997 remained a valid election. If the defendant had been the subject of a report from an election court, not only would the election have been rendered void, but it would also have been incumbent upon the House of Commons to issue a writ for a new election (see section 144(7)). That obligation does not arise where there is a conviction but, as Mr Amlot QC for the defendant pointed out, the House of Commons can, whenever a vacancy occurs from any legal cause, order the issue of a writ for a new election (see *Erskine May*, 22nd edition 1997 at page 31). So, on any view, in the interval between the conviction and the hearing of the appeal that decision could have been taken.

Possible Alternatives

(A) Never any vacancy?

It is possible to contend that where section 173(a) refers to the incapacities imposed by section 160(4), it refers only to the incapacities listed at (a), (b) and (c), and to assert that the words “and if already elected to the House of Commons or holding such office shall from that date vacate the seat or office” are not invoked. Initially it was our understanding that Mr Amlot was inviting us to adopt that approach, but in the end his position seemed to be very similar to, if not identical with, the position adopted by Mr Sales. In any event there are, as Mr Sales has pointed out, at least three good reasons for not adopting the approach to which we have just referred. In the first place the words in section 160(4), which this approach would omit, begin with the word “and”, suggesting that what follows is part and parcel of the incapacities which have been identified. Secondly, if this approach be right, a convicted candidate could, subject to any decision of the House of Commons, simply refrain from sitting in the House of Commons for the rest of a Parliament, thereby disenfranchising his or her electors. Thirdly, this approach would in effect leave it to Parliament to decide what to do next. It is true that the passage in *Erskine May* to which we have already referred does suggest that the establishment of any legal disqualification for sitting does create a vacancy but, as Mr Sales points out, as long ago as 1883 Parliament made it clear in section 6(4) of the Corrupt and Illegal Practices Prevention Act that:

Any person so convicted of a corrupt practice in reference to an election shall also be incapable of being elected to and of sitting in the House of Commons during the seven years next after the date of his conviction, and if at that date he has been elected to the House of Commons his election shall be vacated from the time of such conviction.

The 1883 Act was consolidated in the Representation of the People Act 1949, which contained in sections 140 and 151 the words now to be found in sections 160 and 173 of the 1983 Act, but there is no indication in either of the two later statutes of any intention to change the approach adopted in 1883.

(B) Any Vacancy Is Permanent

The other possible approach to the wording of section 160(4) is that once a seat is vacated it requires an election to fill it. There are other sections in the 1983 Act where the words used are similar, but the context is such as to suggest that the vacation of the seat will persist (see section 139(3), section 153(1)(b), and perhaps also section 159(3)). However, in our judgment the context is critical and we derive no real assistance as to the true meaning of section 160(4) from the use of similar words in those other sections to which we have just referred.

Of somewhat greater significance in our judgment is the wording of the 1883 Act which provides that “his election shall be vacated”. Mr Sales in his guise as *amicus curiae* points out that if the effect of a conviction under the 1883 statute was to render the election null and void, and if all that happened thereafter was consolidation, then it would seem to follow that the effect is the same under the present legislation. On the other hand, as he points out, when the 1883 Act was passed there was no court of criminal appeal. An attempt could be made to set aside a criminal conviction by a writ of error or a case might be stated for the opinion of the Court of Crown Cases Reserved, but the chances of a decision being reversed on appeal were slender, so the statutory wording had little reason to take account of that possibility. Furthermore, the wording of the 1883 Act is not the same as, for example, section 159(1) of the 1983 Act, and the difference may be significant. In other words, it seems to us that in reality section 6(4) of the 1883 Act simply anticipates section 160(4) of the 1983 Act and does not necessarily render an election irrevocably void. It simply vacates the election of the candidate, something which may or may not be affected by later events. Mr Sales also drew our attention to other statutes dealing with disqualification. For example, the House of Commons Disqualification Act 1975 disqualifies certain office holders from being members of the House of Commons, and section 6(1) provides that:

(a) if any person disqualified...is elected...his election shall be void, and (b) if any person being a member of that House becomes disqualified...his seat shall be vacated.

That does not seem to us to advance the argument very much, which may be the reason why Mr Sales did not dwell on the 1975 Act when he was making his oral submissions. In reality it simply reproduces the problem we have to face. The Representation of the People Act 1981 prevents those serving substantial

sentences of imprisonment from being elected or continuing to serve as members of the House of Commons. Section 2 is in the same form as section 6(1) of the 1975 Act. It adds nothing to the argument. There was, it seems, some rather inconclusive debate in Parliament as to what would happen under the 1981 Act in the event of a successful appeal, but the exchanges are of no assistance to us. The next statute which we were invited to consider was the Bankruptcy Act 1883. The material sections in that statute so far as relevant read as follows:

32(1) Where a debtor is adjudged bankrupt he shall...be disqualified for:- ...

(b) Being elected to, or sitting or voting in, the House of Commons....

33(1) If a member of the House of Commons is adjudged bankrupt, and the disqualifications arising therefrom under this Act are not removed within six months...the court shall...certify the same to the Speaker...and thereupon the seat of the member shall be vacant.”

Mr Sales submits that section 33 creates an irreversible vacancy. In our judgment that is not necessarily the case. The wording of the statute simply replicates the issue we have to decide.

Finally we were asked to consider section 141 of the Mental Health Act 1983, which deals with the situation that arises when a Member of Parliament suffers from mental illness. Certain reports have to be obtained over a prescribed period. The Speaker then lays the reports before the House “and thereupon the seat of the member shall become vacant” (see section 141(6)). Here again Mr Sales submits that it is contemplated that such vacation is once and for all. No doubt that will be so in most cases, but what happens if the member suddenly recovers before a writ is issued? Maybe the vacancy continues because, unlike the situation which arises when there has been a successful appeal, those factors which caused the vacancy (i.e. the pre-existing illness and the steps taken to verify it) remain, but in any event we cannot regard the provisions of section 141 as being of any real value to us in this case.

Conclusion

In our judgment there are a number of powerful reasons for preferring what Mr Sales describes as his preferred solution. The first reason is that justice requires that when a conviction is set aside on appeal, all penalties imposed at the time of conviction should also, so far as possible, be set aside. It would require very clear statutory language to suggest otherwise and that is not to be found in section 160(4) or elsewhere in the 1983 Act. Where there is a conviction of the type with which we are concerned in this case, there is not only a need to do justice to the individual, but also to the electors she represents, and a need if

possible to avoid the trauma and expense of a fresh election if there is no justification for that course.

Secondly, the wording of section 160(4) lends itself to the solution Mr Sales prefers. The use of the word “and” helps to demonstrate that the final part of the sub-section simply sets out a consequence of the incapacity to sit which falls with the incapacity if it is set aside.

Thirdly, the existence of section 159(1), which renders the candidate’s election void and triggers section 144(7), is significant because it applies only when there is a decision of an election court. Fourthly, the preferred solution gives rise to no difficulty, even if a writ is issued before an appeal is heard. If there has been no return to the election writ, the successful appellant can simply resume his or her seat and a warrant of *supersedeas* can be issued to withdraw the writ. If there has been a return to the writ, then when the appeal succeeds there will be no vacant seat for the appellant to occupy, the appellant’s former seat having been properly filled by someone else. In the course of his helpful submissions Mr Sales took us through the situation which might arise if a member were convicted of corruption in relation to a seat other than his own. That exercise did not in our judgment cast any doubt upon the approach which we consider to be the correct one.

Accordingly we answered the question posed in the way indicated at the start of this judgment and we made the declaration sought. We were advised that no issue arises in relation to costs as they will be borne by the House.

In R v Musuota the accused, a serving member of Parliament and Cabinet Minister, was charged with a number of counts in relation to allegations that on the day that he resigned from government, he received and used a hired car arranged and paid for by another person. The accused was later appointed to the same ministerial portfolio in a new government presided over by a rival to the former Prime Minister. The accused raised several constitutional issues. Firstly, whether a prohibition on the receipt of gifts by political leaders violated the constitution as not being reasonably justifiable in a democratic society. Secondly, whether such a law discriminated against leaders and thus fell foul of the constitutional provision that a law should not be discriminatory. Thirdly, whether a criminal offence can be created in a constitution.

More generally, the case is significant in that the giving of gifts to and by political leaders is not uncommon in several Commonwealth countries and the court in Musuota takes a forthright stand in holding that it is not unjust to pass laws aimed at curbing excesses and discouraging the abuse of power and privileges.

The trial judge also makes some trenchant remarks about the need for counsel to adequately research such cases.

R v MUSUOTA

High Court of Solomon Islands

Lungole-Awich, J

28 - 31 October 1996, 14 March 1997

The facts are summarised above

For the prosecution F Mwanosalua, Director of Public Prosecutions

For the accused: A Radclyffe

Cases referred to in the judgment

Connelly v DPP [1964] 48 Cr App R 183

Haoma v Bartlett [1989] SILR 35

In Reference by Public Prosecutor - the Matter of Kedeu Uru, [1988-89] PNGLR 226

R v Braithwaite and R v Girdham [1983] 1 WLR 385

R v Francis Orodani 1996 CRC 39

R v Riebold and Another [1967] 1 WLR 674

LUNGOLE-AWICH, J:

Honourable Mr. John Musuota, the accused in this case, was a Cabinet Minister at the time of his trial. He was arraigned on an amended information which comprised 5

counts. When each of the counts was being read and explained to accused to plead to, his learned counsel, Mr. Andrew Radclyffe raised objection to the fourth count. That count charged the accused with an offence stated in these exact words:

"Acceptance of benefit contrary to Section 14(1)(c) of the Leadership Code (Further Provisions) Act".

The particulars stated:

"John Musuota on 4 October 1994, in Honiara, being a leader, misconducted himself when he accepted a benefit to writ, (*sic*) the use of hire car registration, No. A2438 from ROBERT GOH through GOH AND PARTNERS, as such benefit was not a memento via ceremony or a social occasion attended by the said JOHN MUSUOTA ".

Preliminary Objection

I understood, the objection raised to be based on two arguments which I put in my own words as follows:

1. that an enactment such as section 14(1)(c) of the Leadership Code (Further Provisions) Act, which prohibits all gifts whether large or small, such as are common practice especially on occasions such as Christmas, is unconstitutional because such omnibus prohibition is not reasonably justifiable in a democratic society.
2. that section 14(1)(c) of the Leadership Code (Further Provisions) Act, under which the offence is created, and accused stood charged, was an enactment which was discriminatory against a class of people, namely, leaders and therefore contrary or inconsistent with section 15(1) as read with 15(4) of the Constitution. As such, section 14(1)(c) of Leadership Code (Further Provisions) Act under which accused has been charged, must be held to be of no effect and the charge in count 4 be struck out.

Learned Director of Public Prosecutions, Francis Mwanasalua, opposed the objection and emphatically countered the two arguments.

Although learned counsel's objection is to be regarded as very important because it raised constitutional issues, counsel did not offer assisting authorities such as academic treatises, case laws or the principle of interpretation of statutes applicable. Such assistance is recommended; it is now very rare in this court. I need not remind counsel, especially the experienced ones that when they do not support their submissions with authorities, the court has to do research right from the start, with the inevitable result that judgment is delayed. I am grateful and thankful to the DPP for the case authority he cited. It might be helpful that when a constitutional issue is intended to be raised, the other counsel is advised so that he may look up the relevant authorities and be able to offer appropriate assistance. I reserved ruling on the issue because given the lack of authorities

that would assist court in deciding such an important point, I needed more time to ponder over them. I took into account that accused did not challenge the validity of the other four counts so he would be tried on them anyway. I now give the ruling.

Mr. Radclyffe referred to section 15(5)(g) of the Constitution in support of his argument that the wholesale prohibition of gifts, however small and whether during Christmas, was discriminatory and not reasonably justifiable in a democratic society. He was not correct in that. In fact sub-section (5) supports the contrary. The circumstances given in sub-subsection (a) to (g) of subsection (5) are exceptions to the general rule in section 15(1) which provides generally that a law should not be made that is discriminatory either of itself or in its effect. And subsection (g) in particular, provides the exception applicable to this case. It is an excuse to an apparent discriminatory law against categories of people mentioned therein . I set out sections 15(1) and 15(5)(g) here:

15(1) Subject to the provisions of subsections (5), (6) and (9) of this section, no law shall make any provision that is discriminatory either of itself or in its effect. ...

(5) Subsection (1) of this section shall not apply to any law so far as that law makes provision:

(a) to (f) ...

(g) Whereby persons of any such description as is mentioned in the preceding subsection may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society. (The underlining is mine).

A leader, such as a Cabinet Minister is a person who is accorded privilege and advantages because of his position. Taking into account his standing in society, particularly the power he may wield and the fact that advantage could easily be accorded to a minister by dishonest persons who have interest in matters within the minister's portfolio, it would not be unjust to pass laws that discriminate against a Cabinet Minister in so far as those laws tend towards curbing excesses of power and discouraging the situation that may give rise to favour unfairly or generally discouraging abuse of power and privilege. Special circumstances exist in the case of leaders such as Cabinet Ministers.

Indeed our law and the Common Law system abounds [with examples of] discrimination against or in favour of persons who are accorded privilege especially by reason of holding public office or suffering or being placed in a disadvantaged position. In most cases the discrimination on account of holding public office is for the public good; to enable the person to carry out his/her public

duties better. Even if we were to restrict our consideration to Criminal Law only, examples are many. I need not wander far afield. The offence of corruption is discriminatorily provided for. Under section 86 of the Penal Code, a person employed in the public service may be charged with the offence of official corruption, a more serious degree of offence of corruption punishable with up to seven years' imprisonment. On the other hand, one may be charged under section 367 as in this case, with the less serious degree of the offence of corruption, punishable with only up to two years imprisonment. Another example is the offence of theft: it is lawful to charge a public servant with theft by servant or agent or to charge a private agent with theft which carry more severe penalties than when a non-agent is charged with plain theft.

Looking at the provisions of the Constitution purely from a technical point, I can say confidently that the constitution certainly excluded or did not prohibit discrimination based on holding public office or on being disadvantaged. It would have been a serious oversight....

The operative word in section 15(1) (above) is, "discriminatory". The word has, however, been restricted in the definition given in subsection (4) so that different treatment, that is, discriminatory treatment which is not because of race, place of origin, political opinions, colour, creed and sex [is] not prohibited. I set out subsection (4) giving the definition:

(4) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, creed or sex whereby persons of one description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

In count No 4, Honourable Musuota is charged not because of his political opinion, rather because he is a leader and a leader who is said to have accepted, or to use the word of the subsection, been afforded the use of a hired car. Leadership is not one of the grounds enumerated in subsection (4), for which different treatment is prohibited discrimination. So count No 4 is not bad for being a charge under a law that is discriminatory and unconstitutional.

What I have said in the above paragraph disposes of counsel's objection, however, I shall add the following.

Mr. Radclyffe stretched the meaning of section 14(1)(c) of the Leadership Code (Further Provisions) Act too far. The section is certainly not meant to cover gifts which are honest personal tokens such as are offered and accepted on occasions or customarily in a particular society. In Solomon Islands there are examples. See the case of *Haomae v Bartlett* [1989] SILR 35 where the court treated certain gifts as customary. It is meant to cover dishonest gifts, however

small in value, although the little value in the gift may negate corrupt intent. The wrong being discouraged there is not based on the high or little monetary value; it is the dishonesty conveyed in the gift. Moreover, the gift or consideration need not be only of monetary value. Glanville Williams at page 884 of his book, *Textbook of Criminal Law*, (2nd edition), suggests sexual favour as consideration in corruption. The majority judgment in the Papua New Guinea case of *In Reference by Public Prosecutor - the matter of Kedeia Uru* [1988-89] PNGLR 226, is a useful persuasion on the point. The Papua New Guinea tribunal given the power to try Leadership Code cases, found that a leader, chairman of the National Broadcasting Board was not guilty of misconduct in office although he had received rental allowances of K350 per week, totalling K25,000 to which he was not entitled. He was found not guilty because he did not receive the rental allowance dishonestly. The officer had moved into [an] official house and applied to buy it, but it had not yet been offered to him to buy though it seemed certain that the offer would be made to him. He wrote to the authority concerned asking whether he was entitled to rental allowance. The authority authorised the payment of the allowance to him and payment of arrears allowance.

Charges on which Accused was Tried (Multiplicity)

So that brings me to the charges. The court has before it information laying five counts against the accused. The five counts named the offences in these exact words quoted:

Count 1 Corrupt practice contrary to section 367(a) of the Penal Code

Count 2 Use of office for personal benefit, contrary to section 8(1) of the Leadership Code (Further Provisions) Act

Count 3 Acceptance of bribery, contrary to section 13 of the Leadership Code (Further Provisions) Act.

Count 4 Acceptance of benefit, contrary to section 14(1)(c) of the Leadership Code (Further Provisions) Act

Count 5 Allowing his integrity to be called in question, contrary to Section 94(1)(c) of the Constitution as read with subsection 24(1) of the Leadership Code (Further Provisions) Act.

In each of the particulars of the five counts naming distinctly different offences, the one and the same overt act was stated to be the offence. It was that the accused, unlawfully accepted or received the use of a hired car, No A2438 from a Mr. Robert Goh. The differences were only about his position, but it was the same act of receiving the use of the one car No.A2438. The DPP, by charging the one overt act in five different counts is saying that the one act is technically five different offences so the accused, by the one act, committed crime five times; he is to be charged for the five times, and if convicted, to be punished five times. That legalism may be attractive to those of us who are trained in Law; what about to an ordinary, but intelligent person, and is it not desirable that

however technical an offence may be, it must be put to an accused in a way that he understands the charge against him? Does excessive multiplicity in counts not leave an accused lost in the maze? After all it is the accused's liberty that is in danger.

I raised the question, with the DPP as to whether he would insist on proceeding with the multiple counts all based on the one overt act. His response was that the DPP was authorised to decide to charge and prosecute for any charges he chooses. What I had in mind was not to question that constitutional authority of the DPP which must be all too obvious to any lawyer of the Common Law tradition. My inquiry was meant to find out whether the DPP had considered exercising his constitutional discretion to elect to proceed on only one or some of the counts since all the counts were based on one overt act. That is normal practice - see *R v Riebold and Another* [1967] 1 WLR 674 where the prosecutor elected to proceed only on a count of conspiracy and 28 other counts of larceny and obtaining by false pretence remained on the court file not to be proceeded with without leave of court. The 29 counts were based on the same overt acts. Of course the prosecutor, in deciding to have some counts stayed must be careful to consider that should it be necessary to return to seek leave to proceed with the counts stayed, circumstances do not exist in which it may be said that he will be merely seeking a retrial of the whole case. Indeed the prosecution could, on the same overt act charge one key count and one or two as alternative counts. The court, for its part, has to ensure that the multiplicity of counts will not amount to oppression or prejudice to the accused.

The power of the court to control proceedings before it includes ensuring that the accused understands the offence he is charged with before he is asked to plead and evidence is led. That necessarily requires the court to check for defects such as ambiguity, non-disclosure of offence, duplicity, wrong reference to statutes, lack of consent of DPP where required and any other impropriety in the charge before it. A useful list of circumstances in which a court may decline to put a charge to an accused would be something like this:

1. that the court has no jurisdiction to try the offence charged;
2. that a matter in bar such as a plea of *autrefois convict* or *autrefois acquit* is confirmed by the court;
3. that a defect in substance such as duplicity, non-disclosure of offence has been confirmed;
4. that a *nolle prosequi* is entered by the DPP; and
5. that the charge or charges amount to oppression or are prejudicial to the accused.

The judgments of the House of Lords in *Connelly v DPP* [1964] 48 Cr App R 183 and of Barry J in *R v Riebold* [1967] 1 WLR 679 explain some of the circumstances. The old rule that any other charge could not be joined in the same indictment with a charge of murder is now discarded. Of course great care

must be taken when deciding what amounts to oppression and prejudice. I would say that when there are multiplicity of counts, but counts that are technically accurate and yet the vast number and extent of the particulars may leave the accused lost in the maze, it is wise to order stay of some of the counts and allow one or a few to proceed. The prosecution can always apply for leave to reactivate the counts stayed.

In this case, it appeared to me at arraignment that it was unnecessary to charge the accused, on the one set of overt acts, with more than one offence, namely that of corrupt practice under section 367(a) of the Penal Code, with an alternative count under the Leadership Code (Further Provisions) Act or at most with a second offence, but only one other under that Act. That would seem to satisfy the desire to proceed under the Leadership Code (Further Provisions) Act. It would avoid the false appearance that accused did something wrong five times. Moreover, the offence of misconduct in office under the Leadership Code (Further Provisions) Act is punishable with a maximum sentence less severe than that for corrupt practice, an offence which not only leaders are chargeable with and for which the accused is already charged with in count No 1. On the other hand, it might sound less overwhelming numerically if counts 3, 4 and 5 were charged in the alternative. What has happened here is like presenting a list said to have names of six people on whereas in fact the five names are a surname, first or Christian name, nickname, pen name, stage name, and an alias of the one person. I decided to proceed to try the accused on all the 5 counts as main counts because the multiplicity of the counts did not seem to trouble the defence. Counsel for defence did not raise issue of oppression nor did he let the court know that it would cause prejudice in conducting defence.

Facts Admitted and Proved

The important facts admitted or proved are these. The accused, Mr. Musuota was on 25 July 1994, appointed a Cabinet Minister in Solomon Islands Government. He was responsible for Post and Communication. The government was headed by the then Honourable Prime Minister, Billy Hilly On 29 September 1994 the accused resigned from the position and on the same day received and used a hired car No.A2438 arranged and paid for on the instruction of a Mr. Robert Goh. The said Goh had earlier offered \$100,000, car and accommodation to Honourable Ezekiel Alebua who was a Cabinet Minister, if Alebua would resign from his cabinet position. Honourable Alebua honourably refused the offer and did not resign. Billy Hilly, resigned on 31 October 1994 and so his cabinet ceased to be. Accused's name was seen on a list to vote for Honourable Solomon Mamaloni for the position of Prime Minister. On 7 November 1994 a new Prime Minister, Solomon Mamaloni was elected by Parliament. On 10 November 1994 the accused was appointed a Cabinet Minister responsible for the same portfolio in the new government headed by Solomon Mamaloni. The government headed by Billy Hilly had a policy to discourage export of round logs, a policy which might have not been popular with those in the business. On these facts the prosecution has asked the court to convict the accused for each of the offences in the five counts.

Count No.1: Corrupt Practices

The charge is laid under section 367 of the Penal Code which reads:

367. If

(a) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do or for having done or forborne to do, any act in relation to his principal's affairs or business or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

(b) ...

(c) ...

he is guilty of a misdemeanour, and shall be liable to imprisonment for two years or to a fine of six hundred dollars.

Section 366 gives the meaning of the word "consideration" used in section 367, and states that a person who serves under the Crown is to be regarded as agent for the purpose of Part XXXVIII which includes section 367. I set out section 366 here.

366. (1) For the purpose of this Part, the expression "consideration" includes valuable consideration of any kind; the expression "agent" includes any person employed by or acting for another, and the expression "principal" includes an employer.

(2) A person serving under the Crown or under any Town Council or other local government council or other public body and a member of any such council or other public body, is an agent within the meaning of this Part

The full charge is as follows:

Count 1. Statement of Offence

Corrupt Practice, contrary to section 367 (a) of the Penal Code.

Particulars of Offence

JOHN MUSUOTA, between 1 September 1994 and 3 October 1994, in Honiara, being a person serving under the Crown, corruptly agreed to accept for himself a consideration, to wit, the use of hire case Reg. No.A2438 from **ROBERT GOH** through **GOH AND PARTNERS**, as an inducement or reward for forbearing or ceasing to carry on his duties and functions as a Minister, in relation to affairs or business of the Crown.

The accused was an agent of the Crown when he was a Cabinet Minister and remained so as a member of Parliament. I have found that accused accepted the use of a hired car from Goh: was it corruptly accepted, and if so was it a consideration as an inducement or reward for forbearing to do an act in relation to the affairs of his principal, the Crown? That Goh paid for the hire of car A2438 to benefit Musuota during the time he left the cabinet headed by Billy Hilly has been amply proved. That Musuota was

afforded that benefit because he had been a minister and resigned, was equally proved. What Goh did is reprehensible and in common parlance, political corruption. Is it corruption in terms of the law in section 367 of the Penal Code which requires that the benefit, in this case, the use of hired car, be a gift or consideration, for Musuota to forbear - omit to do any act in relation to the business of his principal, the Crown? The beneficial use of the hired car was a gift and indeed a consideration. It was the benefit of one side of a dishonest bargain in return for another dishonest side. The English cases of *R v Braithwaite* and *R v Girdham* [1983] 1 WLR 385 reported together, cited by the DPP are very useful guides in deciding what amounts to consideration. Both accused were public employees in England. In the first case the consideration was motor car tyres supplied and fitted free of charge. In the second the consideration was repairs of vehicles of the accused and of his wife free of charge. The cases were brought under a statute requiring that once a gift was received by a public officer from someone holding government contract the gift was presumed corrupt consideration and it was for the accused to prove otherwise. In my view, even without such a statutory presumption, proof of the gift being offered as corrupt consideration was accomplished. In this case the evidence shows that the use of the hired car was offered to persuade Musuota and other ministers to resign. It was an inducement for them to resign but certainly not to refuse to do a job which was waiting to be done or to do that office work in favour of Goh or any other person. The act that Musuota was to omit to do cannot be said to be an act in relation to the principal's business. Musuota quit completely the business of the Crown, his principal. He was not simply forbearing or omitting to do the principal's business. He terminated the whole relationship between him and his principal; he terminated the whole mandate. He removed himself from the post of a Cabinet Minister and so from the authority of the Crown, the principal, which relate to duties of a Cabinet Minister. Section 367 is not meant to cover that situation; it is meant to punish people who are, to use the common expression, "bought" in the performance of their duty so that they show favour in actioning the interest of the person who has offered the benefit, or so that those "bought" avoid taking action correctly, if that action affects adversely the interest of the person who has offered benefit. Suppose a civil servant, an employee of government is approached by a big company, asked to resign from his post and join the company; where he would be paid higher salary and given a vehicle to use. He resigns and the company lives up to its promise. Would he have committed the offence of Corrupt Practice under section 367? Not so. Suppose he was a Cabinet Minister who resigned to take up a private company job, should the answer be different?

The other aspect of the case is this. There is no proof to exclude the probability that Musuota heard that a minister who would resign and join the new political grouping would be given the benefit of the use of a hired car, and so he resigned. If so, is it illegal for someone who joins a political party knowing that if he abandoned his position elsewhere, the party would offer him the use of a car? If it is illegal, it certainly is not under section 367 of the Penal Code. It is certainly a dishonourable thing to do. What has happened here is deplorable. It is conduct that a righteous politician should be ashamed of. It is, however, not a crime under section 367 of the Penal Code. In some countries that we are used to taking examples from, such disgusting political conducts

have been made unlawful in comprehensive acts of parliament specifically dealing with political conduct. I sympathise with the DDP who, knowing that a conduct such as this one is immoral and, because there is no direct legislation about it, tries to bring it within the ambit of laws intended for other concerns. He is doing superb job, but the law at present does not help him. May be that is something for the DPP and the relevant authorities to consider. As far as the charge in count one is laid in 1994 and up to today, the accused cannot be convicted on those facts. He is found not guilty of the offence of corrupt practice contrary to section 367 of the Penal Code and acquitted on Count No. 1.

Count No.2: Misconduct in Office - Use of office for personal benefit

The particulars of the offence stated that on 14 October 1994 the accused who was a leader misconducted himself when he accepted the benefit of the use of hired car No.A2438. The charge was laid under section 8(1) of the Leadership Code (Further Provisions) Act, which provides as follows:

8(1) Any leader who directly or indirectly asks for or accepts, on behalf of himself or any associate of his, any benefit in relation to any action in the course of his official duties (whether such action has already been taken, is continuing or is to be taken in the future) or by reason of his official position, is guilty of misconduct in office.

The section requires that it be proved that the accused accepted the benefit. And must have been in relation to any action in the course of his official duty. In this case the duty of the accused were those in the portfolio of the Minister for Post and Communication. What is the action in the course of his duty of Post and Communication for which he accepted the benefit? Accused accepted the benefit either so that he resigns or upon resigning, and not in relation to action in the course of his official duty. That part of the offence has not been proved. Accused is found not guilty of the offence of Misconduct in Office (Use of Office for Personal Benefit) prohibited under section 8(1) of the Leadership Code (Further Provisions) Act. He is acquitted on count No 2.

Count No.3: Misconduct in Office (Acceptance of Bribe)

Section 13 of the Leadership Code (Further Provisions) Act under which accused is charged in Count No 3 reads:

13. Any leader who asks for, receives or obtains, or agrees or attempts to receive or obtain any property, benefit or favour of any kind for himself or any other person in consideration of his actions in carrying out his duties as a leader being influenced in any manner, or on account of having acted as a leader in any manner (whether generally or in a particular case), is guilty of misconduct in office.

To convict the accused, the section requires that there be proof that he was a leader who has received property, benefit or favour so that his action in carrying out his duty is influenced. Mr. Musuota was a minister and is still a member of Parliament so he was

and is still a leader as defined by section 2 of the Act in reference to section 93 of the Constitution. He received a benefit, also a favour, in the form of the use of the car hired by Mr. Goh. Was the favour a consideration? Yes, it was a dishonest bargain, but was it so that his action in carrying out his duty as a minister is influenced? Not so; it was so that he resigns his post altogether. His duties were things to do within the portfolio of Post and Communication. They were those things he was required to do when he held the position of minister and he could not refuse to do without violating or neglecting his duties. I have already said that resigning is quitting. It is not covered under section 13 of the Leadership Code (Further Provisions) Act. It will be a serious breach of liberty to require that persons do not resign from their position, especially in politics. Of course resigning because of being influenced by gift or benefit as it has been in this case is deplorable, but our law does not make it an offence yet. Accused is found not guilty of the offence of misconduct under section 13 of the Leadership Code (Further Provisions) Act. He is acquitted on count No 3.

Count No.4: Misconduct in Office (Acceptance of Gift or Benefit) contrary to section 14(1)(c)

It was alleged that John Musuota on 4 October 1994 when a leader, accepted a benefit, namely the use of a hired car from Robert Goh, in circumstances not exempted in subsection (2). Section 14(1) prohibiting accepting gifts and benefit states:

14(1) Any Leader who, or whose spouse or child under eighteen-

(a) ...

(b) ...

(c) accepts any gift or other benefit or advantage, from any person, company, corporation or incorporated association, is guilty of misconduct in office.

(2) Subsection (1) shall not apply to

(a) ...

(b) ...

(c) any gift not exceeding fifty dollars in value, or any other minor benefit or advantage, where such gift, benefit or advantage is clearly intended to be a memento of a ceremony or social occasion attended by the Leader or where such benefit or advantage falls within accepted standards of hospitality:

Provided that the provisions of this subsection shall not be construed as relieving a Leader from complying with the provisions of section 5 in relation to such loan, franchise or gift.

Was accused a leader? Yes, as defined by section 2 of the Act in reference to section 93 of the Constitution, a Cabinet Minister and member of parliament is a leader. Accused was both. Did he accept a gift or benefit? Yes, the use of a hired car from Robert Goh. Section 14(1)(c) of the Leadership Code (Further Provisions) Act does not require that the gift or benefit be a consideration for influencing duty, but in my view, it still requires that the leader must be shown to have acted dishonestly though not necessarily in the sense of it being a corrupt consideration, but that it is dishonest

because it appears improper or unbecoming of a leader. The section is a penal one so it must be restrictively interpreted by court. I have referred earlier to the case of *Kedea Uru* in which the accused was acquitted although he received rent allowances he was not entitled to. He was found not to have received it dishonestly. Although the case was a charge for allowing integrity to be called in question, the fact at issue was the same as in this case - that the accused received benefit. Dishonesty of course is decided based on the facts and circumstances, such as the value of the gift, the occasion, customary practice and openness. In this case there was dishonesty; there was graft. Accused obtained the benefit because of his status, his political position as minister and indeed as a member of Parliament. Those positions are positions of leadership. The prosecution has proved beyond reasonable doubt that accused, when a leader and a member of Parliament received the use of a hired car paid for by Mr. Goh, in dishonest circumstances. That is an offence under section 14(1)(c) of the Leadership Code (Further Provisions) Act. I find him guilty of that offence and convict him on count No.4.

Count No. 5: Allowing integrity to be called in question, contrary to section 94(1)(c) of the Constitution as read with section 24(1) of the Leadership Code (Further Provisions) Act

I set out here the sections:

94(1) A person to whom this Chapter applies has a duty to conduct himself in such a way, both in his public or official life and his private life, and in his associations with other persons, as not-

(a) ...

(b) ...

(c) to allow his integrity to be called into question; ...

(2) In particular, a person to whom this Chapter applies shall not use his office for personal gain or enter into any transaction or engage in any enterprise or activity that might be expected to give rise to doubt in the public mind as to whether he is carrying out or has carried out the duty imposed by the preceding subsection.

(3) It is the further duty of a person to whom this Chapter applies-

(a) to ensure, as far as is within his lawful power, that his spouse and children and any other persons for whom he is responsible, including nominees, trustees and agents, do not conduct themselves in a way that might be expected to give rise to doubt in the public mind as to his complying with his duties under this section; and

(b) if necessary, publicly to dissociate himself from any activity or enterprise of any of his associates, or of a person referred to in paragraph (a) of this subsection, that might be expected to give rise to such a doubt.

(4) A person to whom this Chapter applies who-

(a) is convicted of an offence in respect of his office or position or in relation to the performance of his functions or duties;

- (b) fails to carry out the obligations imposed by the preceding subsections of this section; or
- (c) commits any act or omission prescribed under section 95 of this Constitution is guilty of misconduct in office,
is guilty of misconduct in office.

The exact words of the charge in count No. 5 are these:

"Count 5: Statement of Offence

Allowing his integrity to be called in question, contrary to section 94(1)(c) of the Constitution as read with section 24(1) of the Leadership Code (Further Provisions) Act.

Particulars of Offence

JOHN MUSUOTA, between 4 October 1994 and 11 November 1994, in Honiara, being a member of parliament and person to whom section 93 of the constitution applies misconducted himself by allowing his integrity to be called in question, by resigning as the Minister for Posts and Communications in the NCP Government, being provided with the use of hire car Reg. No. A2438 by ROBERT GOH through GOH AND PARTNERS and being re-appointed as the Minister for Posts and Communications in the SINURP Government".

In an earlier case, *R v Francis Orodani* 1996 CRC 39, the question was raised as to whether an offence can be created by provisions in a constitution. It was unnecessary to answer the question to decide that case. The question arises again in count 5 wherein the accused has been charged under, "Section 94(1)(c) of the Constitution as read with section 24(1)" of the Leadership Code (Further Provisions) Act. I now answer it in this judgment. The latter citation merely provides for the penalty. It is section 94(1)(c) of the Constitution that states what is prohibited, that is what the offence would be. When that question was raised, no legal authorities were provided in support. It was not a submission based on detailed examination of principles. It was simply a submission based on a general impression of someone who has general knowledge of principles in Law. It was the kind of submission which has become all too common in this court.

It is well known that the province of Constitutional Law is the rules, conventions, practices and customs that provide for organs of government, regulate their relationship to one another, and to the people. A written constitution is a document that states, in general terms, the system of government chosen by a people, what they perceive as their purpose as a state, what their philosophy about rights of persons are and their assumptions about fundamental values. It is usually a political, cultural and social statement as well as statement of laws. The laws of the constitution are meant to be the fundamental guiding laws of a country. They are therefore the important general laws upon which detailed specific laws on particular subjects are based. See Chapter one of D. Hood Philip's *Constitutional and Administrative Law*, Seventh Edition, and Stanley De Smith and Rodney Brazier's *Constitutional and Administrative Law*, Sixth Edition chapter one.

From what I have said about the nature of constitutional law, one does not expect laws about details such as one creating a particular offence to be stated in a Constitution. That is generally the position. Is it therefore futile to state a particular law providing for an offence and even sentence in a constitution? Not so, and in the case of Solomon Islands I would give two reasons for that view. The first is that the Constitution of Solomon Islands, 1978, does not prohibit making such a law in the Constitution itself. The second reason is that it would be contrary to the principle of sovereignty of parliament. In Solomon Islands it is the Parliament that is the organ authorised to make laws for, "the peace order and good government in Solomon Islands". That is in Chapter VI, section 59 of the Constitution. Parliament may make any law its members desire, even the Constitution may be altered by Parliament, although more stringent requirements in procedure are to be followed. It may be bad practice to crowd a constitution with detailed laws, but that does not mean it is futile and courts should refuse to apply such detailed laws because they are found in a document usually reserved for the fundamentals. The Papua New Guinea case of *Kedea Uru I* cited earlier was, in fact, a case in which the charge was under sections 27(1)(c) and (5)(b) of the Constitution of Papua New Guinea. The present question was not raised but the tribunal proceeded on the basis that section 97 of their Constitution created an offence.

Section 14(1)(c) of the Constitution of Solomon Islands creates the offence of allowing integrity to be called into question but it leaves it very general, as one would expect of a Constitution. That is also the case with section 27 of the Papua New Guinea Constitution. It was envisaged in section 95 of our Constitution that detailed laws on leadership responsibility would be made in statutes providing further provisions. Unfortunately the Leadership Code (Further Provisions) Act has omitted to first state that allowing integrity to be called into question is an offence and secondly to state the details of what acts or omission or conducts amount to the offence of allowing integrity to be called into question. It may not be easy to enumerate all such acts and conducts but a guide would suffice; the acts or conducts could be enumerated or examples could be given from which the court could interpret *ejusdem generis*. As it is it is left to the court to decide what the public would view as amounting to calling integrity into question. It should be the public through Parliament to tell the court what the court should look for when deciding which acts or conducts will lead to the public questioning the integrity of a leader. The range of such acts or conducts is very wide. It is, for example, relatively easy for court to say that integrity of a member is called into question if a member of Parliament is paid by a foreign business company to introduce a bill in parliament that allows that company a monopoly in the particular business although that is not an offence. What about if a member of parliament cheers a foreign sports team in a contest against Solomon Islands' team? What about if the foreign team is a club team and not a national team in contest with a local club team which is a sports rival of the member of Parliament's personal club team in Solomon Islands? Would a decision not to marry, but have children with different women or men, be something that calls into question the integrity of a member of Parliament or any other leader? What about if the decision was not to marry but have a child or children with one woman or one man only? The borderline conduct does not produce instant answers for or against integrity and that is why I think there is need to define acts that are to be regarded as

giving rise to calling integrity into question. What I have said here also applies to the offence of a leader said to demean his office or position; the demeaning acts or conducts have not been enumerated nor are examples given.

In the instant case evidence has established that accused, a Cabinet Minister or a member of Parliament has accepted benefit upon resigning from one political party or grouping and when political confidence in the government of the grouping he has resigned from was diminishing fast. That is not a borderline case in questioning the uprightness or integrity of a leader. It is clear to everybody that his actions tended to be for selfish ends other than for leadership. At the time, the question as to whether the Honourable Billy Hilly, Prime Minister would maintain enough numbers of members of parliament and thus confidence was public matter of concern. Had it been a conduct of equally divided view as to its blameworthiness, I would have declined to find that it amounted to integrity being called in question. Statute has left the category of the conducts rather general and it is my view that because the statute is a penal one courts should interpret it restrictively in favour of minimising the number or range of conducts. In my view there has been proof beyond reasonable doubt that Honourable Musuota, a member of Parliament, a leader, allowed his integrity to be called into question. I find him guilty of the offence in sections 94(1)(c) of the Constitution as read with section 24(1) of the Leadership Code (Further Provisions) Act.

I must state clearly here that Honourable Musuota has not been convicted because he resigned as a minister or that he voted for a candidate other than one put forward by his political party or grouping. He has been convicted on counts 4 and 5 for what I may describe in common and simple language as, receiving the benefit of a hired car in circumstances that do not look good for a leader or a member of Parliament.

The issue of judicial corruption arises in the case of Zardari and Bhutto v The State. Here the validity of the conviction of a former Pakistan Prime Minister and her spouse on corruption charges was in issue. The Supreme Court of Pakistan undertakes an exhaustive examination of the circumstances in which the decision of the lower court was reached and in particular examines the meaning and scope of judicial “bias”. As the Court notes (in para.29), the evidence:

“not only goes a long way to suggest that Malik Muhammad Qayyum, J. [one of the two trial judges] had acquired a personal interest in the case by deriving an out of the way favour of the grant of diplomatic passports to him and his wife but also divulges a close liaison between the learned Judge, Senator Saifur Rehman and Mian Muhammad Nawaz Sharif, the then Prime Minister whose political rivalry with Ms. Benazir Bhutto appellant is a matter of common knowledge”.

The case also illustrates the danger of undue influence by a senior judge upon a fellow, more junior, judge. As the Supreme Court notes (in para.43)

“It appears from the record that Malik Muhammad Qayyum J. being the senior member of the Bench had exerted his influence on the second member S. Najamul Hassan Kazmi J. who being an unconfirmed Judge of the Lahore High Court was sweating for confirmation”.

Overall, the decision is a salutary reminder of the need for judges to observe the rules of natural justice and to maintain their independence and emphasises the importance of the Bangalore Principles of Judicial Conduct, noted earlier in the Bulletin.

Note: The Ehtesab (Accountability) Act assigns the responsibility of conducting an enquiry into corruption and corrupt practices to an Ehtesab (Accountability) Cell. This reports to the Chief Ehtesab (Accountability) Commissioner. A Reference against an accused is initiated by the Chief Ehtesab Commissioner.

ZARDARI AND BHUTTO v THE STATE

Supreme Court of Pakistan (Appellate Jurisdiction)

Mr. Justice Muhammad Bashir Jehangiri.; Mr. Justice Sh. Riaz Ahmad; Mr. Justice Munir A. Sheikh; Mr. Justice Nazim Hussain Siddiqui; Mr. Justice Iftikhar Muhammad Chaudhary; Mr. Justice Qazi Muhammad Farooq; Mr. Justice Abdul Hameed Dogar.

April 6th 2001

The facts appear in paragraph 6 of the judgment

Cases referred to:

Anwar and Another v The Crown PLD 1955 FC 185

Benazir Bhutto v. President of Pakistan and Another 1992 SCMR 140

Mohtarma Benazir Bhutto v. The State PLD 1999 SC 937

Mohtarma Benazir Bhutto, Leader of the Opposition, Bilawal House, Clifton, Karachi, and another v. The State through Chief Ehtesab Commissioner, Islamabad 1999 SCMR 759

Mohtarama Benazir Bhutto, M.N.A, and another v. The State PLD 2000 SC 795

Khairdi Khan v Crown PLD 1953 FC 223

Machia and 2 others v. The State PLD 1976 SC 695,

Metropolitan Properties Co. (F.G.C.), Ltd. v. Lannon and Others [1968] 3 All ER 304

R v Sussex Justices, ex p. McCarthy [1923] 1 KB 256

Shahadat Khan and another v Home Secretary to the Government of West Pakistan and others PLD 1969 SC 158

For the Appellants:

Raja Muhammad Anwar, Sr.ASC

Sardar Muhammad Latif Khosa, Sr. ASC

Mr. Aitzaz Ahsan, Sr.ASC

For the respondent/State:

Mr M Zahoorul Haq, ASC

Mr Ali Sabtain Fazli, ASC

Ch. Fazal-I-Hussain, AOR

For the Federation of Pakistan:

Attorney General of Pakistan

MUHAMMAD BASHIR JEHANGIRI, J. (gave the judgment of the Court)

1. This judgment will dispose of Criminal Appeals bearing No.102 and 127 of 1999, both of which are directed against the judgment dated 15th April, 1999 of a learned Division Bench of the Lahore High Court.

2. The appeals were heard by a larger Bench of seven Judges with effect from 26th February to 3rd April, 2001. The two appellants were tried by the learned Ehtesab Bench of Lahore High Court, Rawalpindi Bench, on its original side on receipt of Ehtesab Reference No. 30 of 1998 from the then learned Chief Ehtesab Commissioner filed under section 15(1) of the Ehtesab Act (IX of 1997) (hereinafter referred to as the Act) against as many as 12 accused including the two convict-appellants before us.

3. Facts of the case, according to the prosecution, are that by his letter dated 14th March, 1998 the Chief Ehtesab Commissioner made a Reference under section 15 of the Act to the Lahore High Court, Lahore. This Reference was registered as ER No.30/98. The learned Chief Justice of Lahore High Court constituted a Bench

comprising Malik Muhammad Qayyum and Syed Najam-ul-Hassan Kazmi, JJ. in terms of section 2(f) read with section 10 of the Act. The Reference comprised the letter referred to above and the interim report referred to in paragraph 13 thereof. The gist of the allegations as set out in the Reference were that Ms. Benazir Bhutto, ex-Prime Minister of Pakistan, Asif Ali Zardari, ex-Federal Minister/ Ms. Benazir Bhutto's spouse, appellants and A.R.Siddiqui, ex-Chairman, CBR by abusing their authority as holders of public office in collusion with each other and with M/s Societe General De Surveillance SA ("SGS") as well as Jens Schlegelmilch, and Directors of M/s. SGS awarded a contract for pre-shipment inspection to M/s SGS. This had allegedly been done for illegal gratification in the form of kickbacks and commissions resulting in loss to the public revenue. The Reference also set out the various dates on which various alleged events took place. It was supported by an interim report in the form of a Reference spreading over pages 1-257 which had been submitted by the Ehtesab Bureau to the Chief Ehtesab Commissioner under section 15(6) of the Act. The reference made by the Chief Ehtesab Commissioner alleged commission of offences of corruption and corrupt practices within the meanings of section 3 read with section 4(2) of the Act.

4. Having taken cognizance of the offences under the Act alleged to have been committed, the Bench finding that there were sufficient grounds for proceeding with the case, issued summonses to the persons named as the appellants in the Reference. It may be mentioned here that at a later stage, the Chief Ehtesab Commissioner also forwarded a supplementary Reference on 20th August, 1998, in which another person, Hans Fischer, was added as an accused.

Supplementary Reference.

5. According to Mr. Abdul Hafeez Pirzada, learned Sr.ASC for Asif Ali Zardari appellant, a Supplementary Reference under section 15(1) of the Act was "purportedly filed by the Chief Ehtesab Commissioner before the learned Ehtesab Bench, Lahore High Court, against the appellant on 20th August, 1998". In the said Reference the name of Hans Fischer, Vice President of SGS, was added as an accused person and it was alleged that as a result of a further probe in the on-going investigation, additional cogent material and documentary evidence had been collected against the accused persons, mostly through the Swiss authorities and certain documents were annexed thereto in which it was stated that at the request of the Government of Pakistan under the Protocol for Mutual Assistance in Criminal Matters, Judge Michelle, Canton of Geneva, ordered the seizure of the documents from the possession of SGS and Cotecna relating to the contract entered into with the Government of Pakistan and thereafter Judge Daniel Devaud *vide* order dated 24th June, 1998 ruled that the Islamic Republic of Pakistan be admitted as a damaged party. It was further alleged in the said Supplementary Reference that the judicial office of the Examining Magistrate in Switzerland after having inculpated the appellants, issued an International "Letter Rogatory" which was handed over to the Ehtesab Bureau, Government of Pakistan by the Swiss Embassy in Pakistan through the Ministry of Foreign Affairs for service on the appellants who refused to accept the same. It was also stated in the Supplementary Reference that "the documents received from the Swiss authorities further revealed that subsequent to the issuance of a letter dated 29th June, 1994 by Cotecna, whereby they had promised to

pay 6% of the receipts from the Government of Pakistan to Mariston Securities Inc, the name of Bomer Finance Inc was substituted on 24th May, 1995, thereby indicating that the said 6% would be paid to Bomer Finance Inc and not Mariston Securities Inc. It is further alleged that Jens Schlegelmilch, one of the accused, visited Pakistan and stayed as a guest of the then Prime Minister on various occasions which fact established his relationship with the then Prime Minister and Asif Ali Zardari.

Short Order

6. The short order dated 15th April, 1999 convicting the appellants is reproduced hereunder:-

The Chief Ehtesab Commissioner has referred to this Court under section 15(1) of the Ehtesab Act, 1997 the above Reference against Mohtarma Benazir Bhutto, former Prime Minister of Pakistan and a Member of the National Assembly and her husband Senator Asif Ali Zardari for trial under sections 3 and 4 of the Ehtesab Act, 1997. After summoning the accused, we framed the following charges against them:

Charges against Mohtarma Benazir Bhutto

“You as Prime Minister of Pakistan from 16.11.1993 to 5.11.1996 along with your spouse Asif Ali Zardari in exercise of your official functions and by abuse of your position as a holder of public office as defined in sub-para (ii) of section 2 of the Act, with the abetment, assistance and aid of other co-accused dishonestly and through corrupt and illegal means ordered the grant of a ‘pre-shipment inspection contract’ dated 29-9-1994 to M/s Societe Generale De Surveillance (SGS) in consideration of illegal gratification, pecuniary advantages, commission and kick-backs, earlier agreed upon which were paid by SGS and contained and received in Bank accounts of off-shore companies operated by Jens Schlegelmilch namely Bomer Finance Inc., Mariston Securities Inc. and Nassam Overseas Inc. of which you and your spouse and others are beneficiaries.

Your above acts constitute the offence of corruption and corrupt practices under section 3(1)(a), 3(1)(d) and 4(2) of the Act which is triable by this Court, we hereby direct that you be tried on the said charges.”

Charges Against Asif Ali Zardari Accused No.2

“You as a holder of public office as defined in sub-para (ii) of section 2 of the Act along with your spouse Ms.Benazir Bhutto in exercise of your official functions and by abuse of your position as a holder of public office, with the abetment, assistance and aid of others, dishonestly and through corrupt and illegal means secured the award of pre-shipment inspection contract dated 29.9.1994 for M/s Societe Generale De

Surveillance S.A, (SGS) in consideration of illegal gratification, pecuniary advantages, commission and kick-backs, earlier agreed upon which were paid by SGS and were obtained and received in bank accounts of off-shore companies operated by Jens Schlegelmilch, namely, Bomer Finance Inc., Mariaton Securities Inc. and Nassam Overseas Inc. of which you and your spouse and other are beneficiaries.

Your above acts constitute the offence of corruption and corrupt practices under section 3(1)(a), 3(1)(d) and 4(2) of the Act which is triable by us. We hereby direct that you be tried on the said charges”.

In order to prove its case, the prosecution examined 16 witnesses and also produced 385 documents which were duly exhibited. In defence the only witness examined by Mr. Asif Ali Zardari was Mr. Nawaz Hussain, Superintendent Landhi Jail, Karachi as DW.1. We have heard the learned counsel for the parties at great length. For detailed reasons to be recorded later, we have reached the following conclusion:-

i) That the evidence comprising of Pakistani documents, documents sent along with letter rogatory, as also documents sent by the Swiss Judge, Daniel Devaud, duly stamped and signed by him, are admissible in evidence being certified copies of public documents and have been duly proved;

ii) That the pre-shipment inspection contract in question was awarded to M/s SGS by the former Prime Minister, Mohtarma Benazir Bhutto alone and the so-called presentation [to] the Committee set up by her was merely an eyewash at the behest of and in abetment with Mr. Asif Ali Zardari;

iii) That the contract was awarded for the reason that M/s SGS had, on 11th March, 1994, promised to pay 6% (six percent) of the fee received by it to Bomer Finance Inc. Bomer Finance was a company wholly and beneficially owned by Mr. Asif Ali Zardari;

iv) That the payment of kickbacks was made in the account of Bomer Finance Inc. which it was maintaining with Union Bank of Switzerland, Geneva, which bears the account No. 552343. In addition to Mr. Asif Ali Zardari, Mohtarma Benazir Bhutto also had access to this account and she had paid £92,000 out of the aforesaid account as the price payable in respect of the necklace purchased by her for £117,000;

v) That this Court had validly appointed Mr. Moazzam Hayat, Registrar of this Court as a Commission in order to compare the certified copies procured in evidence by the prosecution with the documents in the

original record, collected by Judge Daniel Devaud and also to verify the authentication of certified copies;

vi) That the award of the contract resulted in the payment of US \$137,492 million by the Government to M/s SGS which has further claimed US\$13 million out of the above commission amounting to US\$4.3 million was paid by SGS to Mr. Asif Ali Zardari of which Mohtarma Benazir Bhutto was also a beneficiary;

vii) That the trial of the respondents is not hit by Article 12 of the Constitution which has no applicability to the facts of the case.

It follows from the above that the prosecution has proved its case against Mohtarma Benazir Bhutto and Senator Asif Ali Zardari beyond any reasonable shadow of doubt. They are, therefore, guilty of having committed corruption and corrupt practices within the meaning of section 3 (1)(a), section 3(1)(d) and section 4(2) of the Ehtesab Act, 1997.

Accordingly, Mohtarma Benazir Bhutto and Senator Asif Ali Zardari are convicted and sentenced to undergo 5 years imprisonment each and to pay a fine of US\$8.6 million or equivalent amount in the Pakistani currency. They are further disqualified under section 9 of the Ehtesab Act, 1997 from holding any public office. Their property shall also be confiscated.

Evidence

7. In this case the prosecution in order to bring home charges to the appellants placed reliance on [the evidence of a series of witnesses and documentary evidence]

8. Hassan Waseem Afzal (PW14) was appointed as Joint Secretary in Ehtesab Bureau on 9th April 1997 and was a member of the Ehtesab Bureau, Islamabad. During the course of his duty, various matters relating to corruption and corrupt practices came to his notice including matters relating to Ms. Benazir Bhutto, Asif Ali Zardari appellants and some of the bureaucrats and tax-evaders. According to him, the Ehtesab Reference in which the two appellants were involved was sent to the Chief Ehtesab Commissioner by the Ehtesab Bureau. He also coordinated and assisted the prosecution in the preparation of these cases particularly relating to the overseas aspect. In September, 1997, according to Hassan Waseem Afzal, the Attorney General for Pakistan had contacted Mr. Beat Frey, the Chief of Swiss Police, under international mutual legal assistance arrangements, seeking assistance relating to the detection of corruption and corrupt practices and in that process he had obtained certified copies of the documents from the Swiss Police. According to Hassan Waseem Afzal, the original documents were produced before another Ehtesab Bench (ER 26 of 1998) comprising of Ehsanul Haq Chaudhary and Raja Muhammad Khurshid, JJ. In

this process, the Attorney General for Pakistan, added Hassan Waseem Afzal as a witness [and] obtained attested copies of documents from his office. Hassan Waseem Afzal also stated that he appeared before the Ehtesab Bench comprising of Ishan ul Haq Chaudhary and Raja Muhammad Khurshid, JJ and submitted the documents to the Bench and then obtained copies thereof from the Lahore High Court and produced the same in this case as Ex.PW-14/1 to 152. He has also claimed to have visited Geneva as Coordinator of the affairs of the Ehtesab Bureau and met his lawyers in Geneva [and] that the Swiss Government had ordered the raids on the offices of Jens Schlegelmilch and Didier Plantim. According to him the same Judge had ordered the search of Offices of SGS and Cotecna and had summoned various bank managers, recorded their statements and took records into his possession. According to him while carrying on these proceedings, the Swiss Judge blocked the accounts of Ms. Benazir Bhutto and Asif Ali Zardari appellants and Ms. Nusrat Bhutto. Thereafter the said Judge pronounced indictment orders against the President of SGS Hens Fischer, President of Cotecna and then Jens Schlegelmilch, Asif Ali Zardari and Ms. Benazir Bhutto appellants. He produced these documents as Ex.PW-14/153 and 154. Hassan Waseem Afzal further stated that the Letter Rogatory was received through the diplomatic channel along with the documents Ex.P-14/155 to 319. According to him, during the coordination proceedings, he had learnt that 19 offshore companies had been established by the appellants. He further stated that he obtained the original documents which had been submitted in the Court of Ehtesab Bench comprising Ihsanul Haq Chaudhary and Raja Muhammad Khurshid, JJ and produced attested copies thereof as PW-14/320 to 338.

9. Mr. Abdul Hafeez Pirzada, learned Sr. ASC representing Asif Ali Zardari, *inter alia*, contended that the learned Ehtesab Bench while recording the impugned judgment was completely biased, was the victim of malice, misconduct and had failed to observe procedural propriety. The learned counsel also pleaded that we should take judicial notice under Articles 111 and 112 of the Qanun-e-Shahadat Order, 1984 of the press clipping dated 16th August, 1991 of the Daily "News" under the caption "PPP paving way for martial law" attributed to Mian Muhammad Nawaz Sharif, the then Prime Minister of Pakistan. The excerpt from the press clipping aforesaid reads as under:

"My blood boils when the name of PPP is mentioned to me and I feel like cutting it into pieces as this is the party responsible for the division of the country into two parts and now once again it is creating hurdles in the way of the country's progress and development."

10. Learned counsel went on to say that "Saliva that dripped from the mouth of the man was law".

Contentions on the Question of Bias Raised on Behalf of the Appellants.

11. The contentions of Mr. Abdul Hafeez Pirzada and Raja Muhammad Anwar, learned ASC for the appellants, primarily are as under:-

- a) That in Reference No. 26/1998 the learned Bench had ordered the freezing of all the assets, bank accounts and the properties of the two appellants situated inside and outside Pakistan, *vide* order dated 27th April, 1997. In this context, it was pointed out that Reference No. 26/98 appears to have been made over to the Bench headed by Malik Muhammad Qayyum J. temporarily for the sole purpose of securing the order of freezing of assets etc. and in lieu thereof diplomatic passports were granted to Malik Muhammad Qayyum J. and his wife, notwithstanding the serious objection raised by the Ministry of Foreign Affairs that the judges of the High Courts and the Supreme Court of Pakistan are not entitled to the grant of this category of passport. It was thus urged that the grant of diplomatic passports to Mr. Justice Malik Muhammad Qayyum and his wife was a favour and from that point of time onwards bias became evident on the part of Malik Muhammad Qayyum J.
- b) That on 28th September, 1998 the trial of the appellants from that of ten other co-accused was separated in order to use against the appellants the statement purportedly made by one of the co-accused, namely Jens Schlegelmilch, during the investigative process carried out in Geneva.
- c) That Reference No.30/98 was pending at the principal seat of the Lahore High Court from where it was transferred by the order of this Court dated 14th December, 1998 in the case reported as *Mohtarma Benazir Bhutto, Leader of the Opposition, Bilawal House, Clifton, Karachi, and another v. The State through Chief Ehtesab Commissioner, Islamabad* (1999 SCMR 759), to the Rawalpindi Bench where another Ehtesab Bench being seized of other Ehtesab References was available to hear this Reference also. Malik Muhammad Qayyum J. travelled all the way from Lahore to Rawalpindi which was described as the “chasing” of the above Reference filed against the appellants to achieve the desired result.
- d). That on 2nd April, 1999 this Court in the case of *Mohtarma Benazir Bhutto v. The State* (PLD 1999 SC 937 at page 989) authored by Irshad Hasan Khan, J. as his Lordship then was, held that “the controversy raised in these appeals, in substance revolves around the admissibility of the documents in dispute”. [He continued]

“Without expressing any opinion on the above controversial issues, we are of the view that for doing complete justice between the parties and to avoid protracted litigation, it would be expedient if the Ehtesab Bench, before consideration of and placing reliance upon the report of the Commissioner, shall provide adequate opportunity to the parties to raise any objection against the report including the question of admissibility of the documents in dispute which were sent to Switzerland through the Commission for the purpose of verifying the genuineness and authenticity of the said documents, before finally disposing of the Reference, without prejudice to any observation made in the impugned order or the leave granting order and in the light of the judgments rendered by this Court in *Mohtarma Benazir Bhutto v The State* (Criminal Appeals Nos. 62 and 63 of 1999) and *Mohtarma Benazir Bhutto v. The State* (Criminal Petition No.208/1998)”.

12. It was further emphasized in the case of *Mohtarma Benazir Bhutto* (above) that

“On conclusion of the defence evidence as aforesaid, the arguments on the main case as well as on the applications filed under section 265-K [Criminal Procedure Code] may be heard by the Hon Ehtesab Bench simultaneously. However, consideration of objections raised to the admissibility of documents by the appellants at the time of their production in evidence before the Court, [must] be attended to in precedence to other contentions in the case...”

In consequence of the non-compliance of the above direction the appellants were deprived of a substantial right of appeal recognized in law.

- e) That the learned Ehtesab Bench directed Dr.Z.Babar Awan, learned ASC for Ms. Benazir Bhutto appellant to record his statement on behalf of Ms. Benazir Bhutto appellant on 22nd February, 1999 which he was reluctantly constrained to comply with. Ms. Benazir Bhutto, however, later submitted her statement in writing but it was spurned and not made part of the record.
- f) That on the same day i.e. on 22nd April, 1998 the statement of Mr. Ali Sabtain Fazli, the learned Special Public Prosecutor, closing his side was dictated by the Bench giving up important witnesses including V.A. Jafri, Talat

Javed, Khalil Ahmad etc. and he was directed by the learned Bench to sign it, as owned by the learned Special Prosecutor himself in Court before us, with a view to conclude the trial at the earliest.

- g) That an application under section 476 Cr.P.C./195 PPC read with section 193 PPC was moved by Dr. Z. Babar Awan, learned counsel for Ms. Benazir Bhutto appellant for initiating action regarding fabrication of documents, wherein instead of requiring reply thereto and disposing it of, the learned Ehtesab Bench appointed Mr. Mozzam Hayat, the then Registrar, Lahore High Court, as Commission for ascertaining the authenticity of the Swiss documents and that too without notice to the appellants and without their participation in those proceedings at Geneva. The methodology was adopted to strengthen the case of the prosecution.
- h) That later, on 3rd September, 1998 Mr. Moazzam Hayat, the then Registrar, issued notice to Ms Benazir Bhutto and her counsel apprising them of his appointment as Commission to ascertain the authenticity of the aforesaid documents. It was further averred that on 5th March 1999, the appellants were not issued any notice for execution of the Commission to be carried out in the Chambers of Judge Daniel Davoud at Geneva. It was next urged that in this behalf an appeal was filed by the appellants in this Court on 4th March, 1999. This Court suspended the operation of the aforesaid order till 8th March, 1999. It appears that on 8th March, 1999 order of suspension passed by this Court was recalled and the Commission completed the proceedings on the following day without notifying the appellants and also without associating them with the process.
- i) That the appellants felt aggrieved of the order of the learned Ehtesab Bench closing the defence evidence of the appellants, and challenged it before this Court. This Court in the precedent of *Mohtarama Benazir Bhutto, M.N.A., and another v. The State* (PLD 2000 SC 795), *inter alia*, ordered that “the application dated 1-3-1999 filed by Ms. Benazir Bhutto and the application under Section 561-A Cr.P.C. filed by Asif Ali Zardari for summoning of witnesses or any other application for summoning of the witnesses filed by the two appellants which is pending on the record before the Ehtesab Bench may be taken up by the Hon Ehtesab Bench, after completion of the statement of Ms. Benazir

Bhutto under Section 340(2), Cr.P.C. either on 22-3-1999 or on such other date convenient to Court and will be disposed of in accordance with the law” but this order of the apex Court was completely ignored.

- j) That Mr. Abdul Hafeez Pirzada, learned Sr.ASC moved CrI. M. A. No. 64 of 2001 in Criminal Appeal No.102/98 under Order XXXIII rule 8 of the Supreme Court Rules, 1980 seeking a direction from this Court that “the audio tapes and their transcripts be made part of the Court record and/or pass such other order as it deem fit and proper in the circumstances of the case”. In this context pointed reference was made to the taped conversations between Senator Saifur Rehman and Malik Muhammad Qayyum J: “We will find some solution” “Find some short cut now to by pass things” “I am trying my best”.
- k) That the arguments of Mr. Ali Sabtain Fazli, learned Special Public Prosecutor were partly heard on 8th April, 1999 with the direction to him to complete his arguments on the following day at 10.30 a.m. On 9th April,1999 the learned Special Public Prosecutor concluded his arguments. The arguments of Dr. Z. Babar Awan were heard for one hour after 10.30 a.m. as it was Friday and, therefore, the case was adjourned to 12th April, 1999, on which date when Mr. Farooq H.Naek, learned ASC, who had replaced Dr. Z. Babar Awan as counsel for Ms. Benazir Bhutto, opened his arguments. He was, however, ordered by the learned Ehtesab Bench to complete his arguments by 10.30 a.m. on the same day. The grievance made by the learned counsel for the appellant was peremptorily rejected. At this stage, according to Mr. Abdul Hafeez Pirzada, he got up to intervene “as a friend of the Court and not as a counsel for the parties and stated that he had never experienced such an oppressive atmosphere in Court proceedings”. He urged the Court “for the sake of integrity of the Institution to give one more day to Mr. Farooq H. Naek, learned ASC to complete his submissions”. Consequently, the learned Ehtesab Bench reluctantly directed Mr. Farooq H. Naek, learned ASC, to conclude his arguments by 12.00 noon the following day. It was next submitted that Ms. Benazir Bhutto’s counsel concluded his arguments by 12.00 noon with the assurance by Malik Muhammad Qayyum J. that he was permitted to give full written submissions and that the learned Bench would hear him again if clarifications were needed.

- l) That on 14th April, 1998, the appellants' counsel had partly argued on his Application under Section 265-K Cr.P.C. Malik Muhammad Qayyum J., however, "made a personal request to Mr. Abdul Hafeez Pirzada, learned Sr.ASC, to finish his arguments 'tomorrow' since he was not well and needed to go abroad for 'treatment'". The learned counsel for the appellant in support of his submissions, referred to the following conversations which had been tape-recorded and transcript whereof had been made available along with CrI.M.A.64 of 2001.

Taped conversation between CJ Rashid Aziz Khan and Qayyum J.

"He is going to issue warrants for both of us"- Rashid Aziz CJ.

"I have already written the short order"- Qayyum J.

Conversation between Saifur Rehman and Qayyum, J.

"He (Nawaz) wants 101% confirmation"

"Give them full dose" Saifur Rehman

"After the interval at 11 a.m., even if they disagree we will not care". Qayyum J.

"So after half an hour we will come back and announce it"

"It will be 3 or 4 page judgment". Qayyum J.

Saifur Rehman "Today I have to fight with you".

Qayyum J "Why for what reason".

Saifur Rehman "You were supposed to do it today".

Qayyum J "It will be done in a day or so".

Saifur Rehman "What can I tell you".

Qayyum J "For your sake I had to beg his lawyer. I told him that I have to go abroad, I am not feeling well but I have to finish it first".

Saifur Rehman "Hoo"

Qayyum J "I have asked Pirzada to finish it for my sake and he has acceded to my request. Now tell me about me. Will he be happy with me. When it will be done this time. Mian Sahib will also be happy".

Saifur Rehman "You should have done it today".

Qayyum J "What does it matter in one or two days. Now it will be done gracefully which is very good. The people in Supreme Court are saying something, others are saying something".

Saifur Rehman "I will try to control and handle him".

Qayyum J "Handle him as you are my lawyer there".

Saifur Rehman "Yes I am and you don't know it only God knows".

Qayyum J. "No".

Saifur Rehman "I only fight for you".

Qayyum J "Tell me one thing".

Saifur Rehman "Yes"

Qayyum J "By the grace of God this will be done and then both of us will go to him and seek forgiveness".

- m) That on 17th March, 1999 Ms. Benazir Bhutto appellant moved Criminal Misc. Application No.40 of 1999 under Sections 556 and 561-A Cr.P.C. mentioning therein that the learned Bench headed by Malik Muhammad Qayyum J. should not hear the Reference as he was biased against her as is evident from his conduct noted above and further that his father late Malik Muhammad Akram J. was one of those Judges of this Court who had confirmed the death sentence awarded to her father the late Zulfiqar Ali Bhutto and that he would convict her also. The grievance made was that the learned Bench dismissed this application as well without hearing her counsel.
- n) That the short order was announced on 15th April, 1999, before providing an opportunity to the appellants to pursue their objections on the report of the Commission and conclusion of the arguments. The short order had been prepared on 14th April, 1999 and announced on 15th April, 1999. The learned Ehtesab Bench being conscious of the imbroglio corrected the date of announcement of the short order describing it as a typographical mistake. The short order was at variance with the detailed judgment inasmuch as the issue regarding the confiscation of the necklace did not figure in the former while in the latter it was made part thereof.
- o). That after the statement of Mr. Moazzam Hayat was recorded as a court witness, the incriminating parts of his statement as also his report were not put to the appellants by recording their further statements under Section 342 Cr.P.C. which was mandatory.

Contentions on the Question of Bias Raised on Behalf of the State.

13. In response to the above contentions, the learned Sr.ASCs for the State submitted –

- i) That the assets of the appellants were ordered to be frozen in Ehtesab Reference No. 26 of 1998, which was temporarily entrusted to the Ehtesab Bench headed by Malik Muhammad Qayyum J., and not in

Reference No.30 of 1998. Besides, before framing of charge in the titled Ehtesab Reference No.30, the appellants' counsel had categorically stated that their application for defreezing of assets had already become infructuous as their assets had been defrozen. It was however conceded by Mr. S.M. Zafar, Sr.ASC that the diplomatic passports were granted to Malik Muhammad Qayyum J. and his wife.

- ii) That in view of the law declared by this Court in *Shahadat Khan and another v Home Secretary to the Government of West Pakistan and others* (PLD 1969 SC 158) and *Machia and 2 others v. The State* (PLD 1976 SC 695), there was no compulsion on the Bench to try all the accused persons together of the same offences. The trial was separated on 28th September, 1998 and at the time of the framing of the charge on 5th October, 1998, there were only two accused persons facing trial. Hence the provisions of section 239 Cr.P.C. were not attracted. The remaining accused were not available and the learned Ehtesab Bench was required under the Act to complete the proceedings within a period of 60 days as per section 10 of the Act.
- iii) That the learned Ehtesab Bench having been constituted for this particular case by the order of the Chief Justice of Lahore High Court dated 3rd July, 1998 was bound to conduct the case at Rawalpindi. The appellants never raised any objection in this regard till March 1999. Moreover, the learned Chief Justice of Lahore High Court, *vide* notifications of different dates commencing from 10th December, 1998 to 8th April, 1999, ordered that two Judges i.e. Malik Muhammad Qayyum and Najmul Hassan Kazmi JJ. shall work at the Rawalpindi Bench from time to time, details whereof are mentioned in those notifications.
- iv) That it was evident from para 56 of the impugned judgment that in compliance with the order of this Court, the learned Ehtesab Bench had attended to the question of admissibility of documents first and given findings on the other questions involved thereafter.
- v) That the statement of Ms. Benazir Bhutto under section 342 Cr.P.C. was recorded through her counsel Dr. Z. Babar Awan who was authorised in this behalf on account of her exemption from personal appearance in the Court on acceptance of Crl. Misc. Application No. 18 of 1998. By virtue of her application dated 23rd February, 1999 Ms. Benazir Bhutto had not only accepted her statement recorded through Dr. Z.Babar Awan but also supplemented the same by her own statement in writing.
- vi) That Mr. Ali Sabtain Fazli, learned Special Public Prosecutor had closed the prosecution side of his own free will and accord.

- vii) That the Commission was appointed in order to set at rest the controversy raised by the learned counsel for Ms. Benazir Bhutto in an application moved under section 476 Cr.P.C. challenging the authenticity of the documents which were presented before the Ehtesab Bench. The arguments on the application were heard in presence of the learned counsel for the parties but the order was announced later on. The Commission was thus not appointed at the back of the appellants. In any case the appellants had brought the matter of appointment of Commission to this Court and were given ample opportunity to raise objections to the report of the Commission as well as to cross-examine Mr. Moazzam Hayat.
- viii) That the learned counsel for the appellants had the knowledge of appointment of the Commission throughout, therefore, non-issuance of notice of proceedings in the Chambers of Judge Daniel Devaud could not be blown out of proportion.
- ix) That the evidence of the appellants was closed on 15th March, 1999 after passing a detailed order that they had failed to produce either their witnesses or to get the summonses issued in their names in spite of three opportunities granted to them. In any case this Court had dealt with the matter in *Mohtarama Benazir Bhutto v The State* (above) and disposed it of in the terms that Ms. Benazir Bhutto will be afforded an opportunity to examine herself under section 340(2) Cr.P.C. as her own witness in the case on 22nd March, 1999, or on such other date convenient to the Court and allowed a fair opportunity to examine the witnesses in her defence within the bounds of law. The learned counsel for the appellants were provided ample opportunity to put forth their point of view and this fact was borne out by the findings recorded in the short as well as in the detailed orders.
- x) That the ground of bias set up by the appellants that the father of the learned Senior Judge was one of the Judges who had confirmed death sentence awarded to the father of Ms Benazir Bhutto was no ground at all for bias as in fact the appellant might have a bias against the learned senior member and his father.
- xi) That the short order was no doubt silent about the necklace but in the detailed order the confiscation of the necklace did figure with the explanation that the necklace was ordered to be forfeited in lieu of non-payment of the fine of U.S \$ 8.6 million.
- xii) That the short order was prepared and announced on 15th April, 1999, and the date initially mentioned therein was a typographical error pure and simple which was duly rectified.

- (xiii) That mere fact that a judge has dealt with another matter earlier in respect of a party to the legal proceedings before him or has given certain decisions against such a party upon interlocutory applications in the proceedings before him will not render him disqualified from hearing the case.
- (xiv) That bias in a judge is to be shown as a matter of fact and not merely as a matter of opinion....
- (xv) That “mere suspicion of bias even if it is not unreasonable is not sufficient to render a decision void. A real likelihood of bias must be established”. A mere apprehension in the mind of a litigant that he may not get justice, such as based on influence from circumstances is not sufficient.

14. In support of the last three submissions, reliance was placed on *Benazir Bhutto v. President of Pakistan and Another* (1992 SCMR 140).

15. Learned counsel for the State also referred to the distinction drawn between the case of bias of a judge of a subordinate court and that of a superior court inasmuch as in the latter case, the judges of the superior courts were held to have a “judicial conscience”.

16. Mr. Aziz A. Munshi, learned Attorney General for Pakistan defended the impugned order and also controverted the element of any bias of the learned senior member of the Bench on the grounds pressed into service by Mr. S.M. Zafar, learned Sr. ASC and additionally opposed CrI. Misc. Applications No.50 and 64 of 2001 by filing a detailed reply.

FINDINGS

17. Since the main plank of the case of the learned counsel for both the appellants is the ‘bias’ of Malik Muhammad Qayyum J. senior member of the Ehtesab Bench against the appellants, we have decided to examine it at the outset.

18. The foremost question is what is ‘bias’. Bias has been described in *Corpus Juris Secundum*, Volume X pp. 354 and 355 as under:

“**BIAS.** Primarily, a diagonal or slant, especially of a seam, cut, or line across a fabric; and so derivatively, a leaning of the mind; a mental predilection or prejudice; anything which turns a man to a particular course; a particular influential power which sways the judgment; a preconceived opinion; a sort of emotion constituting untrustworthy partiality; bent, inclination, prepossession, propension, or tendency, which sways the mind toward one opinion rather than another; propensity toward an object, not leaving the mind indifferent. ‘Bias’ has

been held synonymous with 'partiality' and strictly to be distinguished from 'prejudice'. Under particular circumstances, *the word has been described as a condition of mind; and has been held to refer, not to views entertained regarding a particular subject matter, but to the mental attitude or disposition toward a particular person, and to cover all varieties of personal hostility or prejudice against him.* (Emphasis provided).

Garner on Administrative Law, 4th edition at page 122 has also attempted to define bias as a disqualification and in such context observed as follows:

"Not only is a person affected by an administrative decision entitled to have his case heard by the agency seized with its determination, but he may also insist on his case being heard by a fair Judge, one free from bias. Bias in this context has usually meant that the adjudicator must have no financial interest in the matter under dispute, but it is not necessarily so limited, and allegations of bias have been upheld in circumstances where there was no question of any financial interest."

19. In this context, the following observations of Lord Denning M.R. in *Metropolitan Properties Co. (F.G.C.), Ltd. v. Lannon and Others* [1968] 3 All E.R. 304 would be relevant:-

"A man may be disqualified from sitting in a judicial capacity on one of two grounds. First, a 'direct pecuniary interest' in the subject-matter. Second, 'bias' in favour of one side against the other.

So far as 'pecuniary interest' is concerned, I agree with the Divisional Court that there is no evidence that Mr. John Lannon had any direct pecuniary interest in the suit. He had no interest in any of the flats in Oakwood Court. The only possible interest was his father's interest in having the rent of 55 Regency Lodge reduced. It was put in this way: if the committee reduced the rents of Oakwood Court, those rents would be used as 'comparable' for Regency Lodge, and might influence their being put lower than they otherwise would be. Even if we identify the son's interest with the father's, I think that this is too remote. It is neither direct nor certain. It is indirect and uncertain.

So far as bias is concerned, it was acknowledged that there was no actual bias on the part of Mr. Lannon, and no want of good faith. But it was said that there was, albeit unconscious, an area of likelihood of bias. This is a matter on which the law is not altogether clear; but I start with the oft-repeated saying of Lord Hewart, C.J., in *R v Sussex Justices, ex p. McCarthy*:

‘... it is not merely of some importance, but of fundamental importance, that justice should both be done and be manifestly seen to be done.’”

20. In our own context, the Code of Conduct framed by the Supreme Judicial Council under Article 128(4) of the erstwhile Constitution of Pakistan, 1962 for the Judges of the Supreme Court and the High Courts in Pakistan provides in Article IV as under:-

“A Judge must decline resolutely to act in a case involving his own interest, including those of persons whom he regards and treats as near relatives or close friends.

A Judge must refuse to deal with any case in which he has a connection with one party or its lawyer more than the other, or even with both parties and their lawyers.

To ensure that justice is not only done, but is also seen to be done, a Judge must avoid all possibility of his opinion or action in any case being swayed by any consideration of personal advantage, either direct or indirect”

21. In reaching the conclusion that Mr. John Lannon was biased Lord Denning employed the following terse phraseology:-

“It brings home this point; in considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he should, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand.

There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: ‘The judge was biased.’” (emphasis provided).

Applying these principles, I ask myself: Ought Mr. John Lannon to have sat? I think not. If he was himself a tenant in difference with his landlord about the rent of his flat, he clearly ought not to sit on a case against the selfsame landlord, also about the rent of a flat, albeit another flat. In this case he was not a tenant, but the son of a tenant; but that makes no difference. No reasonable man would draw any distinction between him and his father, seeing that he was living with him and assisting him with his case. Test it quite simply: if Mr. John Lannon were to have asked any of his friends: 'I have been asked to preside in a case about the rents charged by the Freshwater Group of Companies at Oakwood Court. But I am already assisting my father in his case against them, about the rent of his flat in Regency Lodge, where I am living with him. Do you think I can properly sit?' The answer of any of his good friends would surely have been: 'No, you should not sit. You are already acting, or as good as acting, against them. You should not, at the same time, sit in judgment on them'. No man can be an advocate for or against a party in one proceeding. Everyone would agree that judge, or a barrister or solicitor (when he sits ad hoc as a member of a tribunal) should not sit on a case to which a near relative or a close friend is a party. So, also, a barrister or solicitor should not sit on a case to which one of his clients is a party; nor on a case where he is already acting against one of the parties. Inevitably people would think he would be biased.

I hold, therefore, that Mr. John Lannon ought not to have sat on this rent assessment committee. The decision is violable on that account and should be avoided. Although we are differing from the Divisional Court, I would like to say that we have had a good deal more information than that court had. In particular, we have seen a letter of Jan 13, 1967, and other things not before them when they gave their ruling. Otherwise I would not have thought it right to interfere. *I would allow the appeal and remit the case to another rent assessment committee. Let it be heard again as soon as may be*" (emphasis provided).

22. The element of bias in a judge was considered by the Federal Court of Pakistan in the case of *Anwar and Another v The Crown* PLD 1955 FC 185. In that case, the Federal Court had the occasion to reconsider an earlier case of *Khairdi Khan v Crown* (PLD 1953 FC 223). In the former case, the case of *Khairdi Khan (supra)* was reconsidered by the Federal Court in which an appeal had been allowed because the High Court in its revisional jurisdiction had arrived at a definite finding of fact while ordering the retrial after setting aside an acquittal. In the latter case of *Khairdi Khan*, the late Abdul Rashid, C.J. inferred that the sessions judge who tried the case would

not be able to deliver an unbiased judgment for the reason of observations made by the High Court. But the late Muhammad Munir, C.J. disagreed with the judgment in *Khairdi Khan's* case and held as under:-

“We are, therefore, perfectly entitled to hold, as we do in this case after a full argument that the rule laid down in *Khairdi Khan's* case that bias vitiated all judgments and all orders made by a Judge are void is incorrect and should no longer form part of the law of Pakistan.”

23. Nonetheless the late Muhammad Munir, Chief Justice, was constrained to hold that the accused has a right of a fair trial by a judicial minded person, not functioning under an influence which might paralyse his judicial faculties as to result in the absence of a fair trial. The learned Chief Justice also held that bias may be caused by a judgment, order or observation of a superior Court or it may spring from personal, political, religious, communal, racial, commercial or economic considerations. The other conclusion recorded by the Chief Justice is that bias would vitiate judicial proceedings if such circumstances are created or brought about by the Judge as would rob him of the confidence that a litigant may have in the Judge. We can do no better than reproduce as under the observations of late Munir, CJ:-

“Thus no Judge can be a Judge in his own cause, or in a case in which he is personally interested, not because his decision must invariably be in his own favour but on the principle that justice must not only be done but see[n] to be done, and however right the Judge deciding a cause in his own favour may be, neither the public nor the aggrieved party will be satisfied with the adjudication, and its result will be vacated by the Court of Appeal at the instance of the dissatisfied party.”

24. It may be added at this juncture that the consideration of bias is a branch of the principles of natural justice. It is now agreed on all hands that there are certain broad principles of natural justice deducible from two Latin maxims firstly, *Nemo Debet Esse Judex in Propria Sua Causa* which formed the foundation of the doctrine firstly, that no one can be a judge in his own cause which in a wide application means that a judicial or quasi-judicial authority not only himself [must] not be a party but must also not be interested as a party in the subject-matter of the dispute which he has to decide and; the second principle is *Audi Alteram Partem* (hear the other side). Bias is said to be of three different kinds:

(a) A Judge may have a bias in the subject-matter which means that he is himself a party or has direct connection with the litigation, so as to constitute a legal interest. A ‘legal interest’ means that the Judge is ‘in such a position that a bias must be assumed’.

(b) A pecuniary interest in the cause, however, slight, will disqualify the Judge, even though it is not proved that the decision has in fact been

affected by reason of such interest. For this reason, where a person having such interest sits as one of the Judges the decision is vitiated.

(c) A Judge may have a personal bias towards a party owing to relationship and the like or he may be personally hostile to a party as a result of events happening either before or during the trial. Whenever there is any allegation of personal bias, the question which should be satisfied is: "Is there in the mind of the litigant a reasonable apprehension that he would not get a fair trial?" The test is whether there is a "real likelihood of prejudice", but it does not require certainty. "Real likelihood" is the apprehension of a reasonable man apprised of the facts and not the suspicion of fools or "capricious persons". (emphasis provided).

25. No doubt, the judges of the superior courts are blessed with a judicial conscience but the question nonetheless is whether a particular judge of the subordinate or the superior judiciary against whom the allegation of bias is alleged is possessed of judicial conscience. This litmus test is indeed very difficult but certainly not impossible. The circumstances of a particular case wherein bias of a judge is alleged would themselves speak volumes for the same. In other words, the principle is well settled that a judge of the Superior Court is a keeper of his own conscience and it is for him to decide to hear or not to hear a matter before him. However, in the present case we are not inclined to adhere to the said settled principle because bias is floating on the surface of the record.

26. Admittedly, the assets etc of the two appellants were frozen by the Bench headed by Malik Muhammad Qayyum, J. in Ehtesab Reference No. 26/1998 on 27th April, 1998. This fact also stands admitted that Ehtesab Reference No. 26/1998 was temporarily entrusted to the Bench headed by Malik Muhammad Qayyum, J. The undisputed material made available on the record makes it manifest that Malik Muhammad Qayyum, J. had already moved an application for the grant of a diplomatic passport for himself and his wife which had reached the Prime Minister Secretariat on the 17th April, 1998, along with the following summary:-

"SECRET

MINISTRY OF FOREIGN AFFAIRS

SUMMARY FOR THE PRIME MINISTER

Subject: Request for Issuance of Diplomatic Passports to Justice Malik Muhammad Qayyum, Judge Lahore High Court and his Wife.

1. The Ministry of Law has requested for grant of diplomatic passports to Justice Malik Muhammad Qayyum, Judge Lahore High Court and his wife.

2. According to the rules covering the issuance of diplomatic passports, Justice Malik Muhammad Qayyum and his wife are not entitled to hold a diplomatic passport. It may further be noted that Judges of the High Court and the Supreme Court are not entitled to the grant of diplomatic passports. If an exception is made in one case, other members of the Judiciary are likely to ask for similar privileges. This Ministry is, therefore, not in favour of making an exception in the case.
3. The Prime Minister's kind orders are nevertheless solicited on Justice Malik Muhammad Qayyum's request.
4. The Foreign Minister has seen and approved the Summary.

Sd/-
(Anwar Kemal)
Acting Foreign Secretary

Prime Minister's Secretariat (Mr. Tauqir Hassain, Additional Secretary (FA), Islamabad).
Ministry of Foreign Affairs U.O.No.S/FS/AD 56/98 dated 17-3-1998.

Prime Minister has been pleased to approve Para 1 above: grant of diplomatic passports to Mr. Justice Malik M. Qayyum, Judge, Lahore High Court and his wife.

Sd/-
Secretary, Foreign Affairs

30-041998"

27. It is noteworthy that on the same summary the following direction was given by Senator Saifur Rehman, who was then in charge of Ehtesab Cell, to one of his subordinate Officers:-

"Mr.Sami Khilji please have it delivered to Justice Qayyum"

Regards

Sd/-
Saif

28. The order with regard to the freezing of properties and assets etc. of the appellants was passed on 27th April, 1998 while on 30th April, 1998, the Prime Minister approved the grant of diplomatic passports to the learned Judge and his wife ignoring the formidable objection raised by the Ministry of Foreign Affairs. It was candidly conceded by the learned Attorney General for Pakistan that no Judge of the Superior Courts is entitled to grant of a diplomatic passport except the Chief Justice of Pakistan.

29. The unchallenged document in respect of the grant of diplomatic passports not only goes a long way to suggest that Malik Muhammad Qayyum, J. had acquired a personal interest in the case by deriving an out of the way favour of the grant of diplomatic passports to him and his wife but also divulges a close liaison between the learned Judge, Senator Saifur Rehman and Mian Muhammad Nawaz Sharif, the then Prime Minister whose political rivalry with Ms. Benazir Bhutto appellant is a matter of common knowledge.

30. There is yet another undisputed circumstance, highlighted by Mr. Abdul Hafeez Pirzada, from which inference of partiality of the learned Judge and liaison with the then Prime Minister Mian Muhammad Nawaz Sharif can be safely drawn. It is that Malik Parvez, real brother of Malik Muhammad Qayyum J., was a sitting Member National Assembly of PML (N) having been elected unopposed through a bye-election against a seat vacated by Mian Muhammad Nawaz Sharif.

31. The order of defreezing of the assets of the appellants passed by another Bench seized of Reference No.26 of 1998 was not produced before us. Be that as it may, the order appears to have aggravated and not diminished the personal interest of Malik Muhammad Qayyum J. in the case whose link with Mian Muhammad Nawaz Sharif, who was diametrically opposed to Ms. Benazir Bhutto appellant cannot be denied. This conclusion of ours gets complete support from the principle enunciated in para 22 of the judgment in the case of *Ms. Benazir Bhutto v. President of Pakistan* 1992 SCMR 140 that “*there seems to be judicial consensus that a Judge having pecuniary or proprietary interest or any other personal interest in the subject matter of a case before him cannot hear the case* (emphasis provided).

32. Initially Ehtesab Reference No. 30/1998 was pending at Lahore from where it was transferred by this Court on 14th December, 1998 to Rawalpindi Bench of Lahore High Court *vide* judgment in the case of *Mohtarma Benazir Bhutto supra* (1999 SCMR 759). At that time an Ehtesab Bench comprising Muhammad Nawaz Abbasi and Sheikh Amjad Ali, JJ. was already functioning and was seized of, *inter alia*, another Ehtesab Reference No.31/1998 pending decision against Ms. Benazir Bhutto. Notwithstanding the ratio of the judgment of *Mohtarma Benazir Bhutto supra* being that the Reference aforesaid be heard at Rawalpindi by the Ehtesab Bench functioning there, Malik Muhammad Qayyum, J. somehow or other managed to have the Reference heard by the Bench headed by him even at Rawalpindi. It would, therefore, be worth while to reproduce hereunder para 51 of the Short Order in the case of *Mohtarma Benazir Bhutto, supra*:-

“At present, two Ehtesab References are pending against the petitioners at Rawalpindi Bench of Lahore High Court (Ehtesab Reference 32 and 33/98) while five References against the petitioners are pending at principal seat of Lahore High Court (Reference Nos.26,27,29,30 and 31/98). As the petitioners, *inter alia*, have their residence in Islamabad, it is directed that References Nos. 26,27,29,30 and 31 of 1998 which are being heard at principal seat of Lahore High

Court, will henceforth be heard at the Rawalpindi Bench of Lahore High Court where two Ehtesab Reference are already pending against them.”

33. The judgment of this Court was mis-interpreted as if the Ehtesab Bench was ordered to be transferred to Rawalpindi Bench rather than the Reference itself.

34. It appears from the record that notifications were issued by the then learned Chief Justice Lahore High Court, from time to time to enable Malik Muhammad Qayyum, J. to visit Rawalpindi to hear Ehtesab Reference No.30/1998 and to be present on each and every date of hearing of the afore-noted Reference. It supports the contention of the learned counsel for the appellants that Reference No.30/1998 was virtually “chased” by Malik Muhammad Qayyum, J. and the exercise had caused substantial financial loss to the state exchequer. The “chase” thus given amply demonstrates the keen interest of Malik Muhammad Qayyum, J. to impose himself on the matter and take it to its end according to his pre-conceived notions.

35. In course of hearing of Reference by the learned Judges, the following circumstances stare into one’s eyes from which the inescapable deduction is an urge to proceed hastily to reach the foregone conclusion. First and foremost circumstance is the separation of trial of appellants from their other ten co-accused. No doubt the said course of action is permissible in law but that can only be done after complying with the requirements of law. Under Section 512 Cr.P.C. the trial can be bifurcated but before that it has to be adjudged that the other co-accused are avoiding to face the trial or their presence cannot be procured without any amount of delay. In the present case, the summonses were sent to Switzerland to the foreigner accused and the report received back revealed that a period of thirty days was required to effect the service. The learned Judges in haste did neither wait for the requisite period nor repeated the process and separated the trial. In this context there is nothing on the record to show the mode of service or issuance of the process against the co-accused of the appellants particularly when A.R. Siddiqui the then Chairman CBR and Khalil Ahmad, Chief Collector Customs were in Pakistan. Their attendance could, therefore, have been secured, but the learned Judges do not seem to have taken any step to procure their attendance. It seems that the only target for the trial was the person of the appellants. In our view the failure to procure attendance of the co-accused of the two appellants and the consequential orders were motivated.

36. The record reveals the glaring injustice meted out to Asif Ali Zardari appellant when the Court declined to grant him permission to recall certain witnesses for the purpose of cross-examination. The learned Judges proceeded to observe, *vide* order dated 22nd February, 1999, that since no prejudice had been caused as the defence of both the appellants was joint, therefore, there was no necessity to afford an opportunity to the appellant Asif Ali Zardari to cross-examine the said witnesses. It may be pointed out that because of freezing of assets and funds, the appellant Asif Ali Zardari had expressed his inability to engage a counsel of his choice to cross-examine those witnesses. Admittedly, Asif Ali Zardari appellant had not cross-examined PWs 1 to 5

and PW11 and the learned Judges had observed that if at a subsequent stage it was felt that some prejudice had been caused due to non-availability of a counsel for Asif Ali Zardari appellant, the Court would consider recalling the aforesaid witnesses for further cross-examination. Having observed so, the learned Judges declined to allow to Asif Ali Zardari appellant an opportunity to recall and cross-examine those witnesses. In our view, it was an invaluable right of Asif Ali Zardari appellant to recall and cross-examine those witnesses for ensuring a fair trial. Denial of such right had caused failure of justice and had prejudiced the appellants in their defence, besides reflecting bias.

37. The mode and manner in which the statement of Ms. Benazir Bhutto under section 342 Cr.P.C. was recorded leaves no doubt in our mind that the provision of section 342 Cr.P.C. was abused with a view to reach at a hasty conclusion. The underlying object of section 342 Cr.P.C. is to enable an accused to explain the incriminating circumstances in the prosecution evidence appearing against him. In our view, this is the most valuable right being a sacrosanct principle of natural justice. No doubt, the attendance of Ms. Benazir Bhutto appellant had been exempted but as she was available in Pakistan, it was incumbent upon the learned Judges to have summoned her for recording her statement. The features of the prosecution case also necessitated her examination in person. To our utter dismay the learned Judges opted not to do so and considering the compliance of the provisions of law sufficient by recording the statement of her counsel who according to the learned counsel for the appellants was not authorised to speak on her behalf. According to Ms Benazir Bhutto appellant, when she came to know that her statement under section 342 Cr.P.C had been got recorded through her counsel she at once made an application to supplement her statement under section 342 Cr.P.C. and made a supplementary statement in writing containing answers to all the questions put to her counsel and requested the Court to treat the statement in writing as her statement under section 342 Cr.P.C. but queerly enough her said statement was ignored. The circumstance is also a link in the bias.

38. In the course of trial, while the statement of Hassan Waseem Afzal (PW14) was being recorded, an application under section 476 Cr.P.C. was moved by the learned counsel of Ms. Benazir Bhutto appellant for taking action against the witness for producing allegedly fabricated documents. The learned Judges directed the prosecution to file reply which was done by Hassan Waseem Afzal in his personal capacity. The learned Judges, in post-haste appointed a Commission consisting of Mr. Moazzam Hayat, the then Registrar, Lahore High Court for proceeding to Switzerland to ascertain the genuineness and authenticity of those documents. This order was passed on 1st March, 1999, with the direction to the Commission to submit its report within ten days. The Commission issued notice to the learned counsel for Ms. Benazir Bhutto appellant to appear before him in Switzerland on 5th March, 1999. Imagine, how could a counsel or an accused appear in Switzerland in four days particularly when travel arrangements had to be made and a visa to be obtained. This order was challenged in this Court which suspended the order of appointment of Commission and proceedings before it. However, this order was vacated on 8th March, 1999 when Mr. Moazzam Hayat was already in Geneva. After vacation of the order without issuing a

fresh notice to the appellant, the Commission proceeded to execute the Commission. In this context, the exact grievance is reproduced hereunder:

“The matter came up for hearing on 1st March, 1999 and the learned Ehtesab Bench passed an order for production of defence evidence by the petitioner and adjourned the case [to] 8th March, 1999 for the purpose. During the proceedings of the case the Special Public Prosecutor pressed the plea taken in the written reply on behalf of Hassan Wasim Afzal, P.W.14, for issuance of commission to verify the genuineness and the authenticity of certified copies of documents tendered in evidence by the prosecution. It is alleged that no order was passed when the case was adjourned in presence of both the parties. At about 4.00 p.m. it was communicated by the Additional Registrar of the Lahore High Court at Rawalpindi to Mr. Farooq H. Neak, Advocate, on telephone, that the impugned order has been passed by the learned Ehtesab Bench and despite request, copy of the order was not provided.”

39. The manner of the appointment of the Commission and the Commission having proceeded to Geneva and the steps taken by it in Geneva shows a mysterious hidden hand behind it.

40. While challenging the appointment of Commission, the question of admissibility of the documents produced by Hassan Waseem Afzal (PW14) was agitated and leave was granted by this Court. At the time of disposal of the appeal, this Court passed the order in the case of *Mohtarama Benazir Bhutto v. The State* PLD 1999 SC 937 [i.e. to provide adequate opportunity to the parties to raise any objection against the report including the question of the admissibility of the disputed documents before disposing of the Reference]. We are sorry to observe that in flagrant disregard of the directions issued by this Court the learned Judges proceeded to decide the case in its entirety whereas learned Judges should have taken up the question of admissibility of documents first as ordained by this Court. The learned Judges, after receipt of the report of Commission, treated it as an incriminating circumstance but we have noticed that this important piece of allegedly incriminating evidence was not put to the accused.

41. Another intriguing circumstance consists of the statement of Mr. Ali Sabtain Fazali, learned Special Public Prosecutor. It was pointed out by the appellants that his statement was in fact recorded by the learned Ehtesab Bench itself giving up three very important prosecution witnesses including V.A. Jaferi, Javed Talat and Khalil Ahmad. Ostensibly it was done by the learned Judges with a view to delivering the judgment hastily and this statement was merely read over by the Court to the learned Special Public Prosecutor who admitted it to be correct. This strange procedure was *prima facie* adopted in order to hasten the proceedings and to reach the foregone conclusion.

42. We have considered all the above noted features of the case and we have also noted the fate of the application moved by the learned counsel for Asif Ali Zardari appellant under Section 265-K of Cr.P.C. The atmosphere must have been highly charged. It can also be imagined when on the intervention of the Court the proceedings were drastically cut short by the learned Judges; the defence evidence was restricted to the recording of the statement of a solitary defence witness, namely, Muhammad Nawaz, Superintendent Landhi Jail as DW1. Suddenly the Court rises, retires to the Chambers, re-appears after a while and the short order is handed down on 15th April, 1999 which appears to have been pre-authored bearing the date as 14th April, 1999, which was scored off and corrected.

43. At this stage, it will be pertinent to mention that the Ehtesab Bench which tried and convicted the appellants consisted of two learned Judges. It appears from the record that Malik Muhammad Qayyum J. being the senior member of the Bench had exerted his influence on the second member S. Najamul Hassan Kazmi J. who being an unconfirmed Judge of the Lahore High Court was sweating for confirmation. We have taken judicial notice of the relevant Notifications issued by the Government of Pakistan in the Ministry of Law, Justice, Human Rights and Parliamentary Affairs dated 27th May, 1997, 26th May, 1998 and 13th May, 1999 that the said learned member of the Bench was appointed as Additional Judge of the Lahore High Court for a period of one year but the tenure was extended for a further period of one year with effect from 28th May, 1998 and he was ultimately appointed as a permanent Judge on 13th May, 1999.

44. In support of this appeal an attempt was made at the bar that the learned Judges were not applying independent minds and had been pressurised and coaxed by the authorities in power to oust the appellants from the arena of politics by securing their disqualification to hold public office. On behalf of the appellants certain audio tapes and their transcripts were attempted to be brought on the record. It was argued that Mr. Khalid Anwar, the then Law Minister, Mr. Rashid Aziz Khan J., the then Chief Justice of Lahore High Court, Senator Saifur Rehman and Malik Muhammad Qayyum J. were clandestinely in league with each other to secure the conviction of the appellants at the behest of the then Prime Minister of Pakistan.

The other side took a categorical stance that the audio-tapes were fake and in any event were extraneous for the purpose of determination of the matter in controversy in the appeal.

45. There is no need to advert to the audio-tapes and their transcripts as there is sufficient material on record which substantiates the allegation of bias. We are convinced that the trial in this case was not fair and on account of bias of the Ehtesab Bench, highlighted in preceding paragraphs, the trial of appellants stands vitiated.

46. Resultantly, the titled appeals are accepted, convictions recorded against and the sentences awarded to the appellants are set aside and the case is remitted to the Court of competent jurisdiction for trial afresh in accordance with law. This disposes of the connected matters as well.

47. Before parting with the judgment we are inclined to dispose of plea of Mr. Abdul Hafeez Pirzada, learned Sr.ASC to the effect that Asif Ali Zardari, appellant had already served out the substantive sentence of imprisonment and, therefore, he is entitled to be released from jail. As we have already sent the case to a Court of competent jurisdiction, it would be more appropriate if this matter is agitated before the Court aforesaid.

The establishment of a Commission of Enquiry to consider the possible removal of the Commissioner of Police for alleged corruption is the background to two cases from Mauritius. In Dayal v President of the Republic and Others, the applicant sought leave for the judicial review of a decision by the President to establish the tribunal. Here the Supreme Court of Mauritius examines the scope of the constitutional power of the Head of State and the circumstances in which judicial review will lie against the President. The Court also makes some pointed comments concerning public comments made by the President on matters that were sub judice. The second case appears below.

DAYAL v PRESIDENT OF THE REPUBLIC and OTHERS

Supreme Court of Mauritius

Pillay CJ, Narayen J

2 February 1998

Cases referred to in the judgment

Gokulsingh v Hon Sir Anerood Jugnauth QC and Others 1995 MR 88

Leckning v Governor-General 1975 MR 134

Norton v Public Service Commission 1987 MR 108.

For the applicant: *Leung Shing QC and K Seethiah*

For respondent 2 and the co-respondents: *D .B Seetulsingh SC Solicitor-General*

For respondents 3-5: *Sir Marc David QC*

PILLAY, C.J.

This is an application seeking leave to apply for a judicial review of the decision of the second respondent to make a representation to the first respondent that the question of the removal of the applicant from the office of Commissioner of Police for alleged misbehaviour ought to be investigated and of the decision of the first respondent to set up a tribunal and suspend the applicant.

The first respondent was not represented in Court as no service could be effected on him, pursuant to section 30A of the Constitution, which reads as follows –

Privileges and immunities

- (1) Subject to section 64(5), no civil or criminal proceedings shall lie against the President or the Vice-President in respect of the performance by him of the functions of his office or in respect of any act done or purported to be done by him in the performance of those functions.
- (2) Subject to section 64(5), no process, warrant or summons shall be issued or executed against the President or the Vice-President during his term of office.

Learned counsel for the second respondent and the co-respondents took the preliminary point that, by virtue of section 30A of the Constitution, the decision taken by the first respondent is not amenable to judicial review and cannot be questioned by this Court.

After hearing the submissions of counsel in the light of a close examination of section 30A [of the Constitution], including its marginal note, and bearing in mind the principle stated by this Court in *Leckning v Governor-General* 1975 MR 134 at page 136, namely “that there is a presumption in favour of the availability of judicial review and that access to the courts can only be foreclosed, if expressly, by unambiguous positive language which shows conclusively the intention of the legislature”, we consider that the first respondent should be put out of cause for the following reasons –

- (a) civil proceedings include constitutional proceedings; that is why reference is made in section 30A itself to the only exception where the Supreme Court may enquire into an act done or purported to be done by the President under section 64(5) of the Constitution. Moreover, section 81(1) of the Constitution gives a right of appeal from final decisions of the Court of Appeal or the Supreme Court to the Privy Council as of right, *inter alia*, “in any civil proceedings on questions as to the interpretation of the Constitution”;
- (b) if civil proceedings include constitutional proceedings, as fairly conceded by learned counsel for the applicant himself, they must surely also include judicial review applications on questions as to the interpretation of the Constitution – *vide*, for instance, *Norton v Public Service Commission* 1987 MR 108.

It is significant that if the legislator had wanted to make an exception in the case of judicial review, he could easily have done so by inserting the following opening lines in section 30A “Subject to sections 64(5) and 119...”

Since this is not the case, we cannot import into section 30A under the guise of interpretation that which is deliberately omitted as we would be justifiably taxed with usurping the functions of the legislature, the more so as section 30A needs a weighted majority of three quarters of all the members of the Assembly to be amended – *vide Gokulsingh v Hon Sir Anerood Jugnauth QC and ors* 1995 MR 88.

Consequently, we hold that all the acts performed or purported to be performed by the first respondent in reaching his decision to set up the tribunal and suspend the applicant under section 93(4) and (5) of the Constitution are not reviewable by this Court since those acts had been performed or purported to be performed by the first respondent “in his own deliberate judgment.” The only sanction that can be taken against the first respondent for any violation of the Constitution is provided for in section 30 of the Constitution.

The position would be different, in our opinion, in the case of acts ostensibly performed by the first respondent under the Constitution or any other law but which are in reality performed by some other person or authority i.e. acts performed by the first respondent in accordance with the advice of some other person or authority where he is bound to comply with the advice given – *vide* section 64(1) of the Constitution.

Our reasoning is in line with another principle stated in *Leckning*, cited already, namely that “if a provision is amenable to two constructions, one permitting, the other barring judicial review, the former should be allowed to prevail”.

Our ruling that the first respondent enjoys immunity from civil proceedings (including judicial review proceedings) and criminal proceedings (including quasi-criminal proceedings such as contempt of court proceedings), does not mean that he is immune from legitimate criticism. With due respect to His Excellency the President, we venture to point out that he was ill-advised to have made comments in relation to a case which is sub judice and in which he is directly involved as a party (*vide* his interview in the issue of the “Week End” of 4 January 1998), the more so as he proclaims himself to be guardian of the Constitution.

As for the decision of the second respondent which is impugned on grounds of procedural impropriety, illegality and irrationality, we take the view that the submissions of learned counsel for the applicant have amply shown at this stage that his client has an arguable case. Consequently, leave is granted for a judicial review of the decision of the second respondent on those specific grounds.

In the second case, the applicant sought judicial review of the findings of the Commission of Enquiry that he had acted corruptly over a number of matters. It was argued on his behalf that the Commissioners had acted ultra vires and exceeded their mandate by investigating matters that were outside their terms of reference. The judgment of the Supreme Court of Mauritius provides a useful illustration of how a court should approach such issues and the appropriate order when the argument of the applicant is upheld.

DAYAL v YEUNG SIK YUEN AND OTHERS

Supreme Court of Mauritius

Pillay, C.J and Narayan, J.

16 October 2002

For applicant: Mr Attorney M. Conhyedoss
Mr A. Domingue

For respondents: State Attorney
Mr S. Boolell, Acting Assistant Solicitor General
Mr S. Jahangeer, State Counsel

The facts appear in the judgment.

PILLAY, C.J.: (giving the decision of the court)

The applicant is seeking a judicial review of the findings of the Commission of Enquiry comprising of the three respondents which was appointed by the President of the Republic in October 1997 on the following grounds:

(1) Error on the Face of the Record/ Ultra Vires / Illegality

(a) Unexplained Wealth

The respondents have acted *ultra vires* the terms of the Commission in that they have inquired into various matters which fall outside the terms of their commission, particularly by inquiring into the applicant's personal bank accounts, those of the members of his family; by investigating his real property, inheritance, motor vehicles, studies of his children, liquid funds, bank loans, agricultural produce and those of the members of his family, and by investigating the affairs of the Mauritusewar Nath Shiv

Jyothir Lingum Temple. The respondents have usurped powers under section 11(5) of, and the Fourth Schedule to the Commissions of Inquiry Act (the Act).

(b) Contracts which have not been awarded

The respondents have acted *ultra vires* the terms of the Commission by illegally enquiring into the following:- (i) The Lion Alcolmeter, (ii) the 20 generator sets and (iii) free meals.

(2) Procedural Impropriety/Procedural Flaw

(a) Breaches of sections 7, 13 & 14 of the Act

The respondents have throughout their inquiry and in their report pointedly made reference to certain specific contracts instead of inquiring fully faithfully and impartially into all contracts awarded from 1992 to 10 October 1997 in accordance with the instrument appointing them. They failed to call for and examine all contracts awarded by the Police Tender Committee for the period under reference. The respondents, however, called for 5 copies of all contracts from the Tender Board in which the Authority of the Tender Board or the Central Tender Board was sought. The report as a whole and particularly in Part I, Chapter 4, Sub-Chapter 2 PP 95 to 106 glaringly shows the respondents carry out the scrutiny and the practice and procedures resorted to by the Police from 1992 to 10 October 1997 (*sic.*).

The respondents have further acted in breach of sections 13 and 14 of the Act in that they have admitted documents in evidence without calling the makers of the said documents, without communicating copies of those documents to the applicant prior to his examination and cross-examination thereon; incriminating evidence was admitted by the respondents in the applicant's absence and that of his Counsel, without prior notice that such evidence would be given in breach of the applicant's fundamental right to the protection of the law and or his statutory right to be present and represented throughout the whole of the inquiry nor was the applicant informed of such right, as evidenced by copy of letter dated 19 January 1999 from the Secretary of the Commission.

(b) The Rule against Delegation/Breaches of sections 10 & 11 of the Act

The respondents have breached the aforesaid sections in that they have delegated their duties to State Law Officers and have further permitted at least one witness duly summoned by the Commission to be interviewed by one State Law Officer in his chambers at the State Law Office. One instance of the delegation of the respondents' duties appears at the

sittings of the Commission held on 29 October 1997 and 17 June 1998. The respondents professed *carte blanche* to the State Law Officer which is not in accord with the letter and spirit of the Act.

(c) Unfairness/Oppressive Treatment

The respondents have been in breach of section 7 of the Act when the applicant was cross-examined in a very hostile manner, particularly when he was sick and under medication and his treating doctor was unfairly and oppressively dealt with -- *vide* notes of proceedings of the sitting of 27 May 1998.

Further throughout the inquiry, the respondents have dealt with the applicant as though the latter was an accused party and, instead of adopting an inquisitorial procedure as is required by the Act, the respondents have wrongly adopted an adversarial procedure akin to a criminal trial.

(3) Sui Generis Intervention / Bias

The subject of the inquiry required the respondents to investigate into all contracts for the supply of goods awarded by the Police department, other Government departments, any ministry or parastatal body for the period under reference and to make full, faithful and impartial inquiry and report. However, the respondents have throughout their proceedings and their report brought a frontal and personal attack upon the applicant, thereby failing to protect the integrity of the process in complete disregard of the elementary principles of fairness and the use of the following expressions amongst others are revealing of their strong animosity and hostility which are apparent from the reading of the report. The following are some instances of expression of animosity: "*Hidden agenda, Holier Than Thou - page 11 of the respondents' Report ('the Report');*" "*manna falling from Line Barracks - page 40;*" "*CP'S spending spree on arms" - page 52;*" "*CP try to outsmart the commission of inquiry" - page 54;*" "*nonchalance" - page 56;*" "*procurement follies" - page 54;*" "*crack shot who can fire the WASP" - page 57;*" "*like Lucky Luke CP's reaction time must have been faster than that of his shadow" - page 82;*" "*OP seems to have acquired some gluttony for mechanical loaders" - page 144....*

(4) Irrationality / Perversity / Absurdity

On the face of the record it appears that the respondents have not objectively stated the facts nor drawn proper inferences from those facts. Their report further shows an absence of logical connections between the evidence and the ostensible reasons for the conclusions drawn nor is there any adequate justification for such conclusions and there is an absence of evidence in support of the conclusions.

(a) The Toyota Prados/Perversity

The above item is reported under Part 2 Chapter 6 (pages 226 to 228 of the Report) and the respondent's conclusion is perverse and is manifestly contrary to the evidence and their 'Quid Pro Quo' conclusion at pages 227 to 228 is absurd.

(b) Alleged over payment to GIAT

The above item is reported under Part 1 Chapter 2, Sub-Chapter 3(2) at PP 61 to 65 of the report. At page 65 Para 6.0 the respondents conclude that there "is seemingly an overpayment of some 21,000FF" which would have been made to GIAT. The respondents have accordingly advised that measures be taken to obtain a refund of that sum. In fact there has been no overpayment but a contractual down-payment of the order of 15000 FF and not 21,000 FF which has already been refunded.

(c) The Ramrachheya Connection/Cpl Vytheliquum/Police Mess Cook

The respondents at page 83 para. 7.0 of the report embarked on demystifying the applicant's connection with witness Ramrachheya by relying on the evidence of witness Cpl Vythelingum. However, in their assessment of the evidence on this particular issue, they did not consider the evidence of witness Unuth who clearly explained that the demonstration took place on 24 September 1997 which is in itself supported by documentary evidence placed before the respondents. The version of witness Vythelingum was thoroughly discredited when confronted with the record of the Passport and Immigration Office to the effect that Ravindra Kishore Sinha, an Indian National, was not in Mauritius on the day of the demonstration, on which date he had seen witness Ramrachheya attending a lunch in honour of Mr Sinha.

(d) The Offshore Patrol Vessel

The aforesaid vessel project which came into inception at a time where Mr Morvan was the Commissioner of Police. The procurement procedures were initiated under his authority, a technical committee was set up to look after technical matters and the applicant was not involved with it in any

manner whatsoever. The respondents should have called the then Commissioner of Police and the then Commanding Officer of the National Coast Guard (NCG) but they made gratuitous remarks *quoad* the applicant without any basis at all.

(e) All other Contracts/Failure to consider relevant matters

The respondents had a statutory duty to inquire into all aspects of contracts awarded for the period under reference i.e. for the six financial years; they had the additional duties to call all relevant responsible officers and examine them as to the manner the contracts were awarded prior to the applicant's assumption of duty as Commissioner of Police and to ascertain whether there had been any fundamental change in the Procurement Procedures. Having failed to carry out this particular statutory duty, their report which contains their findings, inferences and conclusions is tainted with partiality and irrationality. The respondents wrongly limited themselves to contracts which have been awarded as from 1995 onwards.

(f) Ramrachheva Group Sales to Other Public Institutions

The respondents dealt with the above matter for sales in excess of Rs 46.3 m and after having opined that the National Business Agency should have had the "*support and the ear of some one very high up at the Ministry*" at this material time so as to be able to win such highly valuable contracts without open bidding they refrained from pursuing the inquiry any further in order to identify that person - Page 115 of the Report. In spite of the fact that the inquiry revealed that Ramrachheya had supplied Rs 27.5m worth of blankets to the Ministry of Social Security without any open bidding on a single occasion, the respondents could not have found any disquieting features in the Ramrachheya tendering for supplies worth Rs 24.6m for period 1992 to 1997.

The respondents made a perverse finding of fact by reporting that many recommendations made by the Police for the awards of important contracts to Mr Ramrachheya worth tens of millions of rupees which did not materialise or were simply aborted and these deals included the Lion Alcolmeter project and the Automated Finger printing system which were not the subject matter of any recommendations for the award of such contracts by the Police -- pages 110 and 111 of the Report.

(g) Arms and Ammunition

This sensitive issue affecting national security was inquired into without the appropriate expertise and without calling for one Bhima then one time Commanding Officer of the SMF during whose tenure of office the 89mm

Rockets were procured in terms of their validity and use but the respondents pronounced that such rockets were museum pieces. This is another instance of their perverse finding. The Security Adviser too was not called and examined in other procurements of arms and ammunitions for the period under reference -- page 61 of the Report.

(h) Armoured Payloader/Ambulances

The respondents' remarks on the above were in the particular circumstances perverse as they again failed to call the relevant witness i.e. the then Security Adviser who sanctioned the procurement - pages 142 to 144 of the Report.

At the hearing, learned Counsel for the applicant only pressed ground (1) relating to *ultra vires* and the ground relating to the alleged overpayment to GIAT. We consider that his approach is to be commanded (*sic*) since, having thoroughly examined the evidence on record, in the light of the satisfactory explanations furnished in the affidavits put in on behalf of the respondents, we do not consider that there is any substance to the other grounds.

With regard to the alleged overpayment to GIAT, the respondents admittedly made a mistake as the proper sum overpaid was in fact 15,000 FF, but *not* "some 21,000FF" as written at para. 5.3 of page 65 of the Report.

We may now turn to the sole ground of the applicant relating to the fact that the respondents had no power, in the light of the terms of reference of the Commission of Inquiry (the Commission) in making findings with regard to (a) the Mauritusewar Nath Shiv Jyothir Lingum Temple (the Temple); (b) the Lion Alcolmeter; (c) the 20 Generator Sets; and (d) free meals.

The terms of reference of the Commission make it abundantly clear that the Commission was appointed to enquire into -

"(a) Contracts for the supply of goods, including the terms and conditions thereof awarded from 1992 to October 1997 with or without the approval of the Central Tender Board, by the Police Department and, in particular those awarded to —

- (i) the entity or person trading under the name of "National Business Agency";*
- (ii) Kala Niketan Industries Ltd. or any other entity under the name Kale Niketan;*
- (iii) Mr Sewprasad Ramrachheya;*
- (iv) Rubendranath Holdings Ltd; or*

- (v) *any other entity in which any of the above persons or entities has a pecuniary or other interest;*
- (b) *any contract including the terms and conditions thereof, awarded with or without the approval of the Central Tender Board to --*
- (i) *the entity or person trading under the name of “National Business Agency”*
 - (ii) *Kala Niketan Industries Ltd or any other entity trading under the name Kala Niketan;*
 - (iii) *Mr Sewprasad Ramrachheya;*
 - (iv) *Rubendranath Holdings Ltd; or*
 - (v) *any other entity in which any of the above persons or entities has a pecuniary or other interest, by any other Government Department, any Ministry or parastatal body;*
- (c) *the nature of the different bids made for the award of such contracts and the circumstances in which such bids were made;*
- (d) *the customs procedures and formalities followed for the clearance of any goods the subject matter of such contracts with particular reference to instances of such goods having been undervalued with intent to evade payment of duty, levy and taxes and to any departure from the procedures and formalities generally followed in relation to the clearance of goods;*
- (e) *any other matter connected with, or relevant or incidental to the matters set out above*

and to report thereon” (the underlining is ours).

It is clear, therefore, as rightly observed by learned Counsel for the applicant, that the terms of reference of the Commission deal essentially with contracts awarded to certain specified bodies, the nature of the bids made for the award of such contracts, the customs procedures and formalities followed for the clearance of any goods the subject matter of such contracts and to matters connected with or relevant or incidental to those contracts. Consequently, the respondents had acted *ultra vires* and exceeded their mandate by investigating into the affairs of the Temple and its connection with the applicant and the members of his family and their findings from pages 360 to 371 of the Report which deal essentially with the Temple were uncalled for and unwarranted. As the respondents themselves said in another context, the Commission must be guided by and contained, if not constrained, by its terms of reference.

It is to be noted that the respondents in their Report at page 358 stated that they “came to realise that our undertaking could bring us to inquire into a domain which might fall outside the scope of the contracts for the procurement of goods to the Police”. But unfortunately they ploughed on with their inquiry regardless in relation “to the source of some specific funds” on the erroneous ground that there were matters relevant to their terms of reference when they were plainly not, as indicated already.

Moreover, we take the view that the argument put forward by the respondents that they had probed into those funds “albeit on the general issue of the credibility of the evidence” of the applicant is untenable, given that there were so many other relevant matters on which the applicant’s credibility could have been, and was indeed, tested.

By the same token, we consider that the respondents had also exceeded their mandate, as again rightly submitted by learned Counsel for the applicant, in making findings (pages 160-164 of the Report) with respect to the 20 generator sets as it is clear from the evidence on record that the tender for the supply of such generators was never awarded since the Electrical Services Division stated that it was not in a position to submit any recommendations as the specifications were incomplete -- *vide* para. 8.0 at page 163 of the Report.

We now turn to the issue of the Lion Alcolmeter contract. There is evidence on record to the following effect —

- (a) the applicant held on 5 September 1997 a press brief and informed the press in the presence of the representative of the National Business Agency (NBA) that a Lion Alcolmeter SD-400 P had been commissioned and had been cleared by the experts of the FSL;
- (b) the approval of the Minister of Transport was given on the same day, pursuant to section 132A of the Road Traffic Act;
- (c) on 8 September 1997 the NBA informed the Lion Alcolmeter, UK supplier that “it was going to buy seven sets”;
- (d) on 4 November the NBA informed again its UK supplier that the “Police force have already opted to buy some of our equipment... therefore at this level just quote the price and left open the door for future business”;
- (e) on 19 November 1997 the Quarter Master of the Police stated that the applicant had decided to buy 6 Lion Alcolmeter sets at Rs 75,000 each so as to bring the total

- purchase price under Rs 500,000, thereby bypassing the Central Tender Board; and
- (f) subsequently, for reasons best known to itself, the NBA chose not to proceed with the contract.

It is clear from the evidence quoted above that there was a contract entered into between the Police Department and the NBA over the supply of 6 Lion alcoholmeter sets. Subsequently one party, namely the NBA, did not carry it through so that the contract was aborted. Consequently, we are of the view that the respondents were perfectly entitled to enquire into such a contract entered into between the Police Department and the NBA and make the appropriate findings thereon, pursuant to the terms of reference of the Commission.

With regard to the last item relating to free meals issued by the applicant to certain suppliers of goods, including Mr Ramrachheya, the respondents examined that item not as an instance of a contract being awarded or not but in order to check the veracity of the applicant's statement that he did not befriend suppliers of goods or did not know Mr S. Ramrachheya -- *vide* page 237, paragraphs 1.0 to 1.2 of the Report. We consider that the respondents were entitled to do this in the circumstances of the case, in line with the terms of reference of the Commission, especially paragraph (e) thereof.

However, we cannot help remarking that the respondents went again beyond their mandate by making in para 2.0 to 5.0 of the Report findings against the applicant in relation to free meals which were uncalled for and unwarranted, given the express terms of reference within which they had to carry out their investigation and to which we have already referred.

For the reasons given, we make a declaration that--

- (a) at page 65 of the Report, the words "*some 21,000FF*" shall be replaced by "*15,000FF*";
- (b) pages 360 - 371; pages 160 - 164; and para 2.0 to 5.0 of pages 237 - 239, of the Report should be disregarded.

The application is otherwise dismissed. Since the applicant has been partly successful, we make no order as to costs.

CRIMINAL LAW, EVIDENCE AND PROCEDURE

In Rockall, the applicant had been charged with several counts of conspiracy as well as substantive counts of corruption. The applicant then applied for permission from the Divisional Court to seek judicial review of the decision of the Attorney General to proceed with the conspiracy charges. This required the court to examine the relationship between a statutory conspiracy to corrupt and the substantive corruption offences. It held that they are entirely separate offences such that any presumptions attaching to the substantive corruption offence(s) do not apply to the conspiracy charge.

R v ATTORNEY GENERAL, EX PARTE ROCKALL

Queen's Bench Division, Crown Office List
Maurice Kay J

2 July 1999

Cases referred to in the judgment

Cuthbertson [1981] AC 470
McGowan [1990] Criminal Law Review 399
R v DPP, ex p Kebilene [1999] All ER (D) 360
Wellburn 69 Cr. App. R. 254
Williams (1991) 92 Cr. App. R. 158

For the Applicant: Mr Etherington, QC
For the Crown: Mr Perry, QC

MR JUSTICE MAURICE KAY:

The Applicant is one of a number of defendants awaiting trial in Northampton Crown Court on an indictment containing nine counts. At all material times the Applicant was the managing director of a group of companies. The case concerns alleged corrupt payments made by him and three of his colleagues to two civil servants in return for removing stolen fuel from Ministry of Defence sites. The Applicant is charged in counts 1, 4, 5, 8 and 9 of the indictment. Count 1 is set out as follows:

Statement of offence: conspiracy to make corrupt payments contrary to section 1(1) Criminal Law Act.

DENNIS CHARLES ROCKALL, BERNARD WAYMAN, GRAHAM CAMPBELL AND MELVIN SUTTON between the first day of January 1992 and the first day of December 1995 conspired together and with others corruptly to make payments to agents of the Ministry of Defence

as inducements or rewards in relation to the disposal of fuel contrary to Section 1 of the Prevention of Corruption Act 1906.”

Counts 4 and 5 are substantive counts of corruption contrary to Section 1 of the Prevention of Corruption Act 1906. Counts 8 and 9 are charged as conspiracies to steal.

Proceedings in the Northampton Crown Court have been underway for some time and, but for the matters before me, the trial would have commenced on the 14th June. The event which has precipitated the adjournment of the trial and the making of this application is the decision of the Divisional Court in *Ex parte Kebilene and Others*, 30 March 1999.

The offences charged in counts 1, 4 and 5 of the present indictment require the prosecution to obtain the consent of the Attorney General. Consents were signed in October 1997. In accordance with the relevant statutory requirements, there were separate consents in relation to the conspiracy count and the substantive counts. Before *Kebilene*, the intention of the Crown had been to proceed in relation to both the conspiracy count and the substantive counts of corruption and not to elect.

The substantive offence of corruption which the Applicant faces in counts 4 and 5 is defined in section 1(1) of the Prevention of Corruption Act 1906. So far as is material it reads as follows:

If any person corruptly gives or agrees to give or offers any -gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or for forbearing to show favour or disfavour to any person in relation to his principal's affairs or business ... he shall be guilty of a misdemeanour.

As is well known, perceived evidential difficulties resulted in Parliament easing the task of the Crown by section 2 of the Prevention of Corruption Act 1916 which is in the following terms:

Where in any proceedings against a person for an offence under the Prevention of Corruption Act 1906, or the Public Bodies Corrupt Practices 1889, it is proved that any money, gift, or other consideration has been paid or given to or received by a person in the employment of Her Majesty or any Government Department or public body by or from a person, or agent of a person, holding or seeking to obtain a contract from Her Majesty or any Government Department or public body, the money, gift, or consideration shall be deemed' to have been paid or

given or received corruptly as such inducement or reward as is mentioned in such act unless the contrary is proved

This introduced what is sometimes called a reverse burden of proof. In the light of *Kebilene*, the Applicant requested the Attorney General to reconsider his consents on the basis that section 2 of the 1916 Act is or may not be consistent with the right to a fair trial enshrined in Article 6 of the European Convention on Human Rights and that the Attorney General ought to approach the matter as the Divisional Court held the Director of Public Prosecutions ought to have considered the continuation of the prosecution in *Kebilene*, following the enactment of the Human Rights Act 1998 and in advance of its commencement date.

The response of the Attorney General is contained in a letter dated 10 June 1999. It is in the following terms:

“The Attorney General has, considered the request to withdraw the consent to prosecution in this case. He declines to do so

In your letter you cite the decision in *Ex parte Kebilene* as the basis upon which consent should be withdrawn. As you have been informed, that decision is the subject of an appeal and the statutory provisions considered in it are not, of course, identical to the presumption of corruption provided by section 2 of the Prevention of Corruption Act 1916. That said, it is accepted that there are grounds, in particular as set out in the Law Commission Paper ‘Legislating the Criminal Code: Corruption’ (published in 1998, after the consent to prosecution in this case had been given) for arguing that the presumption of corruption contravenes Article 6 of the ECHR. However it does not follow from this that the consent to prosecution must be withdrawn since, for the reasons set out below, it will be possible for there to be a trial which will adjudicate upon the substance of the alleged criminality of your client without the unfairness that is said to be the result of the operation of section 2.

In accordance with the *Practice Direction (Conspiracy)* 64 Cr. App. R. 258, the Prosecution will be required by the trial judge either to justify the joinder of the substantive counts and conspiracy counts in the indictment or to elect whether to proceed on one or other set of counts. It has been decided that the Prosecution will elect to proceed on the conspiracy counts alone. It is not considered that the presumption under section 2 of the Prevention of Corruption Act 1916 can arise in relation to the conspiracy counts.

As you are aware the presumption in section 2 of the 1916 Act applies in proceedings against a person for an offence under the Prevention of

Corruption Act 1906 or the Public Bodies Corrupt Practices Act 1889. Conspiracy to commit criminal offence (other than conspiracy to defraud) is an offence contrary to section 1 of the Criminal Law Act 1977. It follows that the conspiracy offences, not being proceedings for an offence under either the 1906 or 1889 Act, cannot give rise to the presumption which you say offends your clients Human Rights

It may be helpful if I make it clear that, in deciding to elect to proceed on the conspiracy counts only, the Prosecution is adopting an approach to the resolution of the issues raised in your letter which is intended to meet the concerns about the statutory presumption in the 1916 Act, and yet will ensure that the serious allegations of criminal conduct are adjudicated upon by a criminal court.”

On 14 June 1999 the matter was raised before the trial judge, His Honour Judge Crane, in Northampton Crown Court. The trial date was vacated to await the outcome of an application to this court which now comes before me as an application for permission to seek judicial review of the decision of the Attorney General. The Attorney General has been represented before me. His position is that I ought to refuse permission on the ground that the applicant does not have an arguable case. In the light of the stance of the Attorney General and the Crown in relation to counts 4 and 5, the main argument before me has centred on Count 1, the conspiracy count. At the commencement of the hearing I considered with Counsel whether the application should be adjourned until after the House of Lords has considered *Kebilene*, the appeal in which is due to be argued in two weeks time. However, we do not know when their Lordships will conclude matters, and quite apart from the desirability of progressing the present case, there are other cases awaiting trial in the near future the management of which may benefit from an early decision on this application in relation to corruption and conspiracy to corrupt. In these circumstances I decided not to adjourn. The submission made by Mr Perry on behalf of the Attorney General on the main issue can be encapsulated in this way: whatever may turn out to be the position in relation to counts 4 and 5 and the substantive offence, the *Kebilene* point cannot apply to count 1 because the reverse burden of proof provided in section 2 of the 1916 Act does not apply to a charge of conspiracy to corrupt, even though the corruption which is alleged is said to be in a form which amounts to a substantive offence under section 1 of the 1906 Act. The starting point of any consideration of this issue is the Criminal Law Act 1977, section 1(1) of which states:

Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either a) will necessarily amount to or involve the commission of any offence or any offences by one or more of the

parties to the agreement, or (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible, he is guilty of conspiracy to commit the offence or offences in question.

In *Cuthbertson* [1981] AC 470 the question was whether a common law conspiracy to contravene the provisions of section 4 of the Misuse of Drugs Act 1971 attracted the forfeiture provision contained in section 27 of that Act. The charge was conspiracy at common law because it had occurred prior to the commencement of the Criminal Law Act 1977. Lord Diplock (with whom Lords Edmund Davies, Russell of Kilowen, Keith of Kinkell and Scarman agreed) concluded “with considerable regret” (page 479G) that section 27 did not apply to conspiracy. He said (at pages 480G to 48213):

“As I have said the relevant offences in the instant case were conspiracies at common law to commit criminal offences. They were charged as continuous conspiracies over a period of years which terminated before Part 1 of the Criminal Law Act 1977 came into force. Had they been entered into or continued thereafter they would have been statutory conspiracies under section 1 of that Act; but this would not, in my view, have made any difference. The essence of the offence in this class of conspiracy, whether under the Criminal Law Act 1977 or at common law, is an agreement to pursue a course of conduct which if carried out, would amount to or involve the commission of a criminal offence by one or more of the parties to the agreement..... My Lords, with this, the legal nature of the offence of conspiracy, in mind, I turn to the language of section 27(1) of the Misuse of Drugs Act 1971. There are two reasons why, in my opinion, that section does not apply to cases where the relevant offence of which a person has been convicted is conspiracy to commit an offence under the Act; and this is so whether the conspiracy charge is laid as a statutory conspiracy under section 1 of the Criminal Law Act 1977, or was laid as a conspiracy at common law before that section came into force.

In the first place, to come within section 27(1) of the Misuse of Drugs Act 1971, the offence of which the accused has been convicted must be ‘an offence under this Act’. It is true that an agreement to produce or to supply a particular drug, which would be lawful if the Act had not been passed, is made unlawful by the Act where it relates to a controlled drug. So, it may be said, to enter into such an agreement is an offence which owes its criminal character to the Act and in this loose sense it is capable of falling within the description ‘an offence under this Act’ if that expression is given a very broad interpretation.

The fact that the section is a penal provision is in itself a reason for hesitating before ascribing to phrases used in it a meaning broader

than that which they would ordinarily bear; and, in the instant case, the whole structure of the Act in my opinion points conclusively in the opposite direction. Wherever an offence is created by the Act itself this is done expressly.... For each of the offences so created, express provision for its mode of trial and punishment is made by section 25 and Schedule 4. All the provisions of the Act which expressly create offences (apart from section 19) are listed seriatim in column I of that Schedule the one exception, section 19, is a section that provides expressly that it is an offence for a person to attempt to commit an offence under any other provision of the Act or to incite or attempt to incite another to do so. So the draftsman, where he intends to make even inchoate offences 'offences under this Act', does so expressly; he also makes express provision for their mode of trial and punishment....

My Lords, it is in my view clear from this that section 25 and Schedule 4 between them contain a comprehensive list of all offences, substantive or inchoate, which are included in the expression 'an offence under this Act' in section 27(1), and that in order to fall within the expression there must be found in the Act some express provision declaring and defining the offence. No such express provision is to be found in respect of conspiracy to contravene a provision of the Act"

I do not need to refer to the second reason why Lord Diplock reached his conclusion.

In *McGowan* 1990 Criminal Law Review 399 the Court of Appeal Criminal Division had to decide whether section 28 of the Misuse of Drugs Act applies to a statutory conspiracy to produce a controlled drug. Where section 28 applies, it provides a defence:

"for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged." (section 28(2))

That provision applies to "offences under any of the following provisions of this Act." The Court of Appeal Criminal Division decided, following *Cuthbertson*, that offences of conspiracy were not offences under the Misuse of Drugs Act for the purposes of section 28 because section 28 expressly listed the offences to which it applied and conspiracy was not one of them. The Crown had argued that a logical absurdity would be created if there were counts both of conspiracy and of the substantive offence being tried together with different burdens of proof but the Court considered that there was no ambiguity and the burden of proof remained throughout on the Crown where conspiracy was charged. In commenting on this case in the Criminal law review, Professor J C Smith said (page 400);

“A conspiracy to commit an offence is an offence under the Criminal Law Act 1977. The offence to be committed (‘the ulterior offence’) may be an offence at common law or an offence under another statute but the conspirator is convicted of the offence under section 1 of the 1977 Act. Section 3 of that Act begins: ‘a person may be guilty by virtue of section 1 above of conspiracy to commit any offence or offences the ulterior offence may be triable only summarily but the conspiracy to commit it is triable only on indictment. The ulterior offence may be one of strict liability, but, on a charge of conspiracy to commit it, *mens rea* must be proved as section 1(2) of the 1977 Act makes clear. Section 1(2) is inconsistent with any rule imposing an onus on the Defendant of proving that he was unaware of an element of the offence it is entirely clear then that the conspiracy is an offence separate and distinct from the ulterior offence. The ‘logical absurdity’ envisaged by the Crown is no different from the well-established rule that conspiracy to commit an offence of strict liability requires proof of *mens rea*. The offences under the Misuse of Drugs Act are offences of strict liability, subject to the defence provided by section 28.”

This view is developed further by Professor Smith in Smith and Hogan, *Criminal Law*, 8th edition, pages 285 to 286:

Section 1(2) of the Criminal Law Act which addresses the issue of *mens rea* in the context of a statutory conspiracy to commit a strict liability offence provides:

“Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence by virtue of sub-section (1) above unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.”

Mr Etherington QC for the Applicant submits that section 2 of the 1916 Act is a very different animal from the provisions of the Misuse of Drugs Act which were considered in *Cuthbertson* and *McGowan*. He says that section 2 of the 1916 Act is as general as section 28 of the Misuse of Drugs Act is specific. He argues that there is no comprehensive list of offences to which section 2 applies and the inference that the Act excludes conspiracy and was intended to is less easy to draw. What is more, the substantive offence under section 1(1) of the 1906 Act does not require proof that a Defendant intended the payment to be corrupt. The issue is whether, in view of the jury, it did in fact have that tendency. In support of this submission, Mr Etherington relies on

Wellburn 69 Cr. App. R. 254, where the Court of Appeal Criminal Division approved of the direction which the trial judge had given to the jury, i.e. that “corruptly” means “purposefully doing an act which the law forbids as tending to corrupt.”

My task at this stage of the proceedings is to decide whether the case for the Applicant is an arguable one, justifying a substantive hearing before a Divisional Court, or whether it is, as Mr Perry submits, unarguable. In my judgment Mr Perry is right. I accept that the answer must be sought in the text of the particular legislation in issue. What that requires here is, in the first place, an examination of the statutory provisions in respect of the offence charged, namely, conspiracy contrary to Section 1(1) of the Criminal Law Act 1977. I respectfully adopt the words of Professor Smith: “It is entirely clear that the conspiracy is an offence separate and distinct from the ulterior offence.”

It was and will continue to be open to the legislature to bring conspiracy to corrupt within the ambit of section 2 of the 1916 Act but it has not done so. Section 2 applies to “any proceedings against a person for an offence under the Prevention of Corruption Act 1906 or Public Bodies Corrupt Practices Act 1889...” falling within its express terms. As it happens, it is limited to cases where any money, gift or other consideration has been paid to or received by a person “in the employment of Her Majesty or any Government Department or public body”. It is therefore not applicable to agreements to give or offers which are offences under Section 1 of the 1906 Act, nor to cases where the recipient is in the private sector. Also, its ambit is limited to contracts, thereby excluding, for example, planning permissions. I readily accept that the 1916 Act is a less sophisticated product of a different legislative era than the Misuse of Drugs Act but, upon detailed examination of the Acts of 1906, 1916 and 1977, I am entirely satisfied that a statutory conspiracy to corrupt does not attract the presumption contained in Section 2 of the 1916 Act.

In the course of his submissions Mr Etherington advanced an argument based on the proposition that, in relation to this conspiracy to corrupt, no issue arises as to whether a Defendant had an intention to corrupt. This is the point which he sought to derive from *Wellburn*. I do not consider this argument to be correct. For one thing the Crown have to prove that the payment was given “as an inducement or reward” and even more significantly, for a Defendant to be convicted of a statutory conspiracy, it has to be proved that he agreed with another person that a course of conduct should be pursued which, “if the agreement is carried out in accordance with their intentions”, will necessarily amount to or involve the commission of an offence under section 1 of the 1906 Act. This also raises the point made by Professor Smith and aided by the reference to Section 1(2) of the 1977 Act, with which I have already expressed my agreement.

Finally I refer to a secondary matter referred to by Mr Etherington. For some inexplicable reason, the Applicant and others are charged in counts 8 and 9 with "Conspiracy to steal, contrary to Common Law". Mr Etherington submits, rightly, that no such offence exists, and that the charge ought to be a statutory conspiracy to commit an offence under section 1 of the Theft Act 1968. He seeks to take the point in this court because it is said, if all the counts of corruption and conspiracy to corrupt are flawed, on the *Kebilene* basis, the accused will be faced only with an indictment containing offences unknown to the law which would mean that there had been a defective committal, in effect a nullity in circumstances which could not know be retrieved by the trial judge granting leave to amend the indictment. It is for this reason that the Applicant is seeking relief not only in relation to the conspiracy count but also in relation the substantive accounts of corruption, even though the Crown have stated that they do not now intend to proceed on the substantive counts. In the event, my decision in relation to Count 1, the conspiracy count, has removed the ground upon which this argument was being advanced. However, it is appropriate that I should say that the argument was misconceived. Quite apart from the possibility of amendment by leave of the trial Judge as provided for in Section 5 of the Indictment Act 1915, as illustrated in relation to an offence assumed to be unknown to the law in *Williams* 1991 92 Cr. App. R. 158, any interference by this court on this aspect of the case would fall foul of section 29(3) of the Supreme Court Act 1981 concerning the jurisdiction of the Crown Court in matters relating to trial on indictment.

For all the reasons to which I have referred, this application for permission is refused.

In Chan Sze Ting, the applicants sought leave to appeal against the ruling of the Court of Appeal that section 13 of the Prevention of Bribery Ordinance overturned the privilege against self-incrimination in corruption cases. In refusing leave, the Court held that the Court of Appeal was "plainly right" to hold that the legislature clearly intended to abrogate the common law privilege. The Court also emphasises the need to provide investigative agencies with the necessary investigative tools in order to "combat corruption vigorously".

CHAN SZE TING and LEE CHIN MING v HONG KONG SPECIAL ADMINISTRATIVE REGION

Court of Final Appeal of the Hong Kong Special Administrative Region

Chief Justice Li, Mr Justice Litton PJ and Mr Justice Ching PJ

5 December 1997; 18 December 1997

Case referred:

Zeng Liang Xin v HKSAR, FAMC 1 of 1997

For the Applicants: Mr G J X McCoy SC and Mr P Y Lo

For the Respondents: Mr A A Bruce SC and Mr K Zervos

The facts appear in the judgment of Chief Justice Li

CHIEF JUSTICE LI: (giving the judgment of the Court)

This is the determination of the Appeal Committee upon an application for leave brought under section 32(2) of the Hong Kong Court of Final Appeal Ordinance, Cap. 484.

Section 13 of the Prevention of Bribery Ordinance ("the Ordinance")

This case concerns section 13 of the Ordinance. It is convenient to set out its material provisions at the outset.

Prior to its amendment by the Prevention of Bribery (Miscellaneous Provisions) Ordinance 1996 which came into effect on 18 July 1996, section 13(1) of the Ordinance provided:

"13. Special powers of investigation

(1) Where it appears to the Commissioner that an offence under this Ordinance may have been committed by any person, he may for the purposes of an investigation of such offence authorize in writing any

investigating officer to exercise the following powers on the production by him of the authorization -

- (a) to investigate and inspect any share account, purchase account, club account, subscription account, investment account, trust account, mutual or trust fund account, expense account, bank account or other account of whatsoever kind or description, any safe-deposit box, and any banker's books or company books, of or relating to any person named or otherwise identified in such authorization;
- (b) to require from any person the production of any accounts, books, documents, safe-deposit box or other article of or relating to any person named or otherwise identified in such authorization which may be required for the purpose of such investigation and the disclosure of all or any information relating thereto, and to take copies of such accounts, books or documents or of any relevant entry therein and photographs of any such box (including the contents thereof) or other article."

The Prevention of Bribery (Miscellaneous Provisions) Ordinance 1996 revised section 13(1) and introduced in section 13(1A) a judicial safeguard for suspects. We are only concerned with section 13(1) in the terms set out above prior to its amendment.

Section 13(3) of the Ordinance, which was not amended in 1996, provides:

" (3) Any person who, having been lawfully required under this section to disclose any information or to produce any accounts, books, documents, safe-deposit box or other article to an investigating officer authorised under subsection (1), shall, notwithstanding the provisions of any other law to the contrary save only the provisions of section 4 of the Inland Revenue Ordinance (Cap.112), comply with such requirement, and any such person who fails or neglects, without reasonable excuse, so to do, and any person who obstructs any such investigating officer in the execution of the authorisation given under subsection (1), shall be guilty of an offence and shall be liable on conviction to a fine of \$20,000 and to imprisonment for 1 year."

The Convictions

On 17 December 1996, the two applicants were convicted in the same trial by the magistrate on admitted facts of offences under section 13 of the Ordinance, They were fined. The particulars of each of the offences were that the applicant concerned on a specified day having been lawfully required by an investigating officer of the Independent Commission Against Corruption ("the ICAC") duly authorised under section 13(1) of the Ordinance

"... to provide information and produce documentation relating to a bank account operated by him with the Union Bank of Switzerland, failed or neglected, without reasonable excuse, so to do."

The Court of Appeal

The applicants appealed against conviction to a judge who transferred the appeal to the Court of Appeal for determination pursuant to section 118(1)(d) of the Magistrates Ordinance. On 4 September 1997 the Court of Appeal (The Hon Power V-P, Wong and Stuart-Moore JJ) dismissed the appeals and awarded costs to the prosecution. That Court refused to certify that a point of law of great and general importance was involved in the decision.

The Application to this Court

The applicants then applied to this Court to certify that a point of law of great and general importance is involved in the decision and to grant leave. In their application (both the motion and summons), the applicants did not specify the point of law said to be involved. In response to the Registrar's reminder, the applicants sought to set out the points of law in an amended summons and subsequently further points were sought to be introduced in a re-amended summons. Where applicants apply to the Appeal Committee for certification, it is important that the points of law said to be involved should be clearly set out in the application. Further, as was held by the Appeal Committee in *Zeng Liang Xin v HKSAR*, FAMC 1 of 1997, the Court of Appeal order declining to certify should set out the points of law said to be involved either in its recital or the substantive part. Here, the Court of Appeal order does not appear to have been drawn up.

The points of law said to be involved

The points of law said to be involved are set out in a number of paragraphs in the applicants' re-amended summons. As was accepted by Mr McCoy SC, who appeared for the applicants before us, in substance, only one point of law is said to be involved, namely:

Whether on a proper construction of section 13 of the Ordinance, the privilege against self-incrimination has been abrogated in relation to requirements for disclosure and production made thereunder.

The matters set out in the applicants' re-amended summons relate in effect to various argument on this point of construction.

Mr McCoy made clear the applicants' position that if the answer to this point is yes, that is, the privilege has been abrogated, no attack is made that the provision is invalid as having been repealed by the Hong Kong Bill of Rights Ordinance or otherwise. He relies on Article 11(2)(g) of the Bill of Rights Ordinance simply for the purpose of strengthening the common law presumption against interpreting a statute as abolishing the privilege.

Should the Court certify?

It is common ground that (a) there is a strong presumption against interpreting a statute as taking away the privilege against self-incrimination but (b) a statute can expressly or by necessary implication take away that privilege. The question is the proper construction of section 13 having regard to the strong presumption.

The Court of Appeal ruled that "any person" in section 13(1)(b) bears its ordinary meaning and includes a suspect; that a person entitled to claim the privilege would nevertheless be lawfully required under section 13(3) to disclose information and produce documents under section 13(1)(b); and that a claim to the privilege should not amount to a reasonable excuse in terms of section 13(3) for non-compliance. The Court of Appeal concluded that the Legislature clearly intended to abrogate the common law privilege. In so doing, it noted the background against which the Prevention of Bribery Ordinance was enacted and the ICAC established. Corruption was widespread and the community was determined to tackle this evil and was prepared to give to the ICAC the necessary investigative tools. We would note that the community is today as determined as ever in its resolve to combat corruption vigorously.

In our view, the Court of Appeal was plainly right. This intention appears clearly from the words "any person" which should be given their ordinary meaning without restricting them to persons other than suspects and the words "notwithstanding the provisions of any other law to the contrary" which should be construed to include the common law privilege. As the Court of Appeal was plainly right, no point of law arises for consideration.

Order

Accordingly, we refuse the application for a certificate and also for leave to appeal.

R v MUSUOTA

High Court of the Solomon Islands

The decision is set out above at page 19. The case also raises three interesting questions on criminal law and procedure.

Firstly, whether and, if so, when, it is appropriate to proceed with multiple counts all based on one overt act of corruption. Here the court sets out some useful guidelines on the issue and provides a useful checklist of circumstances in which a court may decline to put a charge to an accused.

Secondly, whether a criminal offence can be created in a constitution. This question arose because whilst the offence of "allowing integrity to be called into question" was included in the Constitution of the Solomon Islands, it was envisaged that detailed laws on the subject would be enacted. This had not been done. In answering the question in the affirmative, the court provides two basis reasons: the Constitution does not prohibit such a law in the document itself; and it would be contrary to the principle of parliamentary sovereignty to hold otherwise. Thirdly, the court examines the scope of the office of misconduct in office.

RESTRAINING PROCEEDS OF CRIME

A key strategy for tackling corruption is putting in place mechanisms designed to ensure that those involved in corrupt practices (and their families) do not derive any financial benefit from their unlawful actions as their assets will be traced, frozen and confiscated no matter where in the world they seek to deposit them. This is potentially an invaluable deterrent in that it hits where it hurts most: in their pocket.

"Proceeds of crime" legislation is designed to give a state the power to freeze property believed to be the proceeds of crime and then to confiscate it. What constitutes "proceeds of crime" in any particular jurisdiction will depend on how the term is defined. The underlying crimes are known as the "predicate offences".

Because much of the initial proceeds of crime legislation was enacted historically to implement the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, many jurisdictions began with legislation relating only to proceeds of drug offences. However, there is a growing trend, recognised and encouraged in international fora such as the Financial Action Task Force, to extend offences to which proceeds of crime legislation applies to all serious crime. In addition, the recent United Nations Convention on Transnational Organised Crime contains a provision that requires states parties to extend the predicate offences for money laundering and asset forfeiture to all serious crime. Corruption offences clearly fall within this category.

With the application of modern technology, monies and other assets can be moved around the world or hidden easily and with great speed. In a proceeds of crime investigation and prosecution, it can be critically important therefore to prevent the movement or disposal of assets pending the outcome of the prosecution and confiscation proceedings.

In most countries, the tool employed for this purpose is a restraining or freezing order. Here an application is made to a court for an order to prevent the movement or disposition of assets. While such orders may be described differently in different regimes, the underlying principle of them is the same.

The nature of the orders may also vary. In the UK and those jurisdictions following that model, the restraint order is "in personam" in that it restrains persons - the defendant and third parties - from dealing with the relevant property. In Australia and jurisdictions with that model, the order is directed to the property such that it will be specifically restrained by the order preventing anyone from dealing with it.

The details of the procedures for obtaining a restraint order or, in the case of civil confiscation or recovery, interim receiving, administration or preservation orders, will

of course flow from the particular legislation. Generally though an application will be brought to a court for the order. In most jurisdictions, this will be done through the filing of an application or motion to the court, along with supporting material such as an affidavit from a police officer or a prosecutor's statement.

Critically, most legislation provides that such an application will be made ex parte. This because of the danger that otherwise the assets will be removed from the jurisdiction before the freezing order can be made.

Yet such action raises important constitutional issues. Some of these are addressed by the Constitutional Court of South Africa in the next case. Here the making of an ex parte "preservation order" (i.e. a freezing order) was challenged on the ground that it unjustifiably limited the fair hearing component of the right of access to a court guaranteed by the Constitution of South Africa. In a decision that is of importance for other Commonwealth jurisdictions, the Constitutional Court held that even if the making of the preservation order constituted a limitation on the enjoyment of a constitutional right, the public interest objectives of the enabling Act fully justified such limitation.

**NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND MINISTER
OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT v YASIEN
MAC MOHAMED N.O AND OTHERS**

Constitutional Court of South Africa

*Chaskalson CJ, Langa DCJ, Goldstone J, Madala J, Mokgoro J, Moseneke J,
Ngcobo J, O'Regan J and Yacoob J, Ackerman*

25 February, 3 April 2003

Case CCT 44/02

For the appellants:W. Trengove SC

For the respondents: D. Marais

The facts appear in the judgment of ACKERMANN, J

Cases referred to:

Administrator, Transvaal and Others v Zenzile and Others 1991 (1) SA 21 (A)

Bernstein and Others v Bester and Others NNO 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC)

Colquhoun v Brooks (1888) 21 QB 52

Cooper NO v First National Bank of South Africa Ltd 2001 (3) SA 705 (SCA)

De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening) 2001 (11) BCLR 1109 (CC); 2002 (1) SA 429 (CC)

De Lange v Smuts NO and Others 1998 (7) BCLR 779 (CC); 1998 (3) SA 785 (CC)

Director of Public Prosecutions: Cape of Good Hope v Bathgate 2000 (2) SA 535 (C)

Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: in re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC)

Du Preez and Another v Truth and Reconciliation Commission 1997 (4) BCLR 531 (A); 1997 (3) SA 204 (A)

Ex Parte Ginsberg 1936 TPD 155

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC)

Mohamed NO and Others v National Director of Public Prosecutions and Another 2002 (4) SA 366 (W).

National Director of Public Prosecutions and Another v Mohamed NO and Others 2002 (9) BCLR 970 (CC); 2002 (4) SA 843 (CC).//

Network Video (Pty) Ltd v Universal City Studios Inc and Others 1984 (4) SA 379 (C)

Numsa and Others v Bader Bop (Pty) Ltd and Another 2003 (2) BCLR 182 (CC)

Palvie v Motale Bus Service (Pty) Ltd 1993 (4) SA 742 (A)

Poynton v Cran 1910 AD 205 at 222

R v Ngwevela 1954 (1) SA 123 (A)

Rennie NO v Gordon NNO 1988 (1) SA 1 (A)

Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission 1982 (3) SA 654 (A)

Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others 1995 (4) SA 1 (A)

Simross Vintners (Pty) Ltd v Vermeulen 1978 (1) SA 779 (T).

Transvaal Agricultural Union v Minister of Land Affairs and Another 1996 (12) BCLR 1573 (CC); 1997 (2) SA 621 (CC)

Veneta Mineraria SPA v Carolina Collieries (Pty) Ltd 1987 (4) SA 883 (A)

Universal City Studios Inc v Network Video 1986 (2) SA 734 (A).

ACKERMANN J: (*giving the judgment of the Court*)

Introduction

[1] This case arises out of a declaration of constitutional invalidity made by the Johannesburg High Court (the High Court) in respect of section 38 (the section) of the Prevention of Organised Crime Act (the Act) [Act No 121 of 1998]. The section reads:

“38. Preservation of property orders.

(1) The National Director may by way of an *ex parte* application apply to a High Court for an order prohibiting any person, subject to such conditions and

exceptions as may be specified in the order, from dealing in any manner with any property.

(2) The High Court shall make an order referred to in subsection (1) if there are reasonable grounds to believe that the property concerned —

(a) is an instrumentality of an offence referred to in Schedule 1; or

(b) is the proceeds of unlawful activities.

(3) A High Court making a preservation of property order shall at the same time make an order authorising the seizure of the property concerned by a police official, and any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.

(4) Property seized under subsection (3) shall be dealt with in accordance with the directions of the High Court which made the relevant preservation of property order.”

In terms of section 1 of the Act a “preservation of property order” means “an order referred to in section 38”.

[2] First appellant is the National Director of Public Prosecutions (the National Director). Second appellant is the Minister of Justice and Constitutional Development (the Minister). The first three respondents are trustees of the Zunaid Family Trust (the Trust) and owners in this capacity of certain fixed property (the Trust property). First and fourth respondents also claim a personal interest in the Trust property. The four respondents will be referred to jointly as “the respondents” bearing in mind that they were the applicants in a counter-application brought in the High Court, to which reference will presently be made. This is the second occasion on which this issue of the section’s constitutional invalidity has served before this Court between the same parties.

The litigation in the High Court and this Court

[3] The litigation commenced with the granting of a preservation of property order by the High Court on 4 October 2000 on the *ex parte* application of the National Director. The order was published in the *Government Gazette* of 13 October 2000 in terms of section 39(1) of the Act and served on, amongst others, the first to third respondents.

[4] On 11 January 2001, the National Director launched an application in terms of section 48 of the Act for the forfeiture, under section 50, of the immovable property that had been the subject of the preservation order. A counter-application, joining the Minister, was then launched by the respondents seeking the following relief: first, a declaration that the whole of Chapter 6 of the Act (comprising sections 37 to 62) was inconsistent with the Constitution and therefore invalid; secondly, the reconsideration of the

preservation of property order in terms of rule 6(12)(c) of the Rules of Court¹ and its dismissal; and thirdly, condonation of their failure to enter an appearance to oppose the forfeiture proceedings.

[5] In the first hearing the High Court dealt first with the second and third heads of relief in the counter-application.² It came to the conclusion, for reasons that are not presently relevant, that “[t]he applicants’ only chance of success lies in the constitutional challenge to the validity of chap[ter] 6 of the Act”. In the first hearing the High Court only dealt with the unconstitutionality of section 38, however, and on 19 March 2002 made an order declaring the section to be constitutionally invalid –

“to the extent that it requires the NDPP [the National Director of Public Prosecutions] to bring an application for a preservation of property order *ex parte* in every case and makes no provision for a rule *nisi* calling upon interested parties to show cause why a preservation of property and seizure order should not be made.”

It referred such order for confirmation to this Court and postponed the proceedings pending our decision.

[6] That order came before this Court for confirmation under sections 167(5) and 172(2) of the Constitution,³ and in a judgment delivered on 12 June 2002 (the “*Mohamed (1)* judgment”),⁴ we set aside the High Court’s declaration of invalidity on two grounds. The first was that the notional severance order was not a competent order to remedy constitutional invalidity caused by an omission.⁵ The second was that the High Court had erred, by dealing solely with the constitutional attack against section 38, and by failing to deal with all the relief sought by the respondents against the appellants.⁶ We accordingly referred the matter back to the High Court to be dealt with in the light of our judgment.

[7] The High Court did so in a second hearing in which it had before it two applications. One was by the National Director for a forfeiture order under section 52 of the Act and related relief. The other was a counter-application (the counter-application) in which, although various sections in Chapter 6 were

¹ Rule 6(12)(c) of the Rules of Court provides: “A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order.”

² *Mohamed NO and Others v National Director of Public Prosecutions and Another* 2002 (4) SA 366 (W).

³ Read with section 8 of the Constitutional Court Complementary Act 13 of 1995 and rule 15.

⁴ Reported as *National Director of Public Prosecutions and Another v Mohamed NO and Others* 2002 (9) BCLR 970 (CC); 2002 (4) SA 843 (CC).

⁵ *Id* paras 26-7.

⁶ *Id* paras 30-2.

separately attacked for their unconstitutionality (sections 38, 39, 48, 49, 50, 52), the respondents also sought to strike down the Chapter in its entirety.

[8] In its judgment of 16 October 2002 the High Court found – as it had in the first hearing – that the section limited the fair hearing component of the section 34 right and that such limitation was not justifiable under section 36 of the Constitution. Section 34 of the Constitution provides, to the extent relevant for the present case, that–

“[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court . . .”.

[9] It thereupon made an order declaring the section to be constitutionally invalid, remedying the perceived unconstitutionality by means of a severance and reading in order. The order reads as follows:

“1.1 The provision in s 38 of Act 121 of 1998 that the National Director may “*by way of an ex parte application*” apply to a High Court for a preservation of property order is declared to be inconsistent with the Constitution.

1.2 s 38 of Act 121 of 1998 is to be read as if the words “*by way of an ex parte application*” did not appear therein.

2.1 The omission from s 38 of Act 121 of 1998 of a rule nisi procedure is declared to be inconsistent with the Constitution.

2.2 s 38 of Act 121 of 1998 is to be read as though it contained a subsection (4) reading as follows:

‘(4)(a) A court to which an application is made in terms of subsection (1) may instead of making a final order, make a provisional preservation of property and seizure order having immediate effect and simultaneously grant a rule nisi calling upon all interested parties (including the parties referred to in s 39(1)(a)) upon a day mentioned in the rule to appear and show cause why the preservation of property and seizure order should not be made final.

(b) If a rule nisi is issued the court may give such directions as it considers appropriate for the rule to be brought to the attention of parties who may have an interest in the property concerned.

(c) Upon the application of any interested party, the court may anticipate the return day for the purpose of discharging the rule nisi if 24 hours’ notice of such application has been given to the National Director.’

3. The orders referred to in paragraphs 1 and 2 shall be with retrospective effect save that they shall not invalidate any forfeiture order already made, and those orders are referred to the Constitutional Court for confirmation.

4. Save as set out in paragraphs 1, 2 and 3 above, the counter-application is dismissed.

5. The applicants are ordered jointly and severally to pay the respondents’ costs, including the costs of two counsel, occasioned by the application to amend and supplement the counter-application.

6. The respondents are ordered jointly and severally to pay the applicants' costs of the counter-application."

The High Court however dismissed the attacks on the other sections as well as against Chapter 6 as a whole. Despite having found section 38 to be unconstitutional to the extent indicated in the order, the High Court granted the main application of the National Director. The order of constitutional invalidity is now before this Court for confirmation.

[10] The appellants appeal as of right but the respondents have not appealed against the dismissal of their attacks in the counter-application against the individual sections of Chapter 6 or against Chapter 6 as a whole, nor against the forfeiture order granted on the main application of the National Director.

The issues before this Court

[11] Accordingly there are only three issues now before us:

- (i) The correctness of the High Court's declaration of invalidity of section 38.
- (ii) The correctness of the remedial order, in the event of the declaration of invalidity having been correctly made.
- (iii) The correctness of the costs orders.

These issues fall within a narrow compass. Here, as in *De Beer's case*⁷ –

"[w]e are concerned with the scope of the fair-hearing component of that [the section 34] right in a court of law. This may simply be referred to as 'the section 34 fair-hearing right'."

[12] The question is whether section 38 unjustifiably limits such right. If it does, the only other question is whether the High Court order should be confirmed in the form issued or in some other form.

[13] This issue relates solely to the constitutionality of the procedure established by section 38 and is not concerned with the constitutionality of the substantive provisions of the Act. As the respondents have not appealed against the High Court's dismissal of the challenges to those provisions they must, for purposes of this judgment, be assumed to be constitutional. The statutory context in which section 38 operates and the nature of the order that could be made under its provisions, as well as the gravity of its consequences, may well be relevant to an assessment of the procedural fairness of the

⁷ *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* 2001 (11) BCLR 1109 (CC); 2002 (1) SA 429 (CC) para 10, a judgment that will be considered more fully later.

section's provisions,⁸ but only in the context of evaluating the constitutional fairness of the section 38 procedure.⁹

The purpose of the Act and certain of its relevant provisions

[14] The Act's overall purpose and operation has been dealt with in *Mohamed (1)*¹⁰ and need not be repeated here. The briefest of summaries suffices. The rapid growth of organised crime, money laundering, criminal gang activities and racketeering has become a serious international problem and security threat, from which South Africa has not been immune. It is often impossible to bring the leaders of organised crime to book, in view of the fact that they invariably ensure that they are far removed from the overt criminal activity involved. Prior to the Act, South Africa's common and statute law failed to keep pace with international measures aimed at dealing effectively with these problems. Hence the need for the measures embodied in the Act.

[15] As stated in *Mohamed (1)*:¹¹

"It is common cause that conventional criminal penalties are inadequate as measures of deterrence when organised crime leaders are able to retain the considerable gains derived from organised crime, even on those occasions when they are brought to justice. The above problems make a severe impact on the young South African democracy, where resources are strained to meet urgent and extensive human needs. Various international instruments deal with the problem of international crime in this regard and it is now widely accepted in the international community that criminals should be stripped of the proceeds of their crimes, the purpose being to remove the incentive for crime, not to punish them. This approach has similarly been adopted by our legislature."

[16] The present Act (and particularly Chapters 5 and 6 thereof) represents the culmination of a protracted process of law reform which has sought to give effect to South Africa's international obligation and domestic interest to ensure that criminals do not benefit from their crimes. Chapter 5 (comprising sections 12 to 36) provides for the forfeiture of the benefits derived from crime but its confiscation machinery may be invoked only when the "defendant" is convicted of an offence.¹² Chapter 6 (comprising sections 37 to 62) provides for forfeiture of the proceeds of and instrumentalities used in crime, but is not conviction based; it may be invoked even when there is no prosecution.¹³

⁸ Id para 15.

⁹ Id.

¹⁰ Above n 6 paras 14-22.

¹¹ Id para 15, footnote omitted.

¹² Section 18(1) of the Act.

¹³ Sections 48(1) and 50(1), read with section 38 of the Act.

[17] Under section 38(2) the High Court must make a preservation of property order—

- “ . . . if there are reasonable grounds to believe that the property concerned –
- (a) is an instrumentality of an offence referred to in Schedule 1; or
 - (b) is the proceeds of unlawful activities.”

Within 90 days of the grant of the preservation order the National Director must apply for the forfeiture of the property. At that stage, affected parties are entitled to a full hearing to determine whether the property should be forfeited or not.¹⁴

[18] Prior to the forfeiture stage of the proceedings there is an opportunity for affected parties to have preservation orders set aside or varied. So, section 47(3) provides that a High Court shall rescind a preservation order made in respect of immovable property “if it deems it necessary in the interests of justice” to do so. Section 47(1) provides, in respect of movable property, that a High Court may vary or rescind the preservation order, but in much more limited circumstances than in the case of immovable property.¹⁵

[19] At the forfeiture stage of the proceedings an owner can claim that he or she acquired an interest in the property in question legally and for value, and that he or she neither knew nor had reasonable grounds to suspect that the property constituted the proceeds of crime or had been an instrumentality in an offence (“the innocent owner” defence).¹⁶

The High Court’s construction of section 38 and the parties’ respective arguments thereon

[20] The High Court came to the conclusion, as it did in the first hearing that, on a proper construction, section 38 precluded a court from granting a provisional preservation of property order coupled with a rule *nisi*. In reaching this conclusion the High Court set great store by the fact that section 26(3)

¹⁴ Sections 40 and 48-50 of the Act.

¹⁵ Section 47(1) of the Act provides as follows:

“(1) A High Court which made a preservation of property order—

(a) may on application by a person affected by that order vary or rescind the preservation of property order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied—

(i) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and

(ii) that the hardship that the applicant will suffer as result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred; and

(b) shall rescind the preservation of property order when the proceedings against the defendant concerned are concluded.”

¹⁶ Section 52 of the Act. Compare also section 54.

made express provision for a provisional restraint order having immediate effect and the simultaneous grant of a rule *nisi*.¹⁷ It further reasoned that where no such provision is made in section 38, a provision in the same Act dealing with a similar matter, it must be concluded that the grant of a rule *nisi* under section 38 is excluded.

[21] In both its judgments the High Court pointed out that the rights of a person who has an interest in the property that is made the subject of a preservation order are extremely limited and stressed the fundamental importance to our jurisprudence of the *audi alteram partem* rule (the *audi* rule), to the effect that a party should be given an opportunity of being heard in court before an order is made that might adversely affect such party's rights. The High Court concluded that section 38, in the context of Chapter 6 of the Act, constituted a gross invasion of the section 34 fair hearing rights of a person affected by a preservation of property order. Such limitation, it was further held, could not be justified under section 36 of the Constitution, chiefly because the legislature could have chosen less restrictive means to achieve its purpose, namely by providing in the section for a rule *nisi* having the effect of a temporary order in those cases where an *ex parte* order can be justified.

[22] In the second hearing before us Mr Trengove, who appeared for the National Director and the Minister, advanced three main contentions. The first was that a reasonable and unstrained construction of section 38 did not preclude the High Court, in an appropriate case, from issuing a rule *nisi* and simultaneously making an interim preservation order pending the return day of the rule, and that accordingly section 38 did not limit section 34 of the Constitution. He pointed out that as yet no rules as contemplated in section 62(1) of the Act had been made. Therefore, by virtue of the provisions of section 62(2), the provisions of the Supreme Court Act, 1959, and the rules made under section 43 of that Act would, with the necessary alterations, apply to proceedings under the present Act.¹⁸ Even in the absence of any rules, so

¹⁷ Section 26(3) occurs in Chapter 5 of the Act, however, which deals with forfeiture in criminal cases. See paras 43-7 below.

¹⁸ Section 62 of the Act provides:

"62. Procedure and rules of court.—(1) The Rules Board for Courts of Law referred to in section 1 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), shall, in consultation with the Minister and after consultation with the National Director, with due regard to the purpose of this Act make rules for—

(a) the High Court regulating the proceedings contemplated in Chapters 5 and 6;

(b) the magistrate's court regulating the proceedings referred to in section 51.

(2) In the absence of such rules the provisions of the Supreme Court Act, 1959 (Act No. 59 of 1959), and the rules made under section 43 of that Act and the provisions of the Magistrate's Court Act, 1944 (Act No. 32 of 1944), and the rules made under section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), as the case may be, shall, with the necessary changes, apply in relation to proceedings in terms of such hearing except in so far as those rules are inconsistent with procedures prescribed in this Chapter."

the argument proceeded, the High Court had the inherent jurisdiction, now specifically enshrined in section 173 of the Constitution, to protect and regulate its own process, and to regulate and to develop the common law, taking into account the interests of justice.

[23] He submitted that the High Courts had, over a considerable period of time, developed a coherent and flexible jurisprudence in relation to *ex parte* applications, the granting of rules *nisi* and the making of appropriate interim orders pending the return day of such rules *nisi*. Such jurisprudence could be adapted and applied to new jurisprudential needs. Applied to section 38, it would permit the High Court to deal appropriately with all applications under section 38 in a manner that did not infringe section 34 of the Constitution.

[24] Mr Trengove's second argument, in the alternative, was premised on this Court upholding the High Court's construction of section 38. Mr Trengove contended that, even on the High Court's construction, section 38 did not limit the section 34 fair hearing right. In the alternative he contended that even if section 38 constituted such a limitation, it was justified under section 36 of the Constitution.

[25] Thirdly, and further in the alternative, he submitted that if section 38 were held to be unconstitutional, appropriate remedial orders should be made in order to ensure, amongst other things, that completed preservation and forfeiture orders made under the Act were not undone.

[26] In his written argument Mr Marais, for the respondents, supported both the order of invalidity and the remedial order made by the High Court. In oral argument, however, he made common cause with Mr Trengove that the High Court could and should have interpreted section 38 in conformity with the Constitution, namely, by finding that under the section's provisions a High Court could grant a rule *nisi* together with an interim preservation and seizure order, pending the return day of the rule *nisi*. As part of this alternative argument Mr Marais submitted that the High Court ought to have granted a declaratory order, as sought by the respondents, embodying such constitutionally compatible construction.

Rule 6 of the Uniform Rules of Court, promulgated under the provisions of section 43 of the Supreme Court Act deals, amongst other things, with the regulation of *ex parte* applications. So, for example, rule 6(8) provides as follows:

"Any person against whom an order is granted *ex parte* may anticipate the return day upon delivery of not less than twenty-four hours' notice."

The historical development of ex parte applications, the granting of rules nisi and the making of interim orders pending the return day of a rule nisi

[27] Before considering the above arguments and the High Court's construction of section 38, it is convenient to examine the common law practice relating to *ex parte* applications, the granting of rules *nisi* and the making of interim orders pending the return day of the rules *nisi*, as well as the importance of the *audi* rule for procedural fairness. For the purposes of this case "an 'ex parte application' in our practice is simply an application of which notice was *as a fact* not given to the person against whom some relief is claimed in his absence."¹⁹

[28] Our common law has recognised both the great importance of the *audi* rule²⁰ as well as the need for flexibility, in circumstances where a rigid application of the rule would defeat the very rights sought to be enforced or protected. In such circumstances, the court issues a rule *nisi* calling on the interested parties to appear in court on a certain fixed date to advance reasons why the rule should not be made final, and at the same time orders that the rule *nisi* should act immediately as a temporary order, pending the return day.²¹ This practice has been recognised by the South African courts for over a century:

"The term '*rule nisi*' is derived from English law and practice, and the rule may be defined as an order by a court issued at the instance of the applicant and calling upon another party to show cause before the court on a particular day why the relief applied for should not be granted. Our common law knew the temporary interdict and, as Van Zyl points out, a 'curious mixture of our practice with the practice of England' took place and the practice arose of asking the court for a rule returnable on a certain day, but in the meantime to operate as a temporary interdict."²²

[29] The flexibility and utility of the rule *nisi* acting at the same time as an interim order, has been recognised by the courts and it has been applied to modern problems in commercial suits. I would endorse the following

¹⁹ *Simross Vintners (Pty) Ltd v Vermeulen* 1978 (1) SA 779 (T) at 783B.

²⁰ The High Court rightly cited the judgment of *R v Ngwevela* 1954 (1) SA 123 (A) at 131B-C in which Centlivres CJ referred to the *audi* rule as "a sacred maxim."

²¹ See, for example, Erasmus *Superior Court Practice* B1-52-3 (Juta Service 17, 2002); Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* (Juta 1997) 4ed 232-3 and *Network Video (Pty) Ltd v Universal City Studios Inc and Others* 1984 (4) SA 379 (C) at 381F-H.

²² Erasmus *id* B1-53; Van Zyl *Judicial Practice* vol I 3ed (Juta Cape Town 1921) 450 and following; *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* 1995 (4) SA 1 (A) at 18J-19B.

passages from the judgment of Corbett JA, writing for a unanimous Appellate Division in the *Safcor* case:²³

“The Uniform Rules of Court do not provide substantively for the granting of a rule *nisi* by the Court. Nevertheless, the practice, in certain circumstances, of doing so is firmly embedded in our procedural law (see, generally, Van Zyl *The Judicial Practice in South Africa* 2nd ed at 355ff, 370-1; Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3rd ed at 89-90). This is recognised by implication in the Rules (see, eg, Rule 6 (8) and Rule 6 (13)). The procedure of a rule *nisi* is usually resorted to in matters of urgency and where the applicant seeks interim relief in order adequately to protect his immediate interests. It is a useful procedure and one to be encouraged rather than disparaged in circumstances where the applicant can show, *prima facie*, that his rights have been infringed and that he will suffer real loss or disadvantage if he is compelled to rely solely on the normal procedures for bringing disputes to Court by way of notice of motion or summons.

[30] A prime example of the rule *nisi*'s application to modern problems is in the development of the so-called *Anton Piller* order. In *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam and Another*²⁴ the divergence of judicial opinion concerning such orders was laid to rest by Corbett CJ in the following manner:

“At this point it is necessary to give a decision in regard to what was left open in both the Universal City Studios case *supra* and Jafta's case *supra*, viz whether an Anton Piller order directed at the preservation of evidence should be accepted as part of our practice. In my view, it should; and I would define what an applicant for such an order, obtained in camera and without notice to the respondent, must *prima facie* establish, as the following:

- (1) That he, the applicant, has a cause of action against the respondent which he intends to pursue;
- (2) that the respondent has in his possession specific (and specified) documents or things which constitute vital evidence in substantiation of applicant's cause of action (but in respect of which applicant cannot claim a real or personal right); and
- (3) that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner be spirited away by the time the case comes to trial or to the stage of discovery.

.....

The Court to which application is made for such an Anton Piller order has a discretion whether to grant the remedy or not and, if it does, upon what terms. In exercising this discretion the Court will pay regard, *inter alia*, to the cogency of the *prima facie* case established with reference to the matters listed (1), (2) and (3) above; the potential harm that will be suffered by the

²³ *Safcor Forwarding (Johannesburg) (Pty) Ltd v National Transport Commission* 1982 (3) SA 654 (A) at 674H to 675A.

²⁴ Above n 24.

respondent if the remedy is granted as compared with, or balanced against, the potential harm to the applicant if the remedy is withheld; and whether the terms of the order sought are no more onerous than is necessary to protect the interests of the applicant.”²⁵

[31] As important for present purposes, are the following passages in the *Shoba* case where certain *obiter dicta* in the *Universal Studios* case²⁶ relating to the Court’s inherent powers to develop procedural remedies, were implicitly confirmed.²⁷

“With reference to the third component and the views expressed in the *Cerebos Food* case concerning it, the judgment in the *Universal City Studios* case makes the following observation (at 754E-F):

‘Now, I am by no means convinced that in appropriate circumstances the Court does not have the power to grant *ex parte* and without notice to the other party, ie the respondent (and even, if necessary, *in camera*) an order designed *pendente lite* to preserve evidence in the possession of the respondent. It is probably correct, as so cogently reasoned by the Court in the *Cerebos Food* case *supra*, that there is no authority for such a procedure in our common law. But, of course, the remedies devised in the *Anton Piller* case *supra* and other subsequent cases for the preservation of evidence are essentially modern legal remedies devised to cater for modern problems in the prosecution of commercial suits.’ (Emphasis supplied.)

After reference to the Court’s inherent power to regulate its procedures in the interests of the proper administration of justice, the judgment proceeds (at 755A-E):

‘In a case where the applicant can establish *prima facie* [the requisites for an *Anton Piller* order], and the applicant asks the Court to make an order designed to preserve the evidence in some way, is the Court obliged to adopt a *non possumus* attitude? Especially if there is no feasible alternative? I am inclined to think not. It would certainly expose a grave defect in our system of justice if it were to be found that in circumstances such as these the Court were powerless to act. Fortunately I am not persuaded that it would be. An order whereby the evidence was in some way recorded, eg by copying documents or photographing things or even by placing them temporarily, ie *pendente lite*, in the custody of a third party would not, in my view, be beyond the inherent powers of the Court. Nor do I perceive any difficulty in permitting such an

²⁵ Id 15G - 16C.

²⁶ *Universal City Studios Inc v Network Video* 1986 (2) SA 734 (A).

²⁷ Above n 24 at 8G-9D.

order to be applied for *ex parte* and without notice and *in camera*, provided that the applicant can show the real possibility that the evidence will be lost to him if the respondent gets wind of the application.” (Emphasis supplied.)

[32] The Constitution in section 173 now expressly provides that:

“[t]he Constitutional Court, the Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

There is accordingly in principle no procedural bar to a High Court hearing an application *ex parte* and *in camera* under section 38 of the Act and granting a rule *nisi*, together with an interim preservation and seizure order, pending the return day of the rule.

The proper construction of section 38

[33] I would at the outset point out that it is not the *ex parte* nature of the initial application under 38 that the High Court found to be objectionable, but the fact that on its construction of the section, a High Court is precluded from issuing a rule *nisi*. The phrase in section 38 “[t]he National Director may by way of an *ex parte* application apply” means no more than that, if the National Director is desirous of obtaining an order under section 38, she or he may use an *ex parte* application, in the sense defined in paragraph 27 above. It sanctions a particular initiating procedure to be employed when relief of a particular nature is being sought.²⁸ An important consequence of this is that an application by the National Director under section 38 can never be dismissed solely on the ground that it has been brought *ex parte*.

[34] Against this background I proceed to deal with the proper construction of section 38 and the arguments advanced in this regard. It is common cause, and correctly so, that on the High Court’s construction of the section, the constitutional fair hearing rights of various persons could be materially limited and that unless such limitation was justifiable under section 36 of the Constitution, section 38 would be constitutionally invalid. On the construction favoured by both parties in the present hearing, this would not be the case and the section would pass constitutional muster.

²⁸ See *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C) at para 96, where the High Court came to a similar conclusion in relation to section 16 of the Proceeds of Crime Act Act 76 of 1996 which provided in its relevant part that a designated person—
“. . . may by way of an *ex parte* application apply to a competent Superior Court for an order prohibiting any person, subject to such conditions and exceptions as may be specified in the order, from dealing in any manner with any property to which the order relates.”

[35] A settled principle of constitutional construction recognises that a statutory provision may be capable of more than one reasonable construction. If the one construction leads to constitutional invalidity but the other not, the latter construction, being in conformity with the Constitution, must be preferred to the former, provided always that such construction is reasonable and not strained.²⁹ This principle has been applied in the context of the Constitution's section 34 fair hearing right as follows:

“Since procedures that would render the hearing unfair are inconsistent with the Constitution courts must interpret legislation and rules of court, where it is reasonably possible to do so, in a way that would render the proceedings fair.”³⁰

[36] The importance of the *audi* rule, as one of the main pillars of the section 34 fair hearing right needs to be stressed, when construing a statutory provision which, it is contended, excludes *audi*. The following observations in *De Beer's* case are pertinent in this regard:

“This section 34 fair hearing right affirms the rule of law which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. . . . It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected.”³¹

[37] It is well established that, as a matter of statutory construction, the *audi* rule should be enforced unless it is clear that the legislature has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify a court not giving effect to it.³²

[38] For stronger reasons this approach should apply when construing a statutory provision in order to determine its constitutionality. Accordingly, in

²⁹ *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: in re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) paras 22-4. See also *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC); 1998 (3) SA 785 (CC) para 85 and *Numsa and Others v Bader Bop (Pty) Ltd and Another* 2003 (2) BCLR 182 (CC) para 37.

³⁰ *De Beer's* case above n 9 para 11 and the authorities there cited.

³¹ *Id* para 11, footnotes omitted.

³² *R v Ngwevela* above n 22 at 131H; *Du Preez and Another v Truth and Reconciliation Commission* 1997 (4) BCLR 531 (A); 1997 (3) SA 204 (A) at 231F; *Cooper NO v First National Bank of South Africa Ltd* 2001 (3) SA 705 (SCA) paras 23-5; and *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1996 (12) BCLR 1573 (CC); 1997 (2) SA 621 (CC) para 25.

construing section 38, where no express reference is made to the *audi* principle, or its exclusion, the question to be asked is not whether the *audi* principle can be implied in the section, but rather whether it has been excluded from the section by clear necessary implication, or whether there are exceptional circumstances which would justify a court not giving effect to it.

[39] It is true that section 26(3)(a) of the Act, in Chapter 5, makes express provision for a provisional restraint order and a rule *nisi* in the following terms:

“A court to which an application is made in terms of subsection (1) may make a provisional restraint order having immediate effect and may simultaneously grant a rule nisi calling upon the defendant upon a day mentioned in the rule to appear and to show cause why the restraint order should not be made final.”

The absence of such provisions in section 38, or elsewhere in Chapter 6 of the Act, is the main ground for the High Court’s conclusion that the *audi* principle has been excluded from the provisions of section 38, in the sense that the power of a High Court to grant a rule *nisi* together with a temporary restraining order pending the return day has been excluded.

[40] Although there is no express reference thereto in its judgment, the High Court clearly relied implicitly on the interpretative maxim that the “*specific inclusion of one implies the exclusion of the other*”,³³ in coming to this conclusion. This maxim has been described as “a valuable servant, but a dangerous master”.³⁴ “It is not a rigid rule of statutory construction”,³⁵ in fact it has on occasion been referred to as a “principle of common sense” rather than a rule of construction,³⁶ and “it must at all times be applied with great caution”.³⁷

[41] There are circumstances when the inclusion of a particular provision occurs because of excessive caution,³⁸ or where the legislature is “either ignorant or unmindful of the real state of the law”, or for some other reason

³³ The translation by Hiemstra and Gonin *Trilingual Legal Dictionary* (Juta 1981) of the Latin maxim *inclusio unius est exclusio alterius* at 208.

³⁴ By Lopes LJ in *Colquhoun v Brooks* (1888) 21 QB 52 at 65.

³⁵ *Administrator, Transvaal and Others v Zenzile and Others* 1991 (1) SA 21 (A) at 37G.

³⁶ *Poynton v Cran* 1910 AD 205 at 222 per Innes CJ.

³⁷ *Zenzile’s case* above n 37 at 37H. See also, in general, Mureinik “*Expression Unius: Exclusio Alterius?*” in (1987) 104 *South African Law Journal* 264.

³⁸ See, for example, *Ngwevela’s case* above n 22 at 130H-131A. See also Mureinik, above n 39 at 274.

that does not warrant the inference that its inclusion in one provision means that it was intended to be excluded in the other provision.³⁹

[42] As pointed out in paras 27-32, the inherent power of a court to grant a rule *nisi* together with an interim order pending its return day, in order to prevent the very harm that might result if notice were given, is incontrovertibly established and can be applied to new situations where necessary. It was accordingly not necessary for the legislature to have inserted the provisions relating to the rule *nisi* and the interim restraint order relating to property in section 26(3)(a) of the Act.

[43] It must be remembered that section 26(3)(a) occurs in Chapter 5 of the Act, which limits the restraint order to a defendant who is charged or is about to be charged with an offence.⁴⁰ The property in question may only be realised when, amongst other things, a confiscation order has been made,⁴¹ and a confiscation order may only be made when the defendant is convicted of an offence.⁴² Section 26(3)(a) therefore applies in a setting quite different from section 38, the latter applying (in Chapter 6) to the civil recovery of property.

[44] It should also be borne in mind that section 38 is a relative newcomer to the statutory confiscation of property regime, since civil recovery was not a confiscating mechanism in either the Drugs and Drug Trafficking Act⁴³ or in the 1996 Proceeds of Crime Act⁴⁴ (the 1996 Act), the latter being the immediate precursor to the present Act. Section 16 of the 1996 Act made provision for restraint orders in the criminal context in the same way as section 26 of the present Act, and section 16(3)(a) is in terms identical to the present section 26(3)(a). But when section 16(3)(a) was enacted, there was no equivalent to the present section 38 in the 1996 Act. This considerably weakens any inference to be drawn from the fact that in the present Act

³⁹ In *Maxwell on The Interpretation of Statutes* 11 ed (Sweet & Maxwell 1962) by Roy Wilson and Brian Calpin, the following is stated at 306-7:

“Provisions sometimes found in statutes, enacting . . . for particular cases only that which was already and more widely the law, have occasionally furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment, resting on the maxim *expressio unius, exclusio alterius*. But that maxim is inapplicable in such cases. The only inference which a court can draw from such superfluous provisions (which generally find place in Acts to meet unfounded objections and idle doubts), is that the legislature was either ignorant or unmindful of the real state of the law, or that it acted under the influence of excessive caution.”

⁴⁰ Section 25(1) of the Act.

⁴¹ Section 30(1) and (2) of the Act.

⁴² Section 18(1) read with section 12(1) of the Act.

⁴³ No 140 of 1992.

⁴⁴ No 76 of 1996.

section 26(3)(a) makes specific reference to a rule *nisi* and interim restraint order, whereas section 38 does not.

[45] There is a further consideration that militates strongly against the drawing of such an inference, namely, the provisions of section 44(1) and (2) of the Act. A “preservation of property order” is defined in section 1(1) as “an order referred to in section 38”. Section 44(1) provides that such a “preservation of property order” may make provision for certain reasonable living and legal expenses. No express provision is made for granting such relief at a stage *after* the making of the preservation of property order, as is the case with the relief that may be granted under sections 47, 52 and 54, but as part of the order made under section 38.

[46] But the only persons who can give information concerning such living and legal expenses are the persons affected by the preservation of property order. Section 44(2)(b) moreover provides that a High Court shall not make provision for such expenses unless the affected person concerned has –

“disclosed under oath all his or her interests in the property and has submitted to that Court a sworn and full statement of all his or her assets and liabilities.”

From its clear wording the section contemplates that at the time of making a preservation order an investigation of all these matters may take place.

[47] These provisions of section 44 are incompatible with a construction of section 38 which excludes a rule *nisi* and an interim preservation order. Their clear purpose can be defeated if the affected persons do not have the opportunity, afforded by an order which is only interim and provisional, to make their case in the period between the grant of a provisional and interim order and its confirmation on the return day of the rule *nisi*. In my view the fact that section 26(3)(a) of the Act makes express provision for a provisional restraint order and a rule *nisi* does not warrant the inference that such orders have by necessary implication been excluded from section 38.

[48] Furthermore, the issue is not whether the *audi* principle is to be implied in section 38 but, on the contrary, whether –

“it is clear that Parliament has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify the Court's not giving effect to it.”⁴⁵

⁴⁵ *Ngwevela's* case above n 22 at 131H.

We have adopted the view, consistently enunciated over the years by the courts, that –

“words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands”⁴⁶

and that such implication must be necessary in order “to realise the ostensible legislative intention or to make the Act workable”.⁴⁷

[49] The same approach must be adopted when considering whether, by necessary implication, the *audi* principle has been excluded from section 38. In my view it cannot be found that it has been so excluded. There are no exceptional circumstances and the purposes of the Act can be fully achieved when, in relation to section 38, the principles relating to the issuing of rules *nisi* and the making of interim preservation orders are applied by a High Court.

[50] The essence of these principles is their practicability, flexibility and adaptability. They can be narrowly and appropriately tailored to accommodate the interests of the State in attaining the purposes of the Act, in particular in preventing property to which the State can lay claim under the Act from disappearing or being squandered, and also to protect, as far as possible, the interests of the individuals by observing the *audi* rule and in so doing to afford them as fair a trial as possible under section 34.

[51] In my view there is only one proper construction of section 38, namely, that the *audi* rule has not been excluded and that the principles relating to the issuing of rules *nisi* and the making of interim preservation orders by the High Courts, as discussed in this judgment, are applicable to the section 38 procedures when the National Director applies *ex parte*, as he is entitled to do in all cases, for relief under section 38.

[52] On the construction of section 38 adopted in this judgment, the duration of the temporary preservation order might be very short, particularly in the case where an affected person anticipates the return day of the rule *nisi*. I shall assume, without deciding that such temporary deprivation, before the return day, constitutes a limitation of the section 34 fair hearing right. Such limitation is, however, amply justified under section 36 of the Constitution. Indeed this was properly conceded by Mr Marais, the respondents making no attempt to establish the contrary. The limitation of the section 34 right enables

⁴⁶*Rennie NO v Gordon NNO* 1988 (1) SA 1 (A) at 22E-F per Corbett JA, adopted in *Bernstein and Others v Bester and Others NNO* 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC) para 105.

⁴⁷*Palvie v Motale Bus Service (Pty) Ltd* 1993 (4) SA 742 (A) at 749C per Howie AJA, adopted in *Bernstein* id.

the Act to function for the legitimate and most important purpose for which the Act was designed, referred to in paras 14 to 15 above, and to reduce the risk of the dissipation of the proceeds and instrumentalities of organised crime. The limitation is as narrowly and appropriately tailored as it could be and is under the control of the High Court.

Section 38's inconsistency with sections 14(b) and 25(1) of the Constitution

[53] The High Court, on the basis of the construction it placed on section 38, also concluded that the section unjustifiably infringed section 14(c) of the Constitution which, as part of the right to privacy, guarantees to everyone, the right not to have "their possessions seized" and also unjustifiably constituted an arbitrary deprivation of property in conflict with section 25(1) of the Constitution which provides as follows:

"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

No argument was addressed to us by counsel on these grounds of unconstitutionality and, in particular, the respondents did not seek to support these grounds in impugning section 38's constitutionality. Vital to the High Court's conclusions in this regard is its finding that, on procedural grounds, section 38 was constitutionally invalid. Once this conclusion is rejected, as we do, the whole basis for the finding that the section is unconstitutional on these other grounds, falls away and the finding cannot be sustained.

Ought the High Court to have made a declaratory order on the meaning of section 38

[54] Reference has been made in para 26 above to an argument by Mr Marais that if the proper construction of section 38 did not lead to constitutional inconsistency, then the High Court ought to have made a declaratory order to such effect. Such an order would, in my view, be both inapposite and redundant. Inapposite because declaratory orders are not designed for use when the constitutional invalidity of a statutory provision is being considered. Redundant, because the Constitution itself makes provision for an appropriate order.

[55] Section 19(1)(a)(iii) of the Supreme Court Act⁴⁸ provides a statutory basis for the grant of declaratory orders⁴⁹ without removing the common law

⁴⁸ No 59 of 1959 as amended.

⁴⁹ Section 19(1)(a)(iii) provides, to the extent relevant for present purposes:

jurisdiction of courts to do.⁵⁰ It is a discretionary remedy. It is unnecessary to decide in this case whether and to what extent such a declaratory order could be granted in relation to rights generally under the Constitution.

[56] This judgment deals only with the question in relation to section 172(1)(a) of the Constitution⁵¹ when a court, deciding a constitutional matter within its power, is called upon to decide whether it must declare a statutory provision to be constitutionally invalid. Once it finds a law to be inconsistent with the Constitution, it has no discretion; it “must declare” such law to be “invalid to the extent of its inconsistency”. The Constitution thus makes provision in section 172(1)(a) for its own special form of declaratory order, and allows no room for a declaratory order as envisaged by the common law or section 19(1)(a)(iii) of the Supreme Court Act. We are not here concerned with the provisions of section 172(1)(b).

[57] Mr Marais’ submission relates, however, to the reverse position, when a court comes to the conclusion that a statutory provision is not inconsistent with the Constitution. Even in this event, a formal declaratory order is unnecessary. A court can reach such conclusion at either stage of the two-part inquiry. It may conclude, applying the principles of constitutional construction,⁵² that the provision does not limit the constitutional provision in question or that, despite the fact that it does so limit it, such limitation is justified. Whatever the case may be, the court is obliged at all stages of the inquiry to give proper reasons for its conclusion. Such reasons will not only be binding on the litigants but will constitute an objective precedent, with such binding force on other courts as the principles of *stare decisis* and the status of the court delivering the judgment dictate.

[58] There is another, and related reason, why the granting of a conventional declaratory order is inapposite, even when a court finds no constitutional invalidity. It is because the purpose of the conventional declaratory order differs from that of the Constitution’s section 172(1)(a) inquiry. The purpose of the former is limited to an order that will be binding on the litigants, in the

“19(1)(a) A provincial or local division shall . . . have power – . . .(iii) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.”

⁵⁰ *Veneta Mineraria SPA v Carolina Collieries (Pty) Ltd* 1987 (4) SA 883 (A) 886I.

⁵¹ Section 172(1)(a) provides, to the extent relevant for this case, as follows:

“172(1) When deciding a matter within its power, a court –

(a) must declare that any law . . . that is inconsistent with the Constitution is invalid to the extent of its inconsistency.”

⁵² See para 35 above.

sense of it being *res judicata* between them,⁵³ whereas in relation to questions of constitutional validity we have taken an objective approach.⁵⁴

[59] In this context the following was said in *Ferreira v Levin*:⁵⁵

“The answer to the first question is that the enquiry is an objective one. A statute is either valid or “of no force and effect to the extent of its inconsistency”. The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent Court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach.”

Mr Marais’s contentions in this regard must accordingly be rejected.

Costs

[60] The above conclusion only affects the High Court’s orders in relation to the respondents’ counter-application and the order made on such counter-application, as quoted in para 9 above. The costs order in paragraph 5 of the order on the counter-application must stand, because the upholding of the appeal has no effect on the award of such costs. The National Director, quite properly, did not seek an order for costs against the respondents in the High Court on their counter-application, which, in the light of this judgment has proved to be unsuccessful; nor did he seek an order for costs in this Court.

Order

[61] The following order is accordingly made:

1. The appeal is upheld and the High Court’s order on the counter-application is amended to read as follows:
 - “1. The counter-application is dismissed.
 2. The applicants are ordered jointly and severally to pay the respondents’ costs, including the costs of two counsel, occasioned by the application to amend and supplement the counter-application.”

⁵³ *Ex Parte Ginsberg* 1936 TPD 155 at 158; *Shoba’s case* above n 24 at 14F-H.

⁵⁴ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC) paras 26-9.

⁵⁵ *Id* para 26.

2. The Court declines to confirm the order of constitutional invalidity made by the High Court on 16 October 2002 in case no. 21921/00.