



ten years fighting corruption

Cases and Materials Relating to Corruption Issue 4 – July 2003

Editor John Hatchard

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ISSUE 4: EDITORIAL REVIEW

This issue of the *Bulletin* is divided into four sections covering Constitutional Law, Criminal Law, Evidence and Sentencing.

Constitutional issues

The creation of powerful anti-corruption commissions has already raised significant constitutional issues in a number of Commonwealth countries. See, for example, the case of *Gachiengo and Kahura v Republic* (*Bulletin 1, page 7*) where the High Court of Kenya ruled the Kenya Anti-Corruption Authority unconstitutional on the basis that it was contrary to the principle of the separation of powers for the body to be headed by a serving High Court judge.

In *Wali and Others v Federation of Pakistan (the NAB case)*, the Supreme Court of Pakistan was faced with a plethora of constitutional petitions attacking the constitutionality of the National Accountability Bureau Ordinance. The case raises issues concerning the separation of powers and independence of judiciary, violation of the fundamental rights of freedom of trade, business or profession, security of the person, safeguard from illegal arrest and detention, protection against retrospective punishment, freedom of movement, equality of citizens and other rights guaranteed by the Constitution. It is useful to compare and contrast the approach of the Supreme Court to that of the High Court of Kenya.

Criminal Law

The cases in this section deal with some key words and phrases commonly found in corruption offences. The decision of the Supreme Court of Canada in *R v Hinchey* contains a particularly useful discussion on the scope of a statutory provision prohibiting a government official or employee from obtaining any “benefit” from a person having dealings with the government. Does this extend to “a government employee who accepts an innocent cup of coffee or occasional lunch from a friend, or receives a lift from someone when caught in the rain”?

The issue of whether the word “corruptly” involves an element of “dishonesty” is then examined in the cases of *R v Harvey* and *R v Godden-Smith* whilst in *R v Natji*, the court is concerned with the scope of the term “public body”.

Evidence

The use of presumptions to “reverse” the burden of proof was considered by the Court of Appeal of Hong Kong in *Attorney-General v Hui Kin Hong* (see *Bulletin 1, page 34*). This issue of the *Bulletin* contains two more significant cases on the issue, namely *R (on the application of Elliot) v Secretary of State for the Home Department* and the NAB case. It is of interest to note that courts in various Commonwealth jurisdictions seem to take a very similar approach to the issue.

Sentencing

This issue breaks new ground by including a series of cases on sentencing in corruption cases. Whilst they in no way provide a “template” as such, they do serve to alert sentencers of some of the specific issues to consider when dealing with a corruption case.

JOHN HATCHARD
Editor

CONSTITUTIONAL ISSUES

The National Accountability Bureau (NAB) in Pakistan was established by the National Accountability Bureau Ordinance of 1999 with the aim of eradicating “corruption and corrupt practices and hold[ing] accountable all those persons accused of such practices...”. The necessity for establishing the NAB with its wide-ranging powers is justified in the Preamble to the Ordinance as follows:

WHEREAS it is expedient and necessary to provide for effective measures for the detection, investigation, prosecution and speedy disposal of cases involving corruption, corrupt practices, misuse/abuse of power, misappropriation of property, kickbacks, commissions and for matters connected and ancillary or incidental thereto;

AND WHEREAS there is an emergent need for the recovery of outstanding amounts from those persons who have committed default in the repayment of amounts to Banks, Financial institutions, government and other agencies;

AND WHEREAS there is a grave and urgent need for the recovery of state money and other assets from those persons who have misappropriated or removed such assets through corruption, corrupt practices and misuse of power and/or authority;

AND WHEREAS there is an increased international awareness that nations should co-operate in combating corruption and seek, obtain or give mutual legal assistance in matters concerning corruption and for matters connected, ancillary or incidental thereto; [New paragraph inserted by a 2001 amendment]

AND WHEREAS it is necessary that a National Accountability Bureau be set up so as to achieve the above aims

The Ordinance provoked numerous constitutional petitions challenging the vires of the NAB on a wide range of issues, many of deep constitutional significance. In the following case, the Supreme Court of Pakistan took the opportunity of disposing of fifteen of these petitions. The many and varied issues for judicial consideration are set out in paragraph 2 of the judgment. In essence the main issues are as follows:

- 1. Whether the Federal legislature was competent to promulgate the Ordinance [para 170 et seq]*
- 2. Whether the Ordinance creates a parallel judicial system in contravention of the Constitution of Pakistan [para 183 et seq]*
- 3. The constitutionality of the offence of “wilful default” that is created with retrospective effect [para 198 et seq]*
- 4. Whether the offence of wilful default negates the constitutional right to freedom of trade, business or profession [para 198 et seq]*

5. *The power of the Chairman NAB to freeze property [para 222 et seq]*
6. *The constitutionality of the "presumption of corruption" [para 224 et seq. This issue is dealt with below at page XXX]*
7. *Whether the Ordinance provides for the excessive delegation of power regarding the venue for trial [para 233 et seq]*
8. *The power of the Accountability Court to dispense any provision of the Code of Criminal Procedure [para 244 et seq]*
9. *The constitutionality of the enhanced period of detention for accused persons [para 248 et seq]*
10. *The constitutionality of the enhanced powers of arrest and discretion as to whether to grant bail enjoyed by the Chairman of the NAB [para 248 et seq]*
11. *Whether the Act contravenes the concept of the independence of the judiciary [para 265 et seq]*
12. *The independence and accountability of the NAB [paras 277 et seq]*

KHAN ASFANDYAR WALI & OTHERS v FEDERATION OF PAKISTAN AND OTHERS

Supreme Court of Pakistan

Mr. Justice Irshad Hasan Khan, C.J. Mr. Justice Muhammad Bashir Jehangiri Mr. Justice Muhammad Arif Mr. Justice Qazi Muhammad Farooq

9-13 and 16 April 2001

Cases referred to in the judgment

Abdul Rahim v. Chancellor of West Pakistan University of Engineering and Technology
PLD 1964 Lah. 376

Abdul Rashid v. Pakistan PLD 1962 SC 42

Abdul Razak Rathore v The State PLD 1992 Karachi 39

Al-Jehad Trust v. Federation of Pakistan 1996 S.C. 324

Arshad Mirza v. The State PLD 1988 Lahore 640

Badshah Hussain v The State 1991 P Cr.LJ 2299

Bashir v. The State P Cr.LJ 670

Benazir Bhutto v. The State PLD 1999 SC 937

Chenab Cement Product (Pvt) Ltd. and others v. Banking Tribunal, Lahore and others
PLD 1996 Lahore 672

Faisal v Federation of Pakistan PLD 2000 Lahore 508

Federation of Pakistan v M. Nawaz Khokhar PLD 2000 SC 26

Federation of Pakistan through the General Manager, N.W. Railway, Lahore v. Syed Gadoon Textile Mills and 814 others v. WAPDA and others 1997 SCMR 641

Ghulam Muhammad v The State 1980 P.Cr.L.J. 1039
Government of Baluchistan v. Azizullah Memon PLD 1993 S.C. 341
Government of Sind v. Sharaf Faridi PLD 1994 S.C. 105
Haji Ismail Dossa v Monopoly Control Authority PLD 1984 Karachi 315
Hakim Khan and 3 others versus Government of Pakistan through Secretary Interior and others (PLD 1992 SC 595
Hasham Ali Shah PLD 1954 Lahore 769
Ikramuddin v The State PLD 1958 Kar. 21
Inayat Masih v The State Criminal Appeal No. 9 of 1993
Inayat Ullah and others v. M.A.Khan and others PLD 1964 SC 126
Jibendranath Kishore Acharya Chaudhry v. Province of East Pakistan PLD 1957 S.C. [Pak.] 9
Kazi Nizamuddin v The State PLD 1979 Karachi 294
Liaqat Parvez Khan v. Government of the Punjab through Home Secretary PLD 1992 Lahore 517
Malik Asad Ali v. Federation of Pakistan PLD 1998 SC 161
Malik Zafar v. The State 1989 MLD 4215
Mehram Ali and others v. Federation and others PLD 1998 SC 1445
Mir Ahmed v. The State PLD 1962 SC 489
Muhammad Anwar v. Government of West Pakistan PLD 1963 Lah. 109
Muhammad Siddique v The State 1977 SCMR 503
Muhammad Akhtar Siddiqui v The State 1994 MLD 2029
Muhammad Tahir v The State 1992 P Cr.LJ 490
Muhammad Ramzan v The State 1990 P Cr.LJ 633,
Muhammad Yusuf v The Chief Settlement and Rehabilitation Commissioner Pakistan, Lahore and another PLD 1968 SC 101
Nagina Silk Mills, Lyallpur v. Income-Tax Officer PLD 1963 SC 322
Nazir Ahmad v The State 1988 P Cr.LJ 775
Noor Ahmad v The State 1991 PCr.LJ 1015
Pakistan through Secretary, Ministry of Defence v The General Public PLD 1989 SC 6
Anukul Chandra Pradhan v Union of India 1996 (6) SCC 354
Re City Equitable Fire Insurance Company [1925] 1 Ch 407
R. v. Metropolitan Police Commissioner [1968] 1 All ER 763
Tariq Mahmood v The State 1985 PCr.LJ 1105.
Shabbir Ahmed v The State PLD 1996 Karachi 537
Wasim Sajjad and others v Federation of Pakistan through Secretary, Cabinet Division and others PLD 2001 SC 233
Shahida Zahir Abbasi and 4 others v President of Pakistan as Supreme Commander of the Armed Force, Islamabad and others PLD 1996 SC 632
Shamas Textile Mills Ltd and others v Province of Punjab 1999 SCMR 1477
State of Bihar v Deokaran Nenshi AIR 1973 SC 908
State of Madras v. A. Vaidyanatha Iyer PLD 1958 SC (Ind.) 264
State of West Bengal v The Attorney General for India, Intervener AIR 1963 SC 255
Sultan Ali v The State PLD 1971 Kar. 78
Syed Zafar Ali Shah and others v General Pervez Musharraf, Chief Executive of Pakistan and others PLD 2000 SC 869
Syed Zafar Ali Shah and others v General Pervez Mussharaf, Chief Executive of Pakistan and others 2000 SCMR 1137
Union of India and Others v Sushil Kumar Modi and Others 1997 (4) SCC 770
Vineet Narain v Union of India 1996 (2) SCC 199

IRSHAD HASAN KHAN, CJ gave the judgment of the Court:-

This judgment shall dispose of Constitutional Petitions No. 13, 10, 27, 15, 16, 17, 28, 24, 26, 01, 14, 19, 20, 32 and 33 of 2000, which have been filed by the petitioners, under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the Constitution), challenging the vires of the National Accountability Bureau Ordinance, 1999 (XVIII of 1999) (hereinafter called the NAB Ordinance) (as amended by Ordinance XIX of 1999 and Ordinances IV and XXIV of 2000) on the grounds that the said Ordinance is *ultra vires* the Constitution, principles of separation of powers and independence of judiciary, in violation of the fundamental rights of freedom of trade, business or profession, security of person, safeguard from illegal arrest and detention, protection against retrospective punishment, inviolable dignity of man, freedom of movement, equality of citizens and other rights guaranteed by the Constitution and that it purports to set up an arbitrary executive body to negate the rule of law.

2. *Vide* order dated 12th September, 2000, a Bench of this Court, admitted the above petitions to regular hearing, to consider the common points emerging from these petitions, which are in the following terms:

- (i) Whether the impugned Ordinance creates a parallel judicial system in disregard of the provisions of Articles 175, 202 and 203 of the Constitution and is violative of the law laid down by this Court in the case of *Mehram Ali and others v. Federation and others* (PLD 1998 SC 1445)?
- (ii) Whether section 2 of the impugned Ordinance whereby it deems to have come into force with effect from 1 January 1985 being retrospective contravenes the fundamental right enshrined in Article 12 of the Constitution in so far as it creates a new offence of wilful default with retrospective effect?
- (iii) Whether section 5(r) of the impugned Ordinance which defines wilful default negates the freedom of trade, business or profession as contemplated by Article 18 of the Constitution, which guarantees that subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation and to conduct any lawful trade or business?
- (iv) Whether the power vesting in the Chairman NAB or the Court trying a person for any offence under the impugned Ordinance *vide* clause (a) of section 12 and by providing in clause (c) (iv) thereof that any such order shall remain in force for a period of up to thirty days is an unreasonable restraint and violative of Articles 4, 9, 23 and 24 of the Constitution?
- (v) Whether clause (d) of section 14 of the impugned Ordinance whereby the burden of proof in respect of an offence under section 9(a)(vi) and (vii) has been placed on the accused and his conviction has been conferred validity, is violative of Articles 4 and 25 of the Constitution?
- (vi) Whether section 16(d) of the impugned Ordinance which authorises the Chairman NAB to select the venue of the trial by filing a reference before any Accountability Court established anywhere in Pakistan suffers from excessive delegation?

- (vii) Whether section 17(c) of the impugned Ordinance which enables the Accountability Court to dispense with any provision of the Code of Criminal Procedure, 1898, and follow such procedure as it may deem fit in the circumstances of the case is violative of Articles 4 and 25 of the Constitution?
- (viii) Whether section 18 of the impugned Ordinance which prohibits the Accountability Court to take cognizance of any offence under the impugned Ordinance except on a reference made by Chairman NAB or an officer of the NAB duly authorised by him amounts to excessive delegation?
- (ix) Whether section 24(d) of the impugned Ordinance which empowers the Chairman NAB to detain in custody an accused person up to a period of ninety days after having produced him once before the Accountability Court, such power vesting in executive authority is contrary to the right of equal protection and also opposed to the spirit of fundamental rights contained in Clause (2) of Article 10 of the Constitution?
- (x) Whether section 23 of the Ordinance in so far as it prohibits transfer of any right, title, interest or creation of charge on property after the Chairman NAB has initiated investigation into the offences under the impugned Ordinance, alleged to have been committed by an accused person, is violative of Articles 23 and 24 of the Constitution?
- (xi) Whether section 24(a) of the impugned Ordinance empowering the Chairman NAB at any stage of the investigation under the impugned Ordinance, to direct that the accused, if not already arrested, shall be arrested, [is] tantamount to conferment of unbridled and unfettered powers of determining if an accused is to be arrested or not [and] is violative of Article 25 of the Constitution?
- (xii) Whether in so far as section 24(c) of the impugned Ordinance which enjoins that the provision of clause (a) thereof shall also apply to cases which have already been referred to the Accountability Court, offends the provisions of Articles 4 and 25 of the Constitution on the ground of retrospectivity in its operation.
- (xiii) Whether the case of voluntary return (plea bargaining) under section 25 of the impugned Ordinance is derogatory to the concept of independence of judiciary in so far as where the trial has commenced the Court cannot release the accused without consent of the Chairman NAB?
- (xiv) Whether section 25A (e) and (g) give unfettered discretion to the Chairman NAB to reject the recommendations of a duly appointed committee and to refuse to recognise a settlement arrived at between a creditor and a debtor amounts to excessive delegation and restraint on the freedom of contract on the touchstone of Articles 4, 18 and 25 of the Constitution?
- (xv) Whether section 32(d) of the impugned Ordinance purports to oust the jurisdiction of the superior Courts from exercising their jurisdiction under Article 184(3) and Article 199 of the Constitution?
- (xvi) Whether various provisions of the impugned Ordinance grant arbitrary and unfettered discretion to the Chairman NAB e.g.
 - (i) Under section 9(c) of the impugned Ordinance to set whatever conditions he feels with respect to the release of an accused from custody,
 - (ii) Under section 18(g) to refer or not to refer a case to an Accountability Court.
 - (iii) Under section 25A(g) to refuse to recognise a settlement arrived at between a creditor and debtor.
- (xvii) Whether to exclude the officers and staff of the NAB who have not been deputed to or posted to NAB from the Federation or a Province from the category of civil

servants within the purview of section 2(b) of the Civil Servants Act, 1973, is violative of Article 25 of the Constitution?

- (xviii) Whether the alleged violation of principles of Universal Declaration of Human Rights of 1948 and the Cairo Declaration on Human Rights in Islam are justiciable in these proceedings?
- (xix) Whether the impugned Ordinance is liable to be struck down on the ground that earlier Ehtesab Act, 1997 was competently and validly made and its vires were upheld by this Court and therefore there is no necessity for enacting the same?
- (xx) Whether the vires of the impugned Ordinance can be examined on the touchstone of Article 2A of the Constitution having regard to the law laid down by this Court in the case of *Hakim Khan and 3 others versus Government of Pakistan through Secretary Interior and others* (PLD 1992 SC 595)?
- (xxi) Whether the provisions for appointment of Chairman and other officials in the NAB are discriminatory inasmuch as they do not lay down any qualifications in that regard or methodology for their appointment?
- (xxii) Whether the provisions relating to transfer of cases qua the Provincial Courts within the territories of a Province and from one Province to another, suffer from excessive delegation?
- (xxiii) Whether in the absence of any provision in the impugned Ordinance regarding special treatment to be meted out to women-accused is not violative of the mandate under Article 25(3) of the Constitution and section 167 of the Criminal Procedure Code.

The above questions are matters of first impression and of great public importance involving fundamental rights as ordained by Article 184(3) of the Constitution and as commented upon by this Court in the case of *Syed Zafar Ali Shah and others versus General Pervez Mussharaf, Chief Executive of Pakistan and others* (2000 SCMR 1137) wherein it was observed that the validity of National Accountability Ordinance, 1999 will be examined separately in appropriate proceedings at an appropriate stage. This is another circumstance for admitting these petitions to a regular hearing.

As observed at the outset of the hearing today that in these petitions the question of validity of the impugned Ordinance alone shall be examined and not individual grievances of the petitioners raised in some of the petitions either directly or indirectly. However, the petitioners shall not be debarred from raising their respective pleas available under the law through appropriate proceedings before appropriate fora in accordance with law. It is also clarified that admission of these petitions shall not operate as stay of proceedings before NAB, Accountability Courts or any other Court in relation to the matters arising out of the impugned Ordinance. Of course, such proceedings shall be decided on their own merit and in accordance with law. It is further clarified that the petitioners herein or any accused whose cases are pending in Accountability Courts shall be at liberty, if so advised, to approach the appropriate forum under the Ordinance for redress of their grievances in accordance with law.

3. [The court then examined the history of the laws governing the accountability process in the country and continued] On 16th November, 1999, after the military take-over on 12th, October, 1999, the National Accountability Bureau Ordinance, 1999 (Ordinance No. XVIII of 1999) was promulgated, which has been thrice amended by Ordinance No. XIX of 1999 and Ordinances No. IV and XXIV of 2000. This Ordinance repealed the Ehtesab Act, 1997 (Act No. IX of 1997).

4. Here, it would be advantageous to refer to an observation made in *Federation of Pakistan M. Nawaz Khokhar* (PLD 2000 SC 26) which is to the following effect:

It may be stated that transparent, even-handed and across the board accountability of holders of all public offices, is the essence of Islamic polity and a democratic set-up. [The] presence of an accountability process in a system of governance not only deters those who hold sway over the populace from misusing and abusing the power and authority entrusted to them but it also ensures principles of good governance.

5. We have heard the learned counsel for the parties at quite some length and perused the case law on the subject cited at the Bar as also the other material placed on record.

[The submissions to the court were considered and **IRSHAN HASAN KHAN, CJ** then continued]

SUMMARY OF THE ORDINANCE

158. The [NAB] Ordinance intends to provide for the setting up of a National Accountability Bureau so as to eradicate corruption and corrupt practices and hold accountable all persons accused of such practices and matters ancillary thereto as spelt out from the Preamble.

159. Section 1 of the Ordinance describes the title of the Ordinance. By virtue of Section 2 it came into force on 16 November 1999 and has been made retrospectively applicable with effect from 1 January 1985. Section 3 provides that the Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force. Section 4 covers its application and provides that it extends to whole of Pakistan and shall apply to all persons in Pakistan and persons who are or have been in the service of Pakistan wherever they may be including areas which are part of Federally and Provincially Administered Tribal Areas.

160. Section 5 [is the general definition section]. Section 6 deals with the constitution of the National Accountability Bureau and appointments of its Chairman and Acting Chairman. Sections 7 and 8 deal with the appointments of Deputy Chairman and the Prosecutor General Accountability respectively. Sections 9 and 10 respectively deal with corruption and corrupt practices and punishments therefor. The matters relating to the imposition of [a] fine, freezing of property and claim or objection against the freezing are respectively dealt with in sections 11, 12 and 13.

161. Section 14 deals with the presumption against [an] accused accepting illegal gratification. Section 15 provides for incurring of disqualification to contest elections or to hold public office by convicted persons. Sections 16, 16A and 16B respectively deal with the subjects of trial of offences, transfer of cases and contempt of court. Section 17 relates to application of the Code of Criminal Procedure as also power of the Accountability Court to dispense with any of the provisions of the said Code. Cognizance of offences by the Accountability Court, power of the Chairman NAB or any officer authorised by him to call for information and reporting of suspicious financial transactions by the banks and financial institutions for taking prompt action are dealt with under sections 18, 19 and 20. Section 21 deals with international cooperation and

requests for mutual legal assistance. The jurisdiction of the Chairman NAB to investigate suspected offences is provided under section 22 while section 23 deals with the circumstances under [which] the transfer of property by an accused or his/[her] relatives etc, shall be void. Section 24 deals with the arrest of the accused and other ancillary matters leading to the trial before an Accountability Court. Matters in relation to voluntary return/plea bargaining, payment of loans and tender of pardon to accomplice/plea bargaining are the subject matter of sections 25, 25A and 26. Section 27 deals with power of [the] Chairman NAB or an officer authorised by him to seek assistance from any department of the Federal Government etc. and section 28 pertains to appointment of members of the staff and officers of NAB. Section 29 deals with the competence of the accused to be a witness and sections 30, 31 and 31A encompass the subjects of false evidence, etc, prohibition to hamper investigation and abscondence of accused to avoid service of warrants. Section 31B lays down the procedure for withdrawal from prosecution. Section 31C provides that the Accountability Court shall take cognizance of an offence against an officer or employee of a bank or financial institution with prior approval of the State Bank of Pakistan. Section 31D deals with inquiry, investigation or proceedings in respect of imprudent bank loans etc. The matters in relation to appeal after conviction are dealt with under section 32 and the subject of pending proceedings has been dealt with under section 33.

162. Section 34 lays down the procedure for framing rules for carrying out the purposes of the Ordinance, which shall form part of the Ordinance itself. The subjects of repeal and indemnity are dealt with under sections 35 and 36 whereas section 37 provides for issuance of removal of difficulties order by the President. The Schedule of Offences provides for various terms of imprisonment in relation to the offences under the Ordinance.

MAINTAINABILITY OF PETITIONS UNDER ARTICLE 184 (3) OF THE CONSTITUTION

163. Mr. Abid Hasan Minto [appearing on behalf of the Federation] at the outset vehemently argued that the Federation is submitting to the jurisdiction of this Court under extraordinary circumstances and would welcome any suggestions/amendments in the NAB Ordinance, but the same may not be treated as precedent. While we appreciate the ingenuity and originality of the gracious offer made by Mr. Minto, nevertheless we are of the view that it is never safe to decide cases on concession simpliciter in matters involving questions of great public importance. It is the duty of this Court to exercise powers and functions within the domain of its jurisdiction in respect of any law or provision of law which comes for examination to ensure that the majesty of the law prevails and erosions therein are prevented so that all persons live securely under the rule of law; to promote within the limits of judicial functions, the observance and attainment of human and fundamental rights and to administer justice impartially among persons and between persons and the State which is a *sine qua non* for the maintenance of the independence of Judiciary and encouragement of public confidence in the judicial system.

164. Any legislative instrument which undermines the independence of the Judiciary or abrogates or abridges any fundamental right may be regarded as repugnant to the spirit of the Constitution. The Superior Courts have the power to declare such legislative instrument as unenforceable, partly or wholly, as the case may be, depending upon the nature of legislation and facts and circumstances of each case. When the existence and

safety of the country is endangered because of the economic disaster, this Court is the sole Judge, both of the proportions of the danger and when and how the same is to be prevented and avoided. This is another circumstance for adjudicating the question of validity of the NAB Ordinance.

165. It is a settled constitutional principle that [the] Bench should be independent of the Executive and arbiter of the Constitution to decide all disputed questions. This is so because the Superior Courts in the exercise of their judicial powers have to check the arbitrary exercise of power by any other organ or authority of the State. It rests with the Courts alone to define and limit the exercise of power by the Executive in terms of a legislative instrument. Viewed from this angle, it is the duty of this Court to protect the fundamental rights guaranteed under the Constitution and the independence of the judiciary. This Court is the ultimate guardian of the rights of the people. It is, therefore, the duty of this Court to authoritatively interpret not only the validity of the NAB Ordinance but also its scope.

166. When faced with this, Mr. Abid Hasan Minto argued that the petitioners are not entitled to invoke the jurisdiction of this Court under Article 184 (3) of the Constitution, in that, they do not satisfy the criteria laid down therein. The petitioners, who are facing trial under the NAB Ordinance have an adequate remedy by way of an appeal under section 32 *ibid*. Those who are not under trial, have no cause of action as they do not seek enforcement of any of the fundamental rights.

167. We are afraid the preliminary objection has no force inasmuch as under Article 184(3) the only requirement is that the petition should raise a question of public importance with regard to the enforcement of a fundamental right. Since the NAB Ordinance affects the public at large, the question of its validity is a question of public importance. Under somewhat similar circumstances, in the case of *Mehram Ali (supra)* the validity of the Anti-Terrorism Act was examined and a number of provisions were struck down [as] being violative of the provisions of the Constitution. This question was also dealt with in the admitting order *vide* paragraphs 4 and 5 thereof, which read thus:

The above questions are matters of first impression and of great public importance involving fundamental rights as ordained by Article 184(3) of the Constitution and as commented upon by this Court in the case of *Syed Zafar Ali Shah and others v. General Pervez Musharaf, Chief Executive of Pakistan and others* (2000 SCMR 1137) wherein it was observed that: "The validity of [the] National Accountability Ordinance, 1999 will be examined separately in appropriate proceedings at appropriate stage".

As observed at the outset of the hearing today that in these petitions the question of validity of the impugned Ordinance alone shall be examined and not individual grievances of the petitioners raised in some of the petitions either directly or indirectly. However, the petitioners shall not be debarred from raising their respective pleas available under the law through appropriate proceedings before appropriate fora in accordance with law. It is also clarified that admission of these petitions shall not operate as a stay of proceedings before the NAB, Accountability Courts or any other Court in relation to the matters arising out of the impugned Ordinance. Of course, such proceedings shall be decided on their own merit and in accordance with law. It is further clarified that the petitioners herein or any accused whose cases are pending in

Accountability Courts shall be at liberty, if so advised, to approach the appropriate forum under the Ordinance for redress of their grievances in accordance with law.

Also refer to the following observations in the case of *Syed Zafar Ali Shah (supra)*:

That the Superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Armed Forces, if challenged, in the light of the principles underlying the law of state necessity as stated above. Their powers under Article 199 of the Constitution thus remain available to their full extent, and may be exercised as heretofore, notwithstanding anything to the contrary contained in any legislative instrument enacted by the Chief Executive and/or any order issued by the Chief Executive or by any person or authority acting on his behalf.

That the courts are not merely to determine whether there exists any nexus between the orders made, proceedings taken and acts done by the Chief Executive or by any authority or person acting on his behalf, and his declared objectives as spelt out from his speeches dated 13 and 17 October, 1999, on the touchstone of state necessity but such orders made, proceedings taken and acts done including the legislative measures, shall also be subject to judicial review by the Superior Courts.

That the validity of the National Accountability Bureau Ordinance, 1999 will be examined separately in appropriate proceedings at appropriate stage.

This is another circumstance for examining the *vires* of the NAB Ordinance. Thus visualized, the preliminary objections as to the maintainability of the Constitution Petitions raised by Mr. Abid Hasan Minto are hereby repelled.

168. Mr. Aziz A. Munshi, learned Attorney General also made a half-hearted attempt to raise a preliminary objection that these petitions are not maintainable on the ground that the questions raised therein by the petitioners relate to individual grievances which can only be considered by the competent judicial forum in accordance with law. He spent quite some time to argue that after adjudication by the Court in the first instance the appellate remedy provided by law can be invoked by the petitioners depending upon the merits of each case. The petitions do not involve a question of public importance with reference to enforcement of any of the fundamental rights conferred by Part II of the Constitution and, according to him, in any case some of the Fundamental rights still stand validly suspended by Proclamation dated 28 May 1998.

169. We are afraid, the objections are *ex facie* frivolous in that a bare reading of the admitting note would show that the petitions were admitted to regular hearing *inter alia* to examine whether the promulgation of the impugned Ordinance whereby it deems to have come into force with effect from 1 January 1985 being retrospective, contravenes the fundamental rights enshrined in Article 12 of the Constitution in so far as it creates a new offence of "wilful default"; as also the question whether the impugned Ordinance creates a parallel judicial system in disregard of the provisions of Articles 175, 202 and 203 of the Constitution and is violative of the law laid down by this Court in the case of *Mehram Ali (supra)*. It is therefore the duty of the Court to examine the points raised in

the petitions and pronounce authoritative judgement thereon. The preliminary objection as to maintainability of the petitions is *ex facie* fallacious and is hereby overruled.

COMPETENCE OF THE FEDERAL LEGISLATURE TO PROMULGATE NAB ORDINANCE

170. Before examining the merits of the case, it is necessary to deal with the preliminary objection raised by Mr. M. Akram Sheikh, learned Senior ASC and supported by Mr. Abdul Hafeez Pirzada, learned Senior ASC that the impugned Ordinance was wholly void and liable to be struck down in that the Federal Legislature was not competent to promulgate the same under any provision of the Constitution and/or the subjects contained in the Federal Legislative List/Concurrent Legislative List. The precise objection was that the impugned legislation exclusively falls within the competence of the Provincial Legislatures and the promulgation of the same has the effect of invading the provincial autonomy.

171. M/s Abdul Hafeez Pirzada and Muhammad Akram Sheikh vehemently argued that under the Provincial Lists in the Government of India Act, 1935, 1956 Constitution, Interim Constitution of 1972, the Central List of 1962 Constitution as also the Federal Legislative List and Concurrent List in the 4th Schedule of 1973 Constitution, the constitution and organization of all courts except the Supreme Court is a provincial legislative subject and under Article 142 (c) of the Constitution the Parliament or the President cannot make laws in respect thereof. The NAB Ordinance and the creation of Accountability Courts thereunder are violative of the Constitution and fundamental rights.

172. The learned counsel further argued that clause (2) of Article 175 deals with conferring of jurisdiction on the courts and under Article 142 there is a clear distribution of law making powers between the Parliament and the Provincial Assemblies. Under Article 142 (c) where a legislative power is not mentioned in the Federal or the Concurrent List, the residuary powers vest exclusively in the concerned Provincial Legislature. Their precise submission was that the Federal Government can set up a court only in the Federal territory and not in any Province.

173. Mr. Abid Hasan Minto did not agree with the arguments of M/s Abdul Hafeez Pirzada and Muhammad Akram Sheikh regarding the competence of the Federal Legislature to deal with jurisdiction of the Courts as also the NAB Ordinance being an invasion on the provincial autonomy. He referred to Article 175, Entry 55 of Part I of the Federal Legislative List and Entries 1, 2, 4, 46 and 47 of the Concurrent Legislative List to contend that the Federal Government does have the power to enact laws providing for establishment of courts, which would function in the areas whether federal or provincial, as specified in the enactment.

174. In rebuttal, Mr. Abdul Hafeez Pirzada submitted that some constitutional instruments prior to 1973 invested the Provincial Legislature and Governments with power to establish courts. In 1973 departure was made and all residuary powers were vested in the Provinces because this was one of the agreements on which consensus had been reached, that is why there is no Entry providing that the power to establish courts was provincial, because that is provincial by virtue of the residuary powers. He argued that any subject on which there is no categorical provision in the Federal

Legislative List or in the Concurrent Legislative List is provincial. He referred to *Gadoon Textile Mills and 814 others v. WAPDA and others* (1997 SCMR 641) to contend that just because a law is a subject matter of the Concurrent Legislative List does not ipso facto confer executive authority on the Federal Government. All that the Concurrent Legislative List says is that both the Parliament and the Provincial Legislatures shall be competent to legislate in respect of subjects provided therein, but the Concurrent Legislative List does not vest executive authority in the Federation with respect to any matter within the exclusive legislative field of a Province. In support of the above contention, reference was made to Articles 97 and 137 of the Constitution, which read as under:

97. Subject to the Constitution, the executive authority of the Federation shall extend to the matters with respect to which Majlis-e-Shoora (Parliament) has power to make laws, including exercise of rights, authority and jurisdiction in and in relation to areas outside Pakistan:

Provided that the said authority shall not, save as expressly provided in the Constitution or in any law made by Majlis-e-Shoora (Parliament), extend in any Province to a matter with respect to which the Provincial Assembly has also power to make laws.

137. Subject to the Constitution, the executive authority of the Province shall extend to the matters with respect to which the Provincial Assembly has power to make laws:

Provided that, in any matter with respect of which both Majlis-e-Shoora (Parliament) and the Provincial Assembly of a Province have power to make laws, the executive authority of the Province shall be subject to, and limited by, the executive authority expressly conferred by the Constitution or by law made by Majlis-e-Shoora (Parliament) upon the Federal Government or authorities thereof.

He further argued that if the Federal law impinges on the legislative authority of a Province and enacts on any subject within the Concurrent Legislative List, it has to expressly oust the executive authority of a Province, otherwise even with respect to a Federal law, the executive authority will vest in the Province concerned.

175. It would be advantageous to refer to the above provisions of the Constitution. Article 175 of the Constitution reads:-

175. (1) There shall be a Supreme Court of Pakistan, a High Court for each province and such other courts as may be established by law.

(4) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.

(5) The Judiciary shall be separated progressively from the Executive within [fourteen] years from the commencing day.

Entries 55, 56, 58 and 59 of the Federal Legislative List read as under:-

55. Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List and, to such extent as is expressly authorised by or under the Constitution, the enlargement of the jurisdiction of the Supreme Court, and the conferring thereon of supplemental powers.

56. Offences against laws with respect to any of the matters in this Part.
58. Matters which under the Constitution are within the legislative competence of [Majlis-e-Shoora (parliament)] or relate to the Federation.
59. Matters incidental or ancillary to any matter enumerated in this Part.

Entries 1, 2, 4, 46 and 47 of the Concurrent Legislative List are as follows:

1. Criminal law, including all matters included in the Pakistan Penal Code on the commencing day, but excluding offences against laws with respect to any of the matters specified in the Federal Legislative List and excluding the use of naval, military and air forces in aid of civil power.
2. Criminal procedure, including all matters included in the Code of Criminal Procedure, on the commencing day.
4. Evidence and oath; recognition of laws, public acts and records and judicial proceedings.
46. Offences against laws with respect to any of the matters in this List; jurisdiction and powers of all courts except the Supreme Court, with respect to any of the matters in this List.
47. Matters incidental or ancillary to any matter enumerated in this List.

Entry 1 of the Concurrent Legislative List relates to criminal law, including all matters included in the Pakistan Penal Code, but excluding offences against laws with respect to any of the matters specified in the Federal Legislative List. Entries 2, 3 and 4 of the Concurrent Legislative List empower the Federal Government to legislate on matters relating to criminal/civil procedures as well as evidence/oath, etc.

176. It may also be noted that section 6 Criminal Procedure Code describes the criminal courts and any other court established by or under any other law. Thus, the Federal Government is competent to make a law providing for special courts and the procedure under which the courts will function and dispense justice. The objection of the petitioners that it is a case of "occupied field" is not well-founded, inasmuch as, such a situation arises where legislation is already in the field, which is not the case here. It is well settled that a Legislature, which has made any law, is competent to change, annul, re-frame or add to that law. Admittedly, the Provincial Legislatures have not made any legislation on the subject.

177. In *Shamas Textile Mills Ltd and others v. Province of Punjab and 2 others* (1999 SCMR 1477) this Court dealt with the scope of distribution of legislative powers under Articles 141, 142 and 143 of the Constitution, the conflict in legislation between the Federal and the Provincial Legislatures, resolution by the Judiciary in the event of any inconsistency and the principles relating to the doctrine of "occupied field" as well as the central and provincial law making power under Article 162 of the 1962 Constitution. The head notes on the above aspects from the judgment authored by one of us (Muhammad Arif, J.) are as under:

Distribution of legislative powers; Conflict between the Federal Legislature and Provincial Legislature; Resolution by judiciary; In the event of any inconsistency between the Federal Law and Provincial Law the mandate of the Constitution, as contained in Art. 143 is to prevail; Doctrine of occupied field; Applicability,

In a unitary form of Government, all the legislative powers, of necessity, vest in the Legislature of the given country. In the Federal form of Government, however, the legislative powers vest in the respective Legislatures in line with the dispensation under the Constitutional document/s concerned.

It is in the sphere of distribution of legislative powers in a federal set up that a conflict between the legislation by the Federal/Central Legislature and Provincial/State Legislature can arise for resolution by the Judiciary.

Articles 141, 142 and 143 of 1973 Constitution respectively deal with (1) extent of Federal and Provincial Laws; (2) subject-matter of Federal and Provincial Laws, and (3) inconsistency between Federal and Provincial Laws.

Under Article 141 [(Majlis-e-Shoora) (Parliament)] may make laws for the whole or any part of Pakistan and a Provincial Assembly may make laws for the Province or any part thereof. Under Article 142 (Majlis-e-Shoora (Parliament) has exclusive powers to make laws with respect to any matter in the Federal Legislative List and [(Majlis-e-Shoora (Parliament)] and Provincial Assembly also have powers to make laws with respect to any matter in the Concurrent List. Under clause (c) of Article 142 a Provincial Assembly shall and [(Majlis-e-Shoora (Parliament)] shall not, have power to make laws with respect of any matter not enumerated in either the Federal Legislative List or the Concurrent Legislative List. Further, in the event of any inconsistency between the Federal law and the Provincial law, the mandate of the Constitution as contained in Article 143 is that then the Act of [(Majlis-e-Shoora (Parliament)] whether passed before or after the Act of the Provincial Assembly, or, as the case may be, the existing law, shall prevail and the Act of the Provincial Assembly shall, to the extent of the repugnancy be void. The doctrine of occupied field is a concomitant of the larger doctrine of pith and substance and incidental encroachment under the doctrine of pith and substance with all its concomitants, postulates for its applicability on a competition between Federal legislation and Provincial legislation and it would be erroneous to invoke the doctrine where there is no such competition, merely because a Provincial law conflicts with another law which has not been passed by the Federal Legislature but deals with a matter in the Federal List. Similar is the case where a Federal Statute provides that the Provincial Government may extend the operation of a law to any part of the Province and the legislation is brought into operation by the Provincial Government, the law does not lose its Federal character and does not become invalid when it comes into conflict with another Federal law. Article 143 does not apply to the resolution of inconsistency between two “existing laws” in that it applies only when there is a conflict between a Federal law passed under the Constitution and an existing law, whether Provincial or Federal. In such a case, if the Federal law is passed with respect to a matter in the Federal List or Concurrent List, it would be *intra vires* the Federal Legislature and as regards the question of its repugnancy to an “existing law”, the Federal law would prevail on the principle of repeal by implication which rests on the principle that if the subject-matter of the latter legislation is identical with that of the earlier one, then, the earlier law stands repealed by the latter enactment.

178. This is not the first time that the Federal Government has promulgated laws providing for creation of offences, the procedure and the punishments therefor and the establishment of courts in the Provinces. Enforcement of the Anti-Terrorism Act, 1997 is a classic example of the above power of the Federal Government in the recent past.

Articles 175, 202 and 203 of the Constitution provide a framework on Judiciary, i.e. there shall be a Supreme Court of Pakistan, a High Court for each Province and such other courts, as may be established by law. The words “such other courts as may be established by law” are relatable to the subordinate courts referred to in Article 203 of the Constitution. Article 225 of the Constitution also empowers the Federal Government to establish Election Tribunals, which operate within the Provinces. However, the functioning of any court or tribunal, beyond the control and supervision of the High Court concerned in terms of Article 203 of the Constitution, does not fulfil the mandatory requirement of the Constitution, in that, under Article 203 read with Article 175 of the Constitution, the supervision and control of the subordinate judiciary exclusively vests in the High Courts. The above principles were also recognized by a 5-member Bench of this Court in the case of *Mehram Ali (supra)* wherein it was *inter alia* held that the provisions of the Anti-Terrorism Act, 1997 were valid except those which militated against the concept of independence of Judiciary or which were repugnant to the provisions of Articles 175 and 203 etc. Accordingly, directions were issued for making appropriate amendments in the Act. Some other statutes were also promulgated by the Federal Legislature including the following:

- i) The Foreign Exchange Regulation Act, 1947;
- ii) Pakistan Criminal Law (Amendment) Act, 1958;
- iii) Prevention of Anti-National Activities Act, 1974;
- iv) Suppression of Terrorist Activities (Special Courts) Act, 1975;
- v) Drugs Act, 1976;
- vi) The Emigration Ordinance, 1979;
- vii) Offences in respect of Banks (Special Courts) Ordinance, 1984;
- viii) The Terrorist Affected Areas (Special Courts) Act, 1992;
- ix) The Control of Narcotic Substances Act, 1997;
- x) Anti-Terrorism Act, 1997.

179. It would thus be seen that the Constitution does confer power on the Federal Legislature to establish criminal courts or tribunals and not necessarily those criminal courts, which fall within the purview of section 6 Cr. P. C....

180. As to the question regarding invasion of the provincial autonomy, it may be observed that all laws relating to the jurisdiction of courts and for filing causes before the courts, whether civil or criminal, do not take their queue on the principle of federation. In civil law, it is the cause of action that determines, in most cases, the suit has to be filed where the debtor resides. So, there are [a] variety of considerations but none relatable to federal territorial character. In criminal cases, the general principles are contained in sections 177 to 182 Cr.P.C. i.e. where the crime takes place, the courts in that area have jurisdiction and it matters little whether the person belongs to one or the other Province. It is the crime, its nature and the place of crime that determine the place where the trial has to take place. Section 178 Cr.P.C. authorizes the provincial governments to determine the venue of trial of offences. It is a law of procedure, the scheme of which is not concerned with the question of provincial autonomy. Where a crime has taken place in various parts of the country or is spread over various places, any of the courts of those areas is competent to take cognizance of the matter. In determining where the matter has to be tried, no consideration is given to the provincial nature of the society, autonomous nature of the Provinces or to the fact that the accused belongs to one or the other Province. All these matters have no concern with the concept of provincial autonomy except the High Courts, which have been created

under the Constitution for each Province. Mr. Abid Hasan Minto rightly contended that the scheme of the creation of the Supreme Court is not of that character. It is not a Federal Court. It is the apex Court. It is a Court for the whole of Pakistan and it does not go by the principle of federation in that fashion in which the allocations are made and distributions take place. In its own wisdom, the Supreme Court may decide how to manage its composition. That is a different thing, but the Constitution does not do that, it looks into it as an apex Court.

181. The arguments advanced by M/s M. Akram Sheikh and Abdul Hafeez Pirzada are not sustainable. The NAB Ordinance has been competently promulgated and is neither *ultra vires* the Constitution nor does it invade the provincial autonomy in any manner.

182. Let us now deal with the remaining questions formulated in the admitting order.

WHETHER THE ESTABLISHMENT OF ACCOUNTABILITY COURTS IN THEIR PRESENT FORM CREATES A PARALLEL JUDICIAL SYSTEM.

183. The details of the topic find mention in question no. (i) which reads as follows:

“Whether the Impugned Ordinance creates a parallel judicial system in disregard of the provisions of Articles 175, 202 and 203 of the Constitution and is violative of the law laid down by this court in the case of *Mehram Ali and others v The Federation and others* (PLD 1998 SC 1445)?”

184. Mr. Abid Hasan Minto argued that in *Mehram Ali’s* case, this Court held that other than such judicial courts and tribunals which find specific mention in the Constitution itself, all courts established under Article 175 would be subordinate to the Superior Judiciary, i.e. the High Courts and the Supreme Court. This subordination of courts and their supervision and administrative control by the superior courts was held to be a *sine qua non* of the independence of Judiciary.

185. Section 5(g) provides that a judge of an Accountability Court will be appointed by the President after consultation with the Chief Justice of Pakistan and he can only be removed from office earlier than the statutory period by the President, after consultation with the Chief Justice of Pakistan. Section 16(c) provides that where more than one Accountability Courts have been established for an area, the Chief Justice of the High Court of the Province concerned shall designate an administrative judge from amongst the Accountability Courts/Judges in that area.

186. Section 16A(b) provides that where the Chairman NAB seeks transfer of a case from one Accountability Court to another within a Province, an application seeking such transfer shall be made to the Chief Justice of the High Court for that Province and where the transfer is sought from an Accountability Court in one Province to an Accountability Court in another Province, an application seeking such transfer shall be made to the Chief Justice of Pakistan. Section 32 provides that appeals from final judgment and order of an Accountability Court shall lie to the High Court of the concerned Province. Section 34 provides that rules shall be framed by the President for carrying out the purposes of the impugned Ordinance in consultation with the Chief Justice of Pakistan.

187. Mr. Minto argued that the above provisions, entailing appointment and removal of judges, transfer of cases, designation of administrative judges, hearing of appeals and

framing of rules, put the Accountability Courts amply and effectively under the subordination and control of the Superior Courts. Section 5(g) provides a statutory security of tenure in that the judges of Accountability Courts are to remain in office for two years and their earlier removal, if at all, can only take place after consultation with the Chief Justice of Pakistan and not at the whim of the executive.

188. On these premises it was argued that the impugned Ordinance does not create a parallel judicial system and merely creates “special courts”; in pursuance of Article 175 of the Constitution to function under the effective control of the Superior Courts while guaranteeing their independence by providing statutory security of tenure for their judges. The principles laid down in *Mehram Ali’s* case, it is submitted, are fulfilled.

189. Notwithstanding the above provisions cited by Mr. Abid Hasan Minto, the questions which require consideration are (i) whether the above provisions of the impugned Ordinance are violative of the principle of trichotomy of powers as envisaged under the Constitution and (ii) whether the Ordinance has created a parallel judicial system in disregard of the provisions of Article 175, 202 and 203 of the Constitution in the light of the law laid down in *Mehram Ali*.

190. It is true that under Section 5(g) of the Ordinance a Judge of an Accountability Court is appointed by the President of Pakistan in consultation with the Chief Justice of Pakistan and he cannot be removed earlier than the statutory period of two years after consultation with the Chief Justice of Pakistan. It is also true that as a matter of fact except few, all the Judges of the Accountability Courts are from the subordinate judiciary who were appointed through a consultative process. Though the Chief Justice of Pakistan is the sole consultee for appointment of a Judge of Accountability Court, nevertheless, he had obtained written recommendations from the Chief Justices of the concerned High Courts and only those persons were appointed who were recommended by the concerned Chief Justice.

191. Be that as it may, the provision of Section 5(h) which permits the employment of a retired Judge of a High Court or a retired District and Sessions Judge does impinge upon the independence of Judiciary. The statutory appointment of persons other than serving Judges is two years while a Sessions Judge serving on deputation as Judge, Accountability Court can be reverted to the subordinate judiciary at any stage as no statutory terms of deputation have been prescribed. Additionally, having regard to the principles of separation of powers and in consonance with the concept of independence of Judiciary, judicial powers cannot be exercised by executive functionaries. The NAB Ordinance vests various judicial powers such as grant of bail and release pending trial or appeal, exclusively in an executive authority, i.e. the Chairman NAB, in violation of the principle of separation of powers.

192. Section 9(c) read with Section 24(d) of the NAB Ordinance vests the power to release any person accused of an offence under the NAB Ordinance in the Chairman NAB and that too on the basis of any conditions as he may think fit are unwarranted. The power to set conditions for the release of an accused from custody or detention is a judicial power which ought not to be exercised except by a court which is established under Article 175 of the Constitution and is subject to the supervisory jurisdiction of the High Court in terms of Articles 202 and 203.

193. We are of the view that for smooth and effective functioning of the Accountability Courts all the Judges should be serving District and Sessions Judges qualified to be appointed as Judges of the High Court. They should be appointed for a period of three years in consultation with the Chief Justice of the concerned High Court and not with the Chief Justice of Pakistan as contemplated in Section 5(g) of the NAB Ordinance. During their term of appointment as such they shall not be transferred to any other place nor removed from service except on ground of misconduct, or physical or mental infirmity by the competent authority i.e. the High Court concerned, after following the procedure prescribed in the relevant rules in that regard. They shall be entitled to same remuneration, privileges, facilities and allowances as are admissible to their counterparts who are performing functions in respect of Courts and Tribunals established by the Federal Government. They shall not be paid the salaries and privileges as are admissible to Judges of the High Court except security arrangements if and when required having regard to the nature of their work. Remuneration already drawn for the period they performed their functions as Judges of the Accountability Courts shall not be recovered being hit by the doctrine of past and closed transaction. Further, appointment and posting as Judge of Accountability Court shall not debar such Judge from being elevated as Judge of a High Court if so appointed in terms of Article 193 of the Constitution.

194. The present incumbents /Judges of the Accountability Courts who are not serving District and Sessions Judges shall be given an option to serve as such on the last pay/salary drawn at the time of their retirement as District and Sessions Judges for the remainder part of their term of three years otherwise their services shall be dispensed with by giving them three months salary.

195. There is a positive direction by this Court in the case of *Zafar Ali Shah (supra)* that the Government shall accelerate the process of accountability in a transparent and coherent way. The Accountability Courts have since been established by the President in consultation with the Chief Justice of Pakistan who in turn had supported the recommendations of the concerned Chief Justices of the High Courts in their entirety without suggesting additional names for any of the intending appointees, it would, therefore, be in the interest of quick disposal of accountability cases and in the fitness of things that the present incumbents/Judges of the Accountability Courts are not disturbed from performing their functions at the respective places of their posting. They shall be deemed to have been appointed for a period of three years from the day they entered upon their respective offices. However, the Judges of the Accountability Courts shall perform their functions under the supervision and disciplinary control of the respective High Courts.

196. Budgetary allocations already sanctioned/ear-marked for establishment of Accountability Courts, their presiding officers, staff and for other allied matters, shall remain operative notwithstanding the fact that Judges of the Accountability Courts shall be under the disciplinary control of the concerned High Courts and not the Federal Government. The relevant provisions in the NAB Ordinance, therefore, be suitably amended.

BAIL

197. It was held in the case of *Zafar Ali Shah (supra)* that the powers of the superior courts under Article 199 of the Constitution remain available to their full extent

“notwithstanding anything contained in any legislative instrument enacted by the Chief Executive”. Whereas, section 9(b) of the NAB Ordinance purports to deny to all courts, including the High Courts, the jurisdiction under Sections 426, 491, 497, 498 and 561A or any other provision of the Code of Criminal Procedure or any other law for the time being in force, to grant bail to any person accused of an offence under the NAB Ordinance. It is well settled that the Superior Courts have the power to grant bail under Article 199 of the Constitution, independent of any statutory source of jurisdiction such as section 497 of the Criminal Procedure Code, section 9(b) of the NAB Ordinance to that extent is *ultra vires* the Constitution. Accordingly, the same [to] be amended suitably.

RETROSPECTIVITY AND WILFUL DEFAULT

198. Now we will take up questions no. (ii) and (iii) of the admitting order together as the same are inter-connected. Former question is as to whether section 2 of the NAB Ordinance whereby it deems to have come into force with effect from 1 January 1985 is violative of Article 12 of the Constitution in so far as it creates a new offence of “wilful default” with retrospective effect and the latter is as to whether section 5(r) which defines wilful default negates the freedom of trade, business or profession as contemplated by Article 18 of the Constitution.

199. Under Section 5(r) wilful default has been defined as under:

Wilful default: a person is said to commit an offence of wilful default under this Ordinance if he does not pay, or continues not to pay, or return or repay the amount to any bank, financial institution, co-operative society, or a Government department or a statutory body or an authority established or controlled by a Government on the date that it became due as per agreement containing the obligation to pay, return or repay or according to the laws, rules, regulations, instructions, issued or notified by the State Bank of Pakistan, or the bank, financial institution, co-operatives society, Government Department, statutory body or an authority established or controlled by a Government, as the case may be, and a period of thirty days has expired thereafter:

Provided that it is not wilful default under this Ordinance if the accused was unable to pay, return or repay the amount as aforesaid on account of any wilful breach of agreement or obligation or failure to perform statutory duty on the part of any bank, financial institution, cooperative society or a Government department or a statutory body or an authority established or controlled by Government.

In *Black’s Law Dictionary* the words “default” and “wilful” have been defined as under:

Default: By its derivation, a failure. An omission of that which ought to be done; Specifically, the omission or failure to perform a legal or contractual duty, to observe a promise or discharge an obligation (e.g. to pay interest or principal on a debt when due); or to perform an agreement. The term also embraces the idea of dishonesty, and of wrongful act, or an act of omission discreditable to one’s profession;

Wilful: Proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary. Premeditated; malicious;

done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification; An act or omission is wilfully done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. It is a word of many meanings, with its construction often influenced by its context.

A wilful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. A wilful act differs essentially from a negligent act. The one is positive and the other negative.

In civil actions, the word [wilfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal context it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterise a thing done without ground for believing it is lawful or conduct marked by a careless disregard whether or not one has the right so to act

It would be appropriate to refer to some decisions of the superior Courts from Pakistan and foreign jurisdiction wherein wilful default has been dilated upon, which would help understand the real import of the expression. In *Haji Ismail Dossa v. Monopoly Control Authority* (PLD 1984 Karachi 315), it has been observed:

The learned Authority noted that ignorance of law is no excuse and proceeded to consider the meaning of the word “default” as interpreted by various authorities. Relying on the authorities of our Superior courts where the word “default” has been interpreted it followed the dictum that default would seem to embrace every failure by the defendant to perform his contract unless prevented by the superior force over which he had no control. The entire emphasis of the learned Authority is on the meaning of the word “default” as interpreted by the judgments of our superior courts. In [a] majority of these cases the Courts were considering the provisions of West Pakistan Urban Rent Restriction Ordinance, where the word "default" has been used. In section 19 of the Ordinance, however, words used are “wilfully failed to register”. There is a sharp difference in the meaning of the word “default” and “wilful default” or “wilful failure. There can be no cavil with the meaning of “default” as stated by the learned Authority, but will this meaning apply to “wilful default” or “wilful failure”. The fact that the word “failure” has been qualified by the word “wilful” indicates that the failure or default should be wrongful or intentional. “Wilful failure” as it is apparent, will occur when a party has purposely failed to comply with the provisions or intentionally avoided to comply, knowing full well that he is duty-bound to do so. In such cases the party knows that he has to do a certain act but intentionally persists to follow a different course. If the failure is without any intention it will be a “default” or “failure” simpliciter, but if it is intentional it will amount to “wilful default” or “wilful failure”. In this regard reference can be made to *Horabin v. B.O.A.C.* where the meaning of “wilful misconduct” has been explained in the following manner:

Wilful misconduct is misconduct to which the will is a party, and it is wholly different in kind from mere negligence or carelessness, however, gross

that negligence or carelessness may be. The will must be a party to the misconduct, and not merely a party, to the conduct of which complaint is made. As an example if the pilot of an aircraft knowingly does something which subsequently a Jury finds amounted to misconduct, that fact alone does not show that he was guilty of wilful misconduct. To establish wilful misconduct on the part of this imaginary pilot, it must be shown not only that he knowing (and in that sense wilfully) did the wrongful act, but also that, when he did it, he was aware that he was committing misconduct.

In *Federation of Pakistan through the General Manager, N.W. Railway, Lahore v. Syed Hasham Ali Shah* (PLD 1954 Lahore 769), Orcheson, J. (as he then was), observed:

I therefore find myself entirely unable to agree either that misconduct can be equated with mere negligence or that, as held by Suhrawardy, J., misconduct is something distinct from wilful misconduct. The word "wilful" is defined in the Concise Oxford Dictionary as "for which compulsion or ignorance or accident cannot be pleaded as excuse: intentional; deliberate" while misconduct is defined primarily as "improper conduct". Unless his will is a party to his action, a man cannot be held guilty of misconduct.

In the above, Rahman, J. (as he then was), observed:

"Misconduct" may be intentional conduct inasmuch as the act or omission may have the feature of voluntariness included in it but it should still be distinguishable from intentional or wilful misconduct. To my mind, "misconduct" includes any highly improper or wrong conduct involving something more than mere negligence and "culpable neglect of an official in regard to his office" in the words of the Oxford Dictionary, would be one form of it. Misconduct, on the one side, has to be something more than negligence *simpliciter* and on the other less than "wilful misconduct". At least while fixing the lower boundary of the scope of its connotation. This may be a matter of some nicety in the circumstances of a particular case but the line has to be drawn somewhere consistently with the provisions of the statute and the language of the risk-note. The expression used in Risk Note-B may be regarded as a term of art in as much it is meant to be a compendious term covering *inter alia* the commission of an offence like mischief, criminal misappropriation, criminal breach of trust or theft by a Railway servant. These grosser forms of misconduct (if I might so describe them) which may be taken as corresponding to the "wilful misconduct" of English law, would a fortiori be included within the term "misconduct" and consequently the necessity for equating "misconduct" with "wilful misconduct" vanishes.

In *Re City Equitable Fire Insurance Company* [1925] 1 Ch 407 at page 409, "wilful neglect or default" has been dealt with in the following words:

Wilful Neglect or Default: An act, or an omission to do an act, is wilful where the person who acts, or omits to act, knows what he is doing and intends to do what he is doing, but if that act or omission amounts to a breach of that person's duty, and therefore to negligence, he is not guilty of wilful neglect or default unless he knows that he is committing, and intends to commit, a breach of his duty, or is

recklessly careless in the sense of not caring whether his act or omission is or is not a breach of his duty.

In a very recent judgment passed by a Full Bench of the Lahore High Court, Lahore, the question of wilful default has been dealt with in the case of *Shahida Faisal v. Federation of Pakistan* (PLD 2000 Lahore 508), [the] relevant portion whereof reads thus:

24. From its reading, it is quite clear that a person who does not pay/return/repay the amount due to any bank, financial institution or statutory institutions within thirty days, that person becomes wilful defaulter and is liable to be proceeded under the Ordinance. This is, however, only subject to an exception that wilful default must not have been occasioned or caused by the lending institution due to its wilful breach of agreement/contractual obligations. Seen from the above angle, it clearly follows that the circumstances of default became an offence punishable under the first Ordinance. Thereafter; the expression of "wilful" was added to it at Serial No.1 in amending Ordinance No. IV of 2000. From the above, two questions arise i.e. as to what is the nature of this offence and secondly whether it was/is hit by the principle of retrospectivity. With regard to first it is also to be seen in the context of the afore-described circumstances where-under this was made an offence. The case of the petitioner is that it is a non-continuing offence while the case of the N.A.B. is that it was/is a continuing one. Such question was considered by the apex Court of neighbouring India in *State of Bihar v. Deokaran Nenshi* AIR 1973 SC 908 in following terms:-

A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirements and which involved a penalty, liability for which continues until the rules or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and recurs there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues and, therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all.

25. The rule, so enunciated, was reaffirmed in AIR 1984 SC 1688. The question whether a particular offence is continuing or not depends upon the language of the Statute which creates that offence, the nature of the offence and, above all, the purpose which is intended to be achieved by constituting a particular act as an offence. Turning to the matter in hand in this petition, it is quite clear that the detenus did not pay the debt within the period committed by them. They did not make any promise to pay before the Court even. Seen from the above context, we have no option but to hold that the offence committed by the detenus is a continuing offence.

26. Seen from the above chronological perspective, we have no difficulty in saying that act/omission of non-payment/non-repayment of loans was made a continuing offence. The nature of continuing offence cannot be examined from

the date of first happening of that offence. This applies to the phenomena of default. The defaulter is under duty to pay his liability and commits continuing offence on each occasion and on each moment he does not pay his liability. The declaration of Chief Executive, can safely be said has no nexus with the nature of offence. The declaration was intended to provide opportunity to defaulter to clear their liabilities and save themselves from criminal proceedings. On this view of the matter we are of the considered opinion that offence of wilful default as defined in the Ordinance is a continuing offence.

200. As to retrospective operation of the offence of wilful default, the learned Full Bench of the High Court, in the above report, after referring extensive case-law on the subject from Indian jurisdiction, concluded as under:

29. In view of the facts and circumstances of the case in hand, we are very clear in our mind that the offence of wilful default incorporated in Schedule to Ordinance No. XVIII of 1999 as amended by 19 of 1999 and 4 of 2000 is a continuing offence and petitioners who had neither paid the principal amount nor its mark-up cannot seek benefit under section 12 of Constitution; that the rule of retrospectivity is not applicable to offence which is continuing in nature.

201. For the last several years there has been tremendous increase in allegations of massive corruption against divergent strata of the society. The necessity for creating the offence of "wilful default" arose because in the past the prosecution agency and other government agencies had not properly carried out their public duty to investigate the offences disclosed due to the alleged involvement of several persons holding high offices in the executive, public offices, etc. Indifferent/casual attitude of the concerned agencies to conduct and proceed with the investigation is understandable. This is, indeed, a grave situation. This Court can take judicial notice of the fact that great loss of public revenue owing to enormous corruption and failure to recover the looted money through huge bank loan defaults pose a serious threat to economic life, financial stability, credit and security of Pakistan including the unity and integrity of the nation. These are the circumstances in which the vires of the impugned Ordinance are to be judged, which was promulgated for an expeditious and thorough probe into corruption and corrupt practices and holding accountable those accused of such practices, which had already been delayed for several decades. The validity of the impugned Ordinance is also to be judged keeping in view the extraordinary circumstances prevailing in the country and the adverse impact of lacking probity in the public life leading to highest degree of corruption. Such a situation has also adversely affected the foreign investment and funding from the International Monetary Fund as well as the World Bank who have warned that future aid to Pakistan shall be subject to the requisite steps being taken to eradicate corruption. If the pervading corruption in the society is permitted to continue unchecked it would lead to economic disaster.

202. It was on 12 October 1999, that the situation prevailing in the country in the sphere of economic debacle was recognised. The factors leading to the above situation on the ground, included the acts and omissions of persons who were the Members of the National and Provincial Assemblies, the Senate, the Civil Services, in business and/or working for gain in other disciplines in the country.

203. In *Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others* (PLD 2000 SC 869) this Court took notice of the pleadings of the parties, and after considering the adverse effects of the inaction etc. of all concerned to collect the looted wealth of the country from those who were responsible therefor, it was observed that the action taken on 12 October 1999 was justifiable and that the speeches of the Chief Executive dated 13 October 1999 and 17 October 1999 correctly spelt out the plan/scheme to be adhered to by him for the purposes of making recovery thereof. It was held that Chief Executive of the Islamic Republic of Pakistan is entitled, *inter alia*, to perform all such acts and promulgate all legislative measures as would establish or lead to the establishment of the declared objectives of the Chief Executive as spelt out in his speeches referred above. The Chief Executive in his speech dated 17 October 1999 clearly stated:

Revival of economy is critical. Our economy is in deep trouble and revolutionary steps are needed to put it back on track. The Pakistani people were subjected to betrayal of their trust. Their hard-earned money was frozen or taxed in violation of State commitment. We need to restore this trust. The process of accountability is being directed especially towards those guilty of plundering and looting the national wealth and tax evaders. It is also directed towards loan defaulters and those who have had their loans rescheduled or condoned. The process of accountability will be transparent for the public to see. My advice to the guilty is to return voluntarily national wealth, bank loans and pay their taxes before the hand of law forces them to do so with penalty. As a last chance I urge all defaulters to come forth and settle their debts within a period of four weeks, after which their names will be published and the law will take its due course. They owe this to Pakistan and I expect their spirit of patriotism to guide them.

It was in the above backdrop that the impugned Ordinance was promulgated and amendments made therein, subsequently. The plea taken by the petitioners that a person entering into contractual obligations before the promulgation of the impugned Ordinance cannot be made to suffer for his alleged failure to clear his said indebtedness under the impugned Ordinance and that too as an offence, loses all significance in the light of the above circumstances. It is not the case of any one of the petitioners that they have been willing to account for the ill-gotten wealth and that it was not their inaction which has placed them in the predicament in which they find themselves today. The sources of amassing wealth by the specific individuals and juristic persons being what they are, they should not expect any lenient view in the cases against them provided the action taken against them is not contrary to a valid piece of law. More so, when the efforts on behalf of NAB in putting them under notice of 30-days in terms of Section 5(r) of the impugned Ordinance also fell on deaf ears. Viewed in this perspective, the transformation of the alleged civil action flowing out of the contractual obligations, into an "offence" under the impugned Ordinance, does not suffer from any flaw whatsoever.

204. An eleven-Member Bench of this Court in *Wasim Sajjad and others v. Federation of Pakistan through Secretary, Cabinet Division and others* (PLD 2001 SC 233) upheld the judgment in *Zafar Ali Shah*(supra). In *Zafar Ali Shah* (supra), the shortest possible time was given to the Chief Executive for restoration of civil rule after achieving the declared objective which necessitated the military take over and proclamation of emergency spelt out from the above speeches of Chief Executive dated 13 and 17 October 1999. We also hereby reaffirm by way of emphasis that the validation and

legitimacy accorded to the present Government is conditional, inter-linked and intertwined with the holding of general elections to the National Assembly, the Provincial Assemblies and the Senate of Pakistan within the time frame laid down by this Court leading to restoration of the democratic institutions, that is to say, the elections must be held and Assemblies restored by 12 October 2002.

205. It is true that unless a proper investigation is made and it is followed by equally proper prosecution, the efforts to recover the looted money would be an exercise in futility. The need for a strong and competent prosecution machinery is a *sine qua non* for a fair and competent investigation. Investigation and prosecution are inter-linked. If the conduct of those who are guilty of not discharging their contractual obligations in the re-payment of loans then in order to revive the economy in the light of the declared objectives of the Chief Executive particularly his speech dated 17 October 1999 and the law laid down in *Zafar Ali Shah's* case, there does not appear to be any bar to promulgate the legislation to make such conduct amounting to an "offence" and the same must be duly investigated and the offender against whom a prima facie case is made out should be expeditiously prosecuted through a fair trial. It is well known that the international agencies like the International Monetary Fund and the World Bank have warned Pakistan time and again that future aid to the country may be subject to appropriate steps being taken to eradicate corruption.

206. In the Commonwealth Finance Ministers Meeting held on 21-23 September, 1999 noticed in the case of *Zafar Ali Shah*, it was *inter alia* observed that: "Corruption, which undermines development, is generally an outcome and a symptom of poor governance. It has reached global proportions and needs to be attacked directly and explicitly". In this context and in the interest of state survival any appropriate strategy/legislation for ameliorating the situation and reviving the economy has to be judged in the light of the test laid down in *Zafar Ali Shah*. It may be re-emphasised that in the judgment in that case, which was upheld in review, it was stated in unambiguous terms that the Chief Executive is entitled to perform all acts and promulgate all legislative measures as are highlighted in paragraph-6 of the Short Order, clause (v) whereof reads: "That these acts, or any of them, may be performed or carried out by means of Orders issued by the Chief Executive or through Ordinances on his advice".

207. The *de facto* and *de jure* status of the present regime was recognised for a transitional period to prevent any further destabilisation and with a view to creating a corruption free atmosphere at national level through transparent accountability; revive the economy before restoration of democratic institutions under the Constitution, in that, the Constitution offered no solution to the crisis. In these circumstances, the Court took judicial notice of the fact that the people of Pakistan generally welcomed the army takeover due to avowed intention of the Chief Executive to initiate the process of across-the-board and transparent accountability against persons from every walk of life against whom corruption and abuse of national wealth have been alleged, and take appropriate measures for stabilising the economy and restoring the democratic institutions within the shortest possible time after achieving his declared objectives. This will be another factor which shall be kept in mind while examining the validity of the impugned Ordinance.

208. Yet another factor, which is to be taken into consideration while judging the validity of the impugned Ordinance would be that one of the grounds on which validation and

legitimacy was accorded to the present regime as stated in *Zafar Ali Shah* was that the representatives of the people, who were responsible for running the affairs of the State were themselves accused of massive corruption and corrupt practices in the public as well as private spheres and were benefiting therefrom. They were resisting the establishment of good governance. There was a general perception that corruption was being practised by diversified strata including politicians, parliamentarians, public officials and ordinary citizens and there was no political and economic stability in the country. The bank loan defaults were rampant, in that, as per report of the Governor, State Bank of Pakistan, Rs.356 billion were payable by the bank defaulters upto 12 October 1999. There being no accountability and transparency, economic stability in the country was highly precarious and there was an overall economic slowdown as GDP growth during the past three years had hardly kept pace with the growth of population and that Pakistan has a debt burden which equals the country's entire national income.

209. The *Seven Principles of Public Life*, stated in Volume I of Lord Nolan's Report (1995) titled: "Standards in Public Life" are also needed to be kept in view. The principles are as follows:

The Seven Principles of Public Life

Selflessness

Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves.

Integrity

Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that influence them in the performance of their official duties.

Objectivity

In carrying out public business, including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.

Accountability

Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.

Openness

Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.

Honesty

Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.

Leadership

Holders of public office should promote and support these principles by leadership and example.

210. If the conduct of a holder of public office amounts to an offence, it must be investigated forthwith and if a prima facie case is made out against the offender we see no reason why he should not be prosecuted for the majesty and maintenance of rule of law. A duty is cast on the judiciary to ensure the rule of law and guard against erosion therein. In the past the government agencies had failed to perform their statutory duties

to investigate matters and to prosecute all persons who were found to have committed offences of corruption, corrupt practices and recovery of government dues with a view to protect the persons involved, who were very influential and powerful.

211. In view of [the] persistence of corruption and [the] genuine emergent need for the recovery of outstanding amounts from those persons who have committed default in the repayment of amounts to banks, financial institutions, government and other agencies and all measures having failed to recover the same through ordinary Courts of law, it became necessary to promulgate this extraordinary legislation in the extraordinary circumstances prevalent in the country. Had the Government agencies and the Revenue authorities performed their duties and legal obligations justly, fairly and in accordance with law and had there been proper investigation into alleged offences committed by important politicians, bureaucrats and the persons who were recipient of money from any unlawful sources given for unlawful considerations, there would have been no need to promulgate the impugned Ordinance. But when the matter discloses a clear nexus between crime/corruption and powerful persons holding public offices which poses a serious threat to the economy as well as the very existence of the country, then to prevent erosion of the rule of law and to take steps for [the] restoration of democracy in the country within the time frame laid down by this Court, it will have to be examined whether the mechanism involved for recovery of amounts from the wilful defaulters for reviving the economy is in conformity with the declared objectives of the Chief Executive. Applying the above principles, we are led to [the] irresistible conclusion, after hearing the learned counsel for the petitioners at length, that there was a need for creation of an offence of “wilful default” and the mechanism for recovery of the same as is purported to have been done under Section 5(r) of the impugned Ordinance.

212. Also refer to the Prevention of Corruption Act, 1947 which was a political dispensation under the colonial rule, wherein a post-war situation was taken note of, in that, a lot of things were happening in the society which were breeding corruption, necessitating the enactment of the above Act. The Act became a permanent law and is on the statute book even today.

213. Reference may also be made to the Racketeer Influenced and Corrupt Organisations Act, 1970 of USA, commonly known as the RICO Act. It was passed by the United States Congress as a powerful tool in the fight against organized crime, which enables persons financially injured by a pattern of criminal activity to bring a RICO claim in state or federal court, and to obtain damages three times the amount of their actual harm, plus their attorneys fees and costs. It has not only been successfully used against members of the Mafia, but also against legitimate business persons, etc. (Refer <http://www.ricoact.com/>).

214. It would thus be seen that the RICO Act was meant to protect society from the malfeasance of organized crime, but it was also intended to protect business from corruption and weed out criminal business practices. It can also be used to recover losses caused by business corruption. The RICO Act is complicated, but no more complicated than many other laws. If a business runs across corruption in its midst, it is the best weapon. In Section 1961 of the RICO Act, the “racketeering activity” has been defined thus:

Sec. 1961. Definitions

As used in this chapter - (1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18,....".

215. The matter may be looked at from another angle as well. The mere fact that at the time of entering into an agreement no punishment was prescribed for default in payment of loan or bank dues, as the case may be, cannot possibly mean that the duty of the defaulter to re-pay the loan/dues also expired. The duty still remains. It continues till the loan/dues are re-paid as required under the agreement. Therefore, non-payment of loan/dues in terms of the agreement within the contemplation of Section 5(r) is a continuing breach of duty or obligation, which itself is continuing if duty to re-pay the loan/dues as aforesaid continues from day to day and the non-performance of that duty/obligation from that point of view must be held to be a continuing default in the repayment of loan. Therefore, if it is continuing, there is a fresh starting point of limitation every day as the wrong continues. Viewed from this angle, there is no limitation and no question of retrospectivity involved as long as the duty remains undischarged.

216. It is also instructive to refer to section 23 of Limitation Act, 1908 which prescribes that in the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues. It is within the competence of the Legislature to treat a continuing wrong as an offence independent of the contract so that the offence so created is applicable to a case where there is a continuing breach of contract which has been converted into an offence, with a view to helping the general public at large in that sphere. It could, therefore, be rightly urged that there will practically be no limitation of prosecution under section 5(r) of the Ordinance as long as the duty to re-pay the loan/debt/bank dues continues under an agreement or contract and the same remains undischarged. The offence contemplated under section 5(r) is the one which is committed over a span of time, therefore, the last act of the offender controls the innocence or otherwise of the party. The nature of default contemplated here is not the default which is committed once and for all. It is a continuous default. Thus on every occasion the default occurs and recurs, it constitutes an act or omission which continues and is therefore a fresh act. Looked at from this angle the offence contemplated under section 5(r) is not retrospective but prospective in nature.

217. Notwithstanding the above findings, the next question which requires consideration whether section 5(r) is hit by clause (1) of Article 12 of the Constitution which contemplates thus:

- (1) No law shall authorize the punishment of a person
 - (a) for an act or omission that was not punishable by law at the time of the act or omission; or
 - (b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.

218. Article 12 of the Constitution does not deprive the legislature of its power to give retrospective effect to an enactment, which the legislature is competent to enact. It merely provides that no law shall authorise the punishment of a person for an act or omission that was not punishable by law at the time of the act or omission; or for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed. Seen in this perspective, the act of wilful default, is not an act or omission which was punishable by law at the time the same was committed but an act or omission committed 30-days after the promulgation of the Ordinance whereby the offence of wilful default under section 5(r) was created. As stated above, it was in the nature of a continuous wrong, which was converted into an offence prospectively i.e. in a case where such wrong/wilful default continued even after the expiry of 30-days of the promulgation of the impugned Ordinance and not retrospectively. In other words, it is a case where the punishment is prescribed in relation to the breach of a continuing duty which is not performed even within 30-days after the coming into force of the Ordinance. By no stretch of imagination it could be termed retrospective in operation, particularly, in view of the statement made by Mr. Abid Hasan Minto on behalf of the Federation that no prosecution was launched in respect of wilful default where re-payment of loan etc. was made good within 30 days of the promulgation of the Ordinance.

219. So far as the punishments and creation of offences by the impugned Ordinance are concerned, they are protected by Article 12 of the Constitution, in that, under Article 12 of the Constitution *ex post facto* legislation can neither create new offences nor provide for more punishment for an offence than the one which was available for it when committed. This is the limited impact of Article 12 of the Constitution. Therefore, the only prohibition as to retrospectivity of the offence, contemplated under clause (1)(a)(b) of Article 12 of the Constitution, is not attracted here. However, in order to ensure across-the-board accountability we order the following directions for the application of Section 5 (r) of the impugned Ordinance. The same shall be suitably incorporated in the Rules to be framed under section 34 of the Ordinance, which shall on promulgation become part of the Ordinance.

- i. No prosecution for wilful default shall be launched before the expiry of 30 days statutory notice and an additional 7 days notice shall also be served on the alleged defaulter to satisfy Governor, State Bank of Pakistan that he has not committed any wilful default. The report of Governor, State Bank of Pakistan as to the prima facie guilt or innocence will be subject to the final decision of the Accountability Court. The same procedure will be followed with regard to recovery of other public dues falling within the contemplation of Section 5(r) of the Ordinance. The Governor, State Bank of Pakistan shall record his recommendations within 7-days with reasons therein.
- ii. Any settlement arrived at with the defaulters by the Chairman, National Accountability Bureau or compounding of any offence shall be subject to the decision of the Accountability Court.
- iii. In respect of any person who is being investigated under the Ordinance, if the final report after full investigation, is that no prima facie case is made out to proceed further and the case must be closed against him, that report must be promptly submitted to the Accountability Court concerned for its satisfaction that the concerned authorities have not failed to perform their legal obligations and have reasonably come to such conclusion. The final decision in the matter would

be by the concerned Accountability Court. The Accountability Court shall conclude the trial expeditiously after giving fair opportunity to the accused. iv. Everyone against whom there is reasonable suspicion of commission of a crime under the NAB Ordinance is to be treated equally and if need be, proceedings may be held in camera to the extent necessary in public interest and to avoid prejudice to the accused. v. The concerned prosecuting agencies shall conduct their responsibilities and functions without being influenced by extraneous consideration.

vi. The Chairman NAB shall ensure reasonable and expeditious time-frame for the completion of investigation and launching of prosecution.

vii. The Chairman NAB should take time-bound steps to establish a grievance redressal mechanism to promptly deal with the complaints received from the public against the Bureau.

viii. While attending to nature of duty and functions of the officer engaged in the investigation of an offence, the following observations made in *Union of India and Others v. Sushil Kumar Modi and Others* (1997 (4) SCC 770), be kept in view:

4. At the outset, we would indicate that the nature of proceedings before the High Court is somewhat similar to those pending in this Court in *Vineet Narain v. Union of India* (1996 (2) SCC 199) and *Anukul Chandra Pradhan v. Union of India* (1996 (6) SCC 354) and, therefore, the High Court is required to proceed with the matter in a similar manner. It has to be borne in mind that the purpose of these proceedings is essentially to ensure performance of the statutory duty by the CBI and the other government agencies in accordance with law for the proper implementation of the rule of law. To achieve this object a fair, honest and expeditious investigation into every reasonable accusation against each and every person reasonably suspected of involvement in the alleged offences has to be made strictly in accordance with law. The duty of the Court in such proceedings is, therefore, to ensure that the CBI and other government agencies do their duty and do so strictly in conformity with law. In these proceedings, the Court is not required to go into the merits of the accusation or even to express any opinion thereon, which is a matter for consideration by the competent court in which the charge sheet is filed and the accused have to face trial. It is, therefore, necessary that not even an observation relating to the merits of the accusation is made by the Court in these proceedings lest it prejudice the accused at the trial. The nature of these proceedings may be described as that of continuing mandamus; to require performance of its duty by the CBI and the other government agencies concerned. The agencies concerned must bear in mind and, if needed, be reminded of the caution administered by Lord Denning in this behalf in *R. v. Metropolitan Police Commissioner* [1968] 1 All ER 763. Indicating the duty of the Commissioner of Police, Lord Denning stated thus: (at p.769):

I have no hesitation, however, in holding that, like every constable in the land, he should be, and is, independent of the executive. He is not subject to the orders of the Secretary of State. I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected and that honest citizens

may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.

The nature of such a proceeding in a court of law was also indicated by Lord Denning, as under:

A question may be raised as to the machinery by which he could be compelled to do his duty. On principle, it seems to me that once a duty exists, there should be a means of enforcing it. This duty can be enforced. I think, either by action at the suit of the Attorney General; or by the prerogative order of mandamus.

ix. Unless a competent prosecution follows a fair and competent investigation, the ultimate analysis would be violative of the principle of fair trial. A panel of competent lawyers of experience and impeccable reputation should be prepared with the advice of Ministry of Law, Justice and Human Rights. Their services should be utilised as prosecuting lawyers in cases of significance on reasonable remuneration. For terms and conditions of their services, guidance may be sought from the Central Law Officers Ordinance, 1970, prescribing method for the appointment of Standing Counsel and Deputy Attorney Generals.

220. Adoption of the above course shall not affect the initiation of investigation and its continuation to its logical end or the proceedings pending before any authority/Court under NAB Ordinance. These instructions are being issued under Article 37 read with Article 187 of the Constitution, which empowers this Court to issue any appropriate directions, orders or decrees, as may be necessary for doing complete justice in any case or matter pending before it which are enforceable throughout Pakistan.

221. Suitable amendments shall also be made under section 37 of the Ordinance to provide for consultation by the President of the Islamic Republic of Pakistan with the Chief Justice of Pakistan for modifications, additions or omissions. This disposes of questions no. (ii) and (iii) of the admitting order.

Power of Chairman NAB To Freeze Property

222. Section 12 of the NAB Ordinance confers upon the Chairman NAB, the unchallengeable power to freeze the property of an accused. The power to deprive an individual of the legitimate use of his property is no minor concern but is one which goes to the root of the case. It is the duty of the Superior Courts to protect citizens from being deprived of their liberty and property, except in accordance with the Constitution and the laws, subject to reasonable restrictions. Section 12 in so far as it vests the power in the Chairman NAB to pass any order of seizure, freezing, attachment or prohibitory order by taking possession, or by appointment of receiver, or prohibiting the payment of rent or delivery of property to the accused or to any other person on his behalf which shall

remain in force for a period of not exceeding thirty days, suffers from excessive delegation. The ends of justice would be fully met if the period contemplated under the first proviso to clause (c) of section 12 is curtailed to fifteen days. Likewise, the provisions contained in clause (f) thereof that the order of freezing mentioned in Section 12(a) to (e) shall, as the case may be, remain operative until final disposal by the Accountability Court or the Appellate Forum impinges upon the independence of Judiciary and suffers from excessive delegation in that it is for the Accountability Court alone to determine the period of duration during which the freezing shall remain operative till final disposal of the reference by the Accountability Court. Similarly, clause (f) also makes operative the freezing order notwithstanding filing or pendency of appeal under the Ordinance. This provision is against the concept of independence of Judiciary. It is true that section 12 (a)(c)(iv) of the Ordinance provides for an interlocutory measure to ensure that property relating to the accused is not dealt with by him or on his behalf pending investigation. Similar provisions exist in other laws, in respect of civil as well as criminal liability. Rules 1 and 2 Order XXXIX of the Code of Civil Procedure provide for the passing of such orders. Section 37(2) of the Control of Narcotic Substances Act 1997 and the Criminal Law Amendment Act 1964 also contemplate powers to freeze property. Nevertheless, it is for the appellate Court alone to decide having regard to the merits of each case justly, fairly and in accordance with law whether or not the order of freezing shall remain operative upon filing of or during the pendency of an appeal under the Ordinance. However, the ends of justice will be fully met if clause (f) of Section 12 of the Ordinance providing for continuation of freezing of property after the accused has been acquitted is suitably amended to provide for continuation of such freezing for a period not exceeding ten days to be reckoned from the date of receipt of the certified copy of the order to enable the NAB for filing an appeal against the acquittal order. Thereafter it would be for the appellate forum to pass appropriate orders.

223. Clause (c) of section 13, which relates to claim or objection against freezing, also denies the right of appeal against an order made under section 12 of the Ordinance. In *Pakistan through Secretary, Ministry of Defence v. The General Public* (PLD 1989 SC 6) it was held by the Shariat Appellate Bench of this Court, as under:

The Federal Shariat Court in its impugned judgment has also held that the right of appeal was recognised by the Holy Prophet (Peace be upon him) as well as by the Khulafa-e-Rashideen and discussed this question in great detail. Nothing has been shown to us in refutation thereof. The plea, thus, that barring the right of appeal does not offend against the injunctions of Islam, cannot be accepted.

The purported denial of the right of appeal is violative not only of Article 2A of the Constitution but also power of the Superior Courts to correct such orders through exercise of their constitutional jurisdiction. Clearly, the denial of right of appeal is contrary to the norms of justice as also violative of principles of natural justice. Also refer to *Chenab Cement Product (Pvt) Ltd. and others v. Banking Tribunal, Lahore and others* (PLD 1996 Lahore 672). Thus, section 13(c) which denies the right of appeal is violative of the principles of the Islamic injunctions and the same needs to be suitably amended so as to allow right of appeal to the accused as well as to the non-accused/third party whose claim or objection against freezing of property is dismissed by the Accountability Court.

[BURDEN OF PROOF: see below p.XXX]

DISQUALIFICATION TO CONTEST ELECTIONS OR TO HOLD PUBLIC OFFICE.

231. The provision of clause (a) of Section 15 of the NAB Ordinance providing disqualification from being elected, chosen, appointed or nominated as a member or representative of any public office, or any statutory or local authority of the Government of Pakistan for a period of 21 years is too excessive and the same be suitably amended so as to provide disqualification for a period of 10 years to be reckoned from the date the convict is released after serving his sentence.

232. The proviso to clause (a) of Section 15 *ibid* providing disqualification for 21 years shall also be suitably amended to provide disqualification for 10 years to be reckoned from the date the convict is discharged of his liabilities relating to matter on transaction in issue.

VENUE OF TRIAL

233. The relevant question reads: "Whether section 16(d) of the impugned Ordinance which authorises the Chairman NAB to select the venue of the trial by filing a reference before any Accountability Court established anywhere in Pakistan suffers from excessive delegation?"

234. It is true that ordinarily, the jurisdiction to try a person for an offence does not depend upon the place where the offender is found, but the place where crime is committed. Generally speaking, all crime is local. These principles are also enshrined in the general law relating to proceedings in criminal prosecution and jurisdiction of the criminal courts as also trials. Section 177 Cr.P.C. also provides that every offence ordinarily be inquired into and tried by a court within the local limits of whose jurisdiction it is committed. However, notwithstanding the above provision, the Provincial Government under section 178 *ibid* may direct that any cases or class of cases in any district sent for trial to a court of Sessions, may be tried in any Sessions Division provided such direction is not repugnant to any direction previously issued by the High Court under section 526 Cr.P.C. or any other law for the time being in force. Thus, the determination of venue of trial under the Ordinance in terms of section 16 (d) does not contravene the concepts of federalism and/or Provincial autonomy.

TRANSFER OF CASES

235. Article 175 of the Constitution provides for the establishment and jurisdiction of the Supreme Court of Pakistan, a High Court for each Province and such other courts as may be established by law. Apart from establishment of the courts as aforesaid, the Constitution or the law may provide for the subjects in respect of which that power may be exercised and the manner of exercise of such power. It may demarcate/identify the territories/place or places in which a particular court shall function. It may specify the persons in respect of whom the judicial power to hear and determine will be exercisable. Put differently, it may provide for the subject-matter over which the judicial power is to be exercised, the manner of exercise of jurisdiction, the right to adjudicate upon a particular subject-matter and the authority to exercise in a particular manner.

236. Article 175 (3) provides that the Judiciary shall be separated progressively from the Executive within 14 years from the commencing day. After expiry of the stipulated period, the cut-off date of 23 March 1994, had been given by the Supreme Court to

enable the Provincial Governments to finalise separation of Judiciary from the Executive. Guidelines for achieving this objective as well as financial independence of the Judiciary were also laid down by this Court in the case of *Government of Sind v. Sharaf Faridi* (PLD 1994 S.C. 105).

237. Article 203 of the Constitution provides that the supervision and control over the subordinate Judiciary exclusively vests in the High Court concerned. It comprehends all supervisory powers both judicial as well as administrative as to the working of the subordinate courts including the disciplinary matters. Any provision in any law, direction or order empowering any executive functionary to have administrative supervision and control over the subordinate Judiciary either directly or indirectly, would militate against the concept of separation of powers and independence of Judiciary as envisaged under Article 175 and the Objectives Resolution as laid down by this Court in the case of *Sharaf Faridi (supra)*. It would thus be seen that even under the general law, the power to order cases to be tried at different places falls within the domain of executive authority, which could not be termed as violative of judicial independence. Be that as it may, Mr. Abid Minto rightly contended that Article 203 of the Constitution is applicable to the courts under the NAB Ordinance and such courts are subordinate to the High Courts and therefore the power of superintendence vested in the High Court prevails over these courts within the hierarchy of the courts of the country and for the purposes of the Constitution. We are also of the considered view that the High Court, in appropriate proceedings whenever it is made to appear to it that a fair trial cannot be held before any Accountability Court at a particular place and it is expedient for the ends of justice that any offence under the NAB Ordinance be tried by any Accountability Court other than the court seized of the matter, may transfer the case accordingly.

238. Section 16A(b)(i) & (ii) of the NAB Ordinance purports to achieve the above objective by empowering [the] Chairman NAB to direct the Prosecutor General Accountability to apply for transfer of a case from any such court in one Province to a Court in another Province or from one Court to a Court in another Province or from one Court in a Province to another Court in the same Province. The above section, however, does not meet the ends of justice, in that, the Chairman NAB has been given the choice to make a move before the appropriate Chief Justice through the Prosecutor General, but such right is not available to the accused.

239. The above provision, insofar as it denies access to an accused person for the redress of his grievance in the matter of transfer of a case from one court to another, is ultra vires Article 4 of the Constitution, which envisages the right of access to justice to all, which is equally founded in the doctrine of due process of law. In *Al-Jehad Trust v. Federation of Pakistan* (1996 S.C. 324), it was held that the right of access to justice includes the right to be treated in accordance with law, the right to have a fair and proper trial and the right to have an impartial court or tribunal. Without having an independent Judiciary, the fundamental rights enshrined in the Constitution will be meaningless. In *Jibendranath Kishore Acharya Chaudhry v. Province of East Pakistan* (PLD 1957 S.C. [Pak.] 9), this Court held that equality of citizens gives rise to two basic questions: first, to what extent the Legislature can delegate legislative functions to other bodies; and secondly, what control the Judiciary can exercise over departmental tribunals? As to the first, the rule is that while the Legislature cannot confer on any other body power to make whatever laws it likes, it can, by its Acts, define the outline of the legislative power within the limited field to carry out the purposes of the legislation. In

Government of Baluchistan v. Azizullah Memon (PLD 1993 S.C. 341), it was held that the Legislature cannot frame such law as may bar right of access to courts of law and justice. Any law, which denies the right of access to courts and justice, is violative of Article 25 of the Constitution. It is true that the expression "equal protection of law" does not place any limitation on the power of the State to make reasonable classification of citizens in that regard, but if such classification is without any reasonable basis, it would tantamount to denying that right to a category of persons and the same being discriminatory is liable to be struck down.

240. In *Zulfiqar Ali Bhutto v. The State* (PLD 1979 S.C. 53), it was held that the rule regarding holding an open trial is not rigid and inflexible nor could it be pressed to its breaking point in defeating very ends of justice. The Presiding Officer or the Magistrate concerned is empowered to forbid access of the public generally or any particular person remaining in Court at any stage of inquiry or trial for sufficient reasons in interests of administration of justice.

241. Paragraph 3, chapter 1 of the High Court Rules & Orders of the Lahore High Court, volume III provides as follows: 3. Court house in an open Court. -- Section 352 of the Code of Criminal Procedure lays down that the place where a Criminal Court is held, "shall be deemed an open Court to which the public generally may have access so far as the same can conveniently contain them" but the discretion to exclude the public from the ordinary Court room rests with the presiding Magistrate. When, however, the presiding Magistrate, for any reason, excludes the public by holding his Court in a building such as a jail, to which the public is not admitted (and he is not entitled to do so without permission of the Department concerned), he should obtain the sanction of Government thereto, through the District Magistrate, and should inform the High Court that sanction has been accorded.

It is not necessary to comment upon the case law cited from the Indian jurisdiction as well as decisions of the learned Judges in Chambers of the High Courts. Suffice it to say that the controversy on the subject stands concluded by a judgement of this Court in the light of the observations made in the case of *Zulfiqar Ali Bhutto (supra)*.

242. Resultantly, in the matter of transfer of cases from one court to another, either within a Province or from one Province to another, as contemplated under section 16A, the prosecutor and the accused must be placed on equal footing. To this extent, section 16A is declared ultra vires the Constitution and needs to be suitably amended.

243. This also disposes of the objection under section 16A(a)(i)(ii) of the impugned Ordinance regarding transfer of cases.

POWER OF ACCOUNTABILITY COURT TO DISPENSE WITH ANY PROVISION OF CODE OF CRIMINAL PROCEDURE

244. The seventh question is whether section 17(c) of the impugned Ordinance which enables the Accountability Court to dispense with any provision of the Code of Criminal Procedure, 1898, and follow such procedure as it may deem fit in the circumstances of the case is violative of Articles 4 and 25 of the Constitution and is devoid of any force, in that, no vested right exists in matters of procedure. Section 12(3) of the Ehtesab Act, 1997 also contained a similar provision, which was not held ultra vires the Constitution in *Federation of Pakistan v. M. Nawaz Khokhar* (PLD 2000 SC 26). However, sufficient

guidelines have been given as to the scope of Section 12(3) of the Ehtesab Act, 1997 in *Benazir Bhutto v. The State* (PLD 1999 SC 937), which read thus:

21. The phrase “as it may deem fit” used in section 12(3) of the Act clearly signifies that Court has full and complete power to follow such procedure in order to do justice but in the exercise of such power, it must act justly, fairly and in accordance with law. The above phrase does not imply following arbitrary procedure but must be construed to follow only such procedure which is just and proper for doing justice between the parties and not in violation of any law.

Article 24A of the General Clauses Act, 1897, reads thus:

24A. Exercise of power under enactments.---(1) Where, by or under any enactment, a power to make any order or give any direction is conferred on any authority, office or person such power shall be exercised reasonably, fairly, justly and for the advancement of the purposes of the enactment.

(2) The authority, office or person making any order or issuing any direction under the powers conferred by or under any enactment shall, so far as necessary or appropriate, give reasons for making the order or, as the case may be, for issuing the direction and shall provide a copy of the order or, as the case may be, the direction to the person affected prejudicially.

Thus visualised, the Court’s power to dispense with a provision of Criminal Procedure Code is not uncontrolled and will be governed by the principles enshrined in Section 24A (*supra*). If the Accountability Court deems fit to make departure from the provisions of the Criminal Procedure Code reasons will have to be recorded in writing under the section. In appropriate cases such reasons are justiciable in the exercise of constitutional jurisdiction of the Superior Courts at the instance of an aggrieved party. Section 164 of the Qanun-e-Shahadat Order provides that: “In such cases as the court may consider appropriate, the court may allow to be produced any evidence that may have become available because of modern devices or techniques”.

245. The upshot of the whole discussion is that in terms of the impugned provision of section 17(c) of the NAB Ordinance, an Accountability Court shall not exercise its discretion arbitrarily but on sound judicial principles by assigning valid reasons. We, therefore, hold that Section 17(c) is not violative of Articles 4 and 25 of the Constitution.

COGNIZANCE OF OFFENCES BY THE ACCOUNTABILITY COURT

246. Question No. (viii) of the admitting order reads thus:

(viii) Whether section 18 of the impugned Ordinance which prohibits the Accountability Court to take cognizance of any offence under the impugned Ordinance except on a reference made by Chairman NAB or an officer of the NAB duly authorised by him amounts to excessive delegation?

247. As to above question, suffice it to say that the offences under the NAB Ordinance are special in nature and their investigation and inquiry extends to complicated transactions, bank accounts and books of account for which aid of experts may be required by investigating authority to unearth and detect such offences. It is, therefore quite reasonable as well as practical that the investigating agency should first thoroughly inquire into suspected offences and then decide whether or not to refer the same to an Accountability Court. There is, therefore, no excessive delegation of power

in the above section. It may be observed that the Ehtesab Act, 1997 also contained a similar provision, which was declared to be a valid piece of legislation by this Court in *M. Nawaz Khokhar (supra)*.

ARREST/DETENTION AND REMAND OF THE ACCUSED

248. Question No. (ix) of the admitting order is to the following effect:

(ix) Whether section 24(d) of the impugned Ordinance which empowers the Chairman NAB to detain in his custody an accused person up to a period of ninety days after having produced him once before the Accountability Court, such power vesting in executive authority is contrary to the right of equal protection and also opposed to the spirit of Fundamental rights contained in Clause (2) of Article 10 of the Constitution?

249. The petitioners have challenged the validity of clause (d) of section 24 in so far it relates to detention of the accused in the custody of NAB for the purposes of inquiry and investigation for a period of ninety days. Article 10 of Part II of the Constitution provides safeguards as to arrest and methodology for the production of an accused before a Magistrate, communication of grounds, rights of the accused to be defended by counsel, arrest under detention law, constitution of Review Board, proceedings before Review Board and maximum period of detention. In the case in hand, we are not dealing with a law regarding preventive detention and, therefore, the provisions relating thereto in Article 10 are not relevant for the purpose of the controversy raised herein. We find that the provisions of clause (d) of section 24 are in substantial compliance of the provisions of clauses (1) and (2) of Article 10 of the Constitution which provide:

- (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice;
- (2) Every person who is arrested and detained in custody shall be produced before a magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the nearest magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

However, the above clause is *ultra vires* to the extent that it denies the right of the accused to consult and be defended by a legal practitioner of his choice. To this extent clause (d) of section 24 of NAB Ordinance requires to be suitably amended.

250. It is true that in terms of sections 167 and 344 Cr.P.C. when an accused is arrested he is bound to be produced before a Magistrate within a period of twenty-four hours and beyond such period police cannot detain him without seeking permission from a Magistrate and that no Magistrate can remand an accused to custody for a term exceeding fifteen days at a time, respectively. It is also well established that remand is not to be granted in routine and the liberty of citizens must be protected subject to the law and the Constitution. It is provided in NAB Ordinance that Cr.P.C. applies subject to any inconsistency with the Ordinance. The provisions contained in clause (d) of section 24 in so far as they relate to the remand of an accused, are inconsistent with the provisions of the Cr.P.C. inasmuch as under sub-section (1) of section 344 of the Cr.P.C. the maximum period of remand is fifteen days. Mr. Baber Awan has rightly contended that several provisions of the impugned Ordinance are inconsistent with what

has been laid down in Cr.P.C. But, as pointed out above, the Cr.P.C. is applicable subject to any inconsistency with the Ordinance. Therefore, the mere fact that sub-section (1) of section 344 Cr.P.C. provides maximum remand for a period not exceeding fifteen days at a time, does not, ipso facto confer a right on a person accused of an offence under NAB Ordinance, to be detained for a period of not more than fifteen days at a time. We may also, however, refer to the explanation added to sub-section (2) of section 344 Cr.P.C. which provides that if sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained in that behalf, this is a reasonable cause for a remand.

251. Mr. Abid Hassan Minto appearing for the Federation also stated at the Bar that under section 24(d), a maximum period of 90 days is provided for detention in connection with investigation etc., which is not automatic or that the accused is to be detained for 90 days straight away. Generally, the accused is produced before the Court after every 10/15 days, in some cases even with an interval of 3-4 days, and the Court, keeping in view the facts and circumstances of the case, determines the period of further custody. It is reasonable if the accused is directed to be produced before the Court after every 15 days or earlier keeping in view the facts and circumstances of each case, for appropriate orders.

252. Be that as it may, it is the duty of this Court to jealously safeguard the liberty of the citizens and to strike down a law, or suggest amendment thereto for protecting the same or avoiding undue harassment to them.

253. After carefully listening to the submissions of the learned counsel for the parties, we are inclined to the view that the outer limit of ninety days fixed in clause (d) of Section 24 of NAB Ordinance appears to be excessive. We are of the view that prolonged detention of an accused without sufficient cause for such detention, makes an inroad on the personal liberty of citizens as guaranteed under the Constitution, which cannot be countenanced by this Court.

254. We, therefore, direct that clause (d) of section 24 of the Ordinance be also amended to the extent that the Accountability Court shall not remand an accused person to custody under clause (d) of section 24 of the impugned Ordinance for a term exceeding fifteen days at a time. If sufficient and reasonable cause appears for further remand, after the expiry of the first fifteen days, the accused shall be brought before the Court for appropriate orders and that in no case, each remand shall be for a period more than fifteen days at a time. It is further directed that the Court passing order of remand as referred to above, shall forward a copy of such order with reasons for making it to the High Court concerned. Suitable amendments [to] be made accordingly.

255. The Chairman NAB cannot under any principle of jurisprudence simultaneously assume the role of prosecutor and Judge. The power of judicial review and the matters relating to the administration of justice solely vest with the judiciary and such powers cannot be entrusted to the NAB being violative of the very concept of Independence of Judiciary.

256. In view of the above, we hold that the proviso to clause (d) of Section 24 in so far as it contains the provision that: "no accused arrested under this Ordinance shall be

released without the written order of the Chairman NAB” is *ultra vires* being repugnant to the concept of independence of Judiciary. Suitable amendment be made so as to delete the words “without the written order of the Chairman NAB or”.

257. Question no. (xi) relates to the point: whether section 24(a) of the impugned Ordinance, empowering the Chairman NAB at any stage of the investigation under the impugned Ordinance, to direct that the accused, if not already arrested, shall be arrested, [is] tantamount to conferment of unbridled and unfettered powers of determining if an accused is to be arrested or not, is violative of Article 25 of the Constitution?

258. The above contention is without any force. We are inclined to agree with Mr. Minto that the powers conferred by the impugned provision are part of normal powers relating to inquiries and investigation. Similar powers are conferred upon Police Officers by the Criminal Procedure Code under section 54 thereof. However, we have no doubt in our minds that while exercising powers under section 24(a) of the impugned Ordinance the Chairman NAB shall consider the facts and circumstances of each case justly, fairly, equitably, in accordance with law and in conformity with the provisions of section 24A of the General Clauses Act, 1897 and not in a discriminatory manner. Any such order passed by him is subject to correction in appropriate cases by the Superior Courts in the exercise of their constitutional jurisdiction. It is, therefore, difficult to hold that section 24(a) is *ex facie ultra vires* Article 25 of the Constitution.

259. Question no. (xii) is whether in so far as section 24(c) of the impugned Ordinance which enjoins that the provision of clause (a) thereof shall also apply to cases which have already been referred to the Accountability Court, offends the provisions of Articles 4 and 25 of the Constitution on the ground of retrospectivity in its operation is also devoid of any force, in that, there is no element of retrospectivity in clause (c) of Section 24 of the impugned Ordinance. Besides, Articles 4 and 25 of the Constitution have nothing to do with the concept of retrospective operation of a law.

260. This disposes of Questions No. (ix), (xi) and (xii).

TRANSFER OF PROPERTY

261. Section 23 of the impugned Ordinance provides that where an investigation has been initiated into an offence under the NAB Ordinance, alleged to have been committed by an accused person, such person or any relative or associate of such person or any other person on his behalf is not authorised to transfer by any means whatsoever, create a charge on any movable or immovable property owned by him or in his possession, while the inquiry, investigation or proceedings are pending before the NAB or the Accountability Court, and any transfer of any right, title or interest or creation of a charge on such property shall be void.

262. It was argued that in so far as section 23 prohibits transfer of property merely because an investigation has been initiated at the discretion of the Chairman NAB is violative of Articles 23 and 24 of the Constitution which guarantee rights to property. In so far as the above section makes any such transfer void even though both the transferor and the transferee be genuinely unaware of such investigation, the section offends Articles 2A, 4, 23, 24 and 25 of the Constitution. We are not inclined to hold that the above provision is in conflict with the aforementioned Articles of the Constitution in

that reasonable restrictions in the public interest may be imposed by a law on the right to hold, acquire or dispose of property. The NAB Ordinance by its very nature is a law relating to acquisition and retention of ill-gotten property and to recover the same.

263. Furthermore, section 23 is an interlocutory measure to prevent persons accused of such offences to frustrate the objects of law by creating third party interest in respect of illegally acquired property, thereby creating hurdles in the object of law i.e. to eradicate corruption and corrupt practices and hold accountable all those persons accused of such practices and matters ancillary thereto. The purpose of this power is more to preserve the property acquired by the accused through corruption and corrupt practices so that ultimately if the guilt is proved the same can be taken back from him in accordance with law. Section 23 of the NAB Ordinance is also preventive in nature and prescribes penalties for the accused person who attempts to alienate or transfer by any means property after the Chairman NAB has initiated investigation, inquiry or proceedings have commenced against him in an Accountability Court. Put differently, it is in the nature of a restraint order. The protective measures are not by way of punishment but with a view to ensure that the final decision is not rendered redundant.

264. Additionally, somewhat similar provisions are contained in Section 7 of the Offences in respect of Banks (Special Courts) Ordinance, 1984 which provides that:

“After a Special Court has taken cognizance of a scheduled offence alleged to have been committed by an accused person, such person or any relative of such person or other person on his behalf shall not, without the previous permission in writing of the Special Court, transfer, or create a charge on, any movable or immovable property owned by him or in his possession, while proceedings are pending before the Special Court; and any transfer of, or creation of a charge on, such property without such permission shall be void”.

Viewed in this perspective, transfer of property by the accused or his relatives etc. seems permissible with the approval of the Court. We therefore, direct that Section 23 *ibid* be suitably amended to reflect that transfer of property by an accused person or any relative or associate of such person or any other person on his behalf or creation of a charge on any movable or immovable property owned by him or in his possession, while the inquiry, investigation or proceedings are pending before the NAB or the Accountability Court, shall not be void if made with prior approval in writing of the Judge, Accountability Court, subject to such terms and conditions as the Judge may deem fit in consonance with the well established principles of law for passing interlocutory orders in consonance with the objects of the Ordinance.

PLEA BARGAINING

265. Question No. (xiii) relates to plea bargaining. It reads thus: Whether the case of voluntary return (plea of bargaining) under section 25 of the impugned Ordinance is derogatory to the concept of independence of Judiciary in so far as where the trial has commenced the Court cannot release the accused without consent of the Chairman NAB?

266. A perusal of the Preamble of the NAB Ordinance shows that it is a composite and an extensive law and its interpretation has to be done in a manner different from the normal interpretation placed on purely criminal statutes. This law deals with, among

others, setting up of the National Accountability Bureau, which is an executive as well as administrative authority and an investigating agency which deals with several aspects of corruption etc. The NAB does not merely deal with crimes of corruption, it also deals with their investigation and settlement out of court. Bargain out of court is now an established method by which things are settled in several developed societies. It was necessary in cases where the criminal is a potential investor and is inter-linked with the economy of the society, he should be given an opportunity to play his role in the society after he has cleared his liability. There appears to be nothing amiss insofar as it does not oust the jurisdiction of the Accountability Courts to exercise their judicial power in appropriate proceedings. Rather this is in the nature of a facility provided to the accused. There is nothing wrong with the NAB Ordinance providing for a procedure of bargaining.

267. Moreover, the scheme for exploring the possibility of settlement during investigation/inquiry stage by the Charmin NAB cannot be ignored straight away. At the outset, most of the lawyers tend to consider the question of settlement out of Court. There is need to focus attention on this significant facet of the matter. The rationale behind the Ordinance is not only to punish those who were found guilty of the charges levelled under the Ordinance but also to facilitate early recovery of the ill-gotten wealth through settlement where practicable. The traditional compromise, settlement, compoundability of offence during the course of proceedings by the Courts after protracted litigation is wasteful. Viewed in this perspective, a power has been vested in the Chairman NAB to facilitate early settlement for recovery of dues through plea bargaining where practicable. Lawyers are often interested in settling the disputes of their clients on [a] just, fair and equitable basis. There are different approaches to settlement. Plea bargaining is not desirable in cases opposed to the principles of public policy. [The] Chairman NAB/Governor, State Bank of Pakistan, while involved in plea bargaining negotiations, should avoid using their position and authority for exerting influence and undue pressure on parties to arrive at settlement. However, in the interest of [the] revival of [the] economy and recovery of outstanding dues, any type of alternate resolution like the plea bargaining envisaged under section 25 of the Ordinance should be encouraged. An accused can be persuaded without pressure or threat to agree on a settlement figure subject to the provisions of the Ordinance. Establishing this procedure at the investigation/inquiry stage greatly reduces determination of such disputes by the Court. However, as the plea bargaining/compromise is in the nature of compounding the offences, the same should be subject to approval of the Accountability Court. Accordingly, section 25 of the impugned Ordinance [must] be suitably amended.

DISCRETION OF CHAIRMAN NAB TO REJECT RECOMMENDATIONS OF COMMITTEE AND GOVERNOR, STATE BANK OF PAKISTAN

268. Question No. (xiv) is to the effect whether section 25A (e) and (g) give unfettered discretion to the Chairman NAB to reject the recommendations of a duly appointed committee and to refuse to recognise a settlement arrived at between a creditor and a debtor amounts to excessive delegation and restraint on the freedom of contract on the touchstone of Articles 4, 18 and 25 of the Constitution?

269. The above provisions of Section 25A (e) and (g) in their present form suffer from excessive delegation of power, in that, these provisions confer unfettered discretion on the Chairman NAB to reject the recommendations of a duly appointed committee and to refuse to recognize a settlement arrived at between a creditor and a debtor. We,

therefore, direct that the recommendations made by the Governor, State Bank of Pakistan shall be binding on the Chairman NAB except for valid reasons to be assigned in writing subject to approval of the Accountability Court, to be accorded within a period not exceeding 7-days. Suitable amendment [must] be made in section 25A (e) and (g).

STAY OF PROCEEDINGS BEFORE ACCOUNTABILITY COURT

270. Let us now examine Question (xv) to the effect whether section 32(d) of the impugned Ordinance purports to oust the jurisdiction of the Superior Courts from exercising their jurisdiction under Article 184(3) and Article 199 of the Constitution?

271. Section 32 of the Ordinance provides [for an] appeal before the High Court at the instance of any person convicted or the Prosecutor General Accountability. However, it prohibits appeal against an interlocutory order of the Court during the proceedings pending before it under this Ordinance and provides an appeal only against the final judgment of the Accountability Court. The main attack of the petitioners is directed against clause (d) thereof which provides that no stay of proceedings before Accountability Court shall be granted by any Court on any ground whatsoever, nor proceedings thereof be suspended or stayed by any Court on any ground whatsoever.

272. It is well settled that constitutional jurisdiction vesting in the High Courts under Article 199 of the Constitution cannot be taken away or abridged, or curtailed by subordinate legislation. The above provision in so far as it purports to oust the jurisdiction of the Superior Courts from exercising the jurisdiction whether under Articles 184(3) or 199 of the Constitution is *ultra vires*. Refer *Inayat Ullah and others v. M.A.Khan and others* (PLD 1964 SC 126), *Nagina Silk Mills, Lyallpur v. Income-Tax Officer* (PLD 1963 SC 322), *Abdul Rashid v. Pakistan* (PLD 1962 SC 42), *Muhammad Anwar v. Government of West Pakistan* (PLD 1963 Lah. 109), *Abdul Rahim v. Chancellor of West Pakistan University of Engineering and Technology* (PLD 1964 Lah. 376), *Mrs. Shahida Zahir Abbasi and 4 others v. President of Pakistan as Supreme Commander of the Armed Force, Islamabad and others* (PLD 1996 SC 632). However, by way of abundant caution, section 32 be suitably amended so as to clarify in unambiguous terms that ouster of jurisdiction does not embrace the Superior Courts in the exercise of their constitutional jurisdiction. Needless to observe that High Courts shall exercise this power sparingly in rare and exceptional circumstances for valid reasons to be recorded in writing.

273. Question (xvi) in the admitting order is to the effect whether various provisions of the Impugned Ordinance grant arbitrary and unfettered discretion to the Chairman NAB e.g. (i) under section 9(c) of the impugned Ordinance to set whatever conditions he feels with respect to the release of an accused from custody, (ii) under section 18(g) to refer or not a case to an Accountability Court and (iii) under section 25A(g) to refuse to recognize a settlement arrived at between a creditor and debtor.

274. We have already held that the Chairman NAB is not competent to reject a settlement arrived at between a creditor and debtor through the intervention of Governor, State Bank of Pakistan without the approval of the Accountability Court.

275. The powers vesting in the Chairman NAB to release an accused from custody having regard to the gravity of the charge against him, favour the accused. However, while doing so, he is to record valid reasons in writing. As regards the vesting of powers

with the Chairman NAB under Section 18(g) to refer or not a case to the Accountability Court after perusal of the material and evidence collected during inquiry and investigation, suffice it to say that this power corresponds to the normal powers vested in all Police Officers or Officers of investigating agencies. Reference may be made to Section 170 Cr.P.C. which reads:

170. Case to be sent to Magistrate when evidence is sufficient.

(1) If, upon an investigation under this Chapter it appears to the officer in charge of the Police-station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police-report and to try the accused or send him for trial or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

(2) When the officer in charge of a police-station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as he may think necessary to execute a bond to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.

(3) *Omitted*

(4) Rep. By the Code of Criminal Procedure (Amndt.) Act (II of 1926), S.2.

(5) The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report.

276. Clearly, the existence of sufficient evidence is a condition precedent for the police acting under section 170 Cr.P.C. and for making a request to the Magistrate to take cognizance of the offence. It is for the officer in charge of a police station to decide whether there is sufficient evidence to justify the forwarding of the accused to the competent Magistrate. As stated above, a corresponding provision is contained in Section 18(g) to which no exception can be taken subject to compliance with the procedure laid down in section 170 Cr.P.C. so far as it is applicable. To this extent section 18(g) to be suitably amended.

APPOINTMENT OF OFFICERS AND STAFF OF NAB

277. Question (xvii) formulated in the admitting order is whether to exclude the officers and staff of the NAB, who have not been deputed or posted to NAB from the Federation or a Province, from the category of civil servants within the purview of section 2(b) of the Civil Servants Act, 1973, is violative of Article 25 of the Constitution.

278. A perusal of section 28(d) of the Ordinance shows that it creates two categories of persons serving in NAB. The first category is of persons directly appointed to whom the Civil Servants Act, 1973 does not apply. The second category is comprised of persons who are civil servants deputed to or posted in NAB. The Civil Servants Act, 1973 continues to apply to such persons. The officers and staff of the NAB are two different categories and classes of employees, therefore, no violation of Article 25 is involved.

279. Question (xviii) in the admitting order is to the effect whether the alleged violation of principles of Universal Declaration of Human Rights of 1948 and Cairo Declaration on Human Rights in Islam are justiciable in these proceedings.

280. It is not necessary to deal with this question in these proceedings and the same shall be considered in some other appropriate case, in that, the order proposed to be passed here does not contravene the above Declaration.

281. Question (xix) is whether the impugned Ordinance is liable to be struck down on the ground that earlier Ehtesab Act, 1997 was competently and validly made and its vires were upheld by this Court and therefore there is no necessity for enacting the same.

282. This question has already been dealt with in the preceding paragraphs. Suffice it to say that new laws are not made only when previous laws have been declared invalid. The mere fact that the Ehtesab Act, 1997 was competently and validly made and its vires were upheld by this court does not in any way prescribe any limitation on the competent legislature to make a new law on the subject. The question of "occupied field" has already been dealt with earlier. It is not necessary to deal with this question any further.

283. Question (xx) is with respect to whether the vires of the impugned Ordinance can be examined on the touchstone of Article 2A of the Constitution having regard to the law laid down by this court in the case of *Hakim Khan and 3 others versus Government of Pakistan through Secretary Interior and others* (PLD 1992 SC 595).

284. It is not necessary to deal with the above question. Suffice it to say that the learned counsel for the petitioners have not been able to point out any of the provisions to be repugnant to the Injunctions of Quran and Sunnah. Furthermore, we have directed numerous amendments/substitutions etc so as to render the impugned Ordinance to be *intra vires* the Constitution.

285. Question (xxi) deals with the point whether the provisions for appointment of Chairman and other officials in the NAB are discriminatory inasmuch as they do not lay down any qualifications in that regard or methodology for their appointment.

286. The method of appointment in respect of the Chairman NAB is contained under section 6(b) (i) of the impugned Ordinance, which makes the following reading: "There shall be Chairman NAB to be appointed by the President and he shall hold office during the pleasure of the President".

287. In so far as the provisions relating to methodology for appointment of Chairman NAB and Deputy Chairman NAB without prescribing any qualifications in that regard are concerned, it may be observed that there are numerous other instances where no specific qualifications have been prescribed for certain appointments. Such examples include appointment of Governor of a Province, Director General FIA under Federal Investigation Agency Act, 1974, Managing Director of PIA under the Pakistan International Airlines Act, 1956 and Federal Tax Ombudsman under Establishment of Office of Federal Tax Ombudsman Ordinance, 2000. However, in view of the

importance of the National Accountability Bureau, its objectives of eradication of corruption and corrupt practices and to ensure the process of accountability to be conducted in a coherent and transparent manner, it is essential that its independence is maintained. With a view to achieving the above objective we hold that clause (b)(i) of Section 6 to the effect that the Chairman NAB, "shall hold office during the pleasure of the President" is *ultra vires* being repugnant to the concept of independence of an institution.

288. Section 6, therefore, requires to be suitably amended in the following terms.

(a) The Chairman NAB shall be appointed by the President in consultation with the Chief Justice of Pakistan.

(b) The Chairman NAB shall hold office for a period of three years.

(c) The Chairman NAB shall not be removed from office except on the grounds of removal of a Judge of the Supreme Court of Pakistan.

(d) The Chairman NAB shall be entitled to such salary, allowances and privileges and other terms and conditions of service, as the President determines and these terms shall not be varied during the term of his office.

(e) The Chairman NAB may, by writing under his hand, addressed to the President, resign his office.

289. In order to ensure continuity of the accountability process and in the light of the decision in *Zafar Ali Shah (supra)* that the process of accountability be accelerated, we direct that the present incumbent of the office of Chairman NAB shall be deemed to have been appointed for a term of three years from the day he entered upon his office.

290. Section 7 of the impugned Ordinance provides for the appointment of Deputy Chairman, NAB. Clause (b) of Section 7 *ibid* reads thus: "The Deputy Chairman shall serve at the pleasure of the President".

In view of our observation in the immediately preceding paragraph, section 7(b) be suitably amended as under: "The Deputy Chairman shall hold office for a minimum period of two years and shall not be removed except on ground of misconduct as defined under section 2(4) of the Government Servants (Efficiency And Discipline) Rules, 1973".

PROSECUTOR GENERAL ACCOUNTABILITY

291. Appointment of Prosecutor General Accountability has been provided in section 8 of the impugned Ordinance, Clause (a) whereof reads: "The Chairman NAB may appoint any person to act as the Prosecutor General Accountability, notwithstanding any other appointment or office the latter may concurrently hold, upon such terms and conditions as may be determined by the Chairman".

292. In view of the legal nature of duties of the Prosecutor General Accountability, he must be a person qualified to be appointed as a Judge of the Supreme Court of Pakistan in that his duty is to give advice to the Chairman NAB upon such legal matters and to perform such other duties of a legal character as may be referred or assigned to him by the Chairman NAB and, in the performance of his duties, he has a right of audience in all courts including the High Courts and the Supreme Court. Section 8(a), therefore, be amended so as to provide as follows:

- (a) The Prosecutor General Accountability shall hold an independent office on whole time basis and shall not hold any other office concurrently.
- (b) He shall be appointed by the President in consultation with the Chief Justice of Pakistan and Chairman, NAB on such terms and conditions as may be determined by the President.
- (c) His remuneration and fringe benefits shall in no case exceed those of the Attorney General for Pakistan, who is the Principal Law Officer of the country and holder of a constitutional office.
- (d) He shall hold a tenure post of not less than two years.
- (e) His services shall not be dispensed with except on the grounds prescribed for removal of a Judge of the Supreme Court.
- (f) He shall not be permitted to conduct private cases and in lieu thereof he may be allowed a special allowance.
- (g) He may, by writing under his hand addressed to the President of Pakistan, resign his office.

In the interest of continuity of accountability process, the incumbent Prosecutor General shall continue in office on the existing terms and conditions of his service till his successor is appointed or he is found suitable to be retained in service as such subject to recommendations of the consultees as aforesaid.

INDEPENDENT PROSECUTION AGENCY

293. A panel of competent lawyers of experience and impeccable reputation shall be prepared in consultation with the Law and Justice Division. Their services shall be utilized as Prosecuting Counsel in cases of significance at reasonable fee on case-to-case basis. Even during the course of investigation of an offence, the advice of a lawyer chosen from the panel should be taken by the NAB.

294. Every prosecution which results in the discharge or acquittal of the accused must be reviewed by a lawyer on the panel and, on the basis of the opinion given, responsibility should be fixed for dereliction of duty, if any, of the concerned officer. In such cases, strict action should be taken against the officer found guilty of dereliction of duty in accordance with law.

295. Steps shall be taken for the constitution of an able and impartial agency comprising persons of unimpeachable integrity to perform functions of investigation and inquiry, etc. by the National Accountability Bureau.

296. Till the constitution of the aforesaid body, Special Counsel shall be appointed for the conduct of important trials in consultation with the Law and Justice Division.

TRANSFER OF CASES

297. Question (xxii) in the admitting note deals with the issue whether the provisions relating to transfer of cases qua the Provincial Courts within the territories of a Province and from one Province to another, suffer from excessive delegation. The above question has been thoroughly discussed in the preceding paragraphs while dealing with section 16(d) of the impugned Ordinance. No further examination of the impugned provision is called for.

SPECIAL TREATMENT TO WOMEN ACCUSED

298. Question (xxiii) in the admitting order dated 12 September 2000 says whether in the absence of any provision in the impugned Ordinance regarding special treatment to be meted out to women-accused is not violative of the mandate under Article 25(3) of the Constitution and section 167 of the Criminal Procedure Code. Suffice it to say that there is no direction in Article 25 to make special provisions for women. It merely permits that provisions with regard to women may be made. In any case, since the provisions of the Criminal Procedure Code apply where such provisions are not specifically over-riden or ousted in the NAB Ordinance, therefore, provisions relating to women-accused under the Cr.P.C. shall apply to the impugned Ordinance as well.

WITHDRAWAL FROM PROSECUTION

299. Section 31B of the NAB ordinance empowers the Chairman NAB to direct the Prosecutor General Accountability to withdraw from prosecution of any person and release him if not required in any other case under the ordinance if he is of the opinion that ends of justice so require.

300. Withdrawal of cases can neither be controlled by the Chairman NAB nor the Prosecutor General or Deputy Prosecutor General. Such course can be resorted to only if the Accountability Court so permits. Suitable amendment [must] be made in Section 31B of the Ordinance.

PERFORMANCE OF NAB

301. The report as to performance of the NAB and the submissions made by Mr. Maqbool Elahi Malik, learned Advocate General Punjab at the bar may be summed up as follows:

1. NAB INQUIRIES/INVESTIGATIONS:

i) 759 investigations against 256 politicians, 383 bureaucrats, 38 businessmen, 16 persons from armed forces and 66 others:

- a) 143 investigations completed;
- b) 586 investigations are in progress
- c) 30 investigations are suspended.

REGIONS:

ii) Accountability cases (politicians):

- a) 92 from Punjab
- b) 17 from NWFP
- c) 20 from Balochistan
- d) 37 from Sindh

POLITICAL SPECTRUM:

- iii) a) 54 belong to PPP
- b) 72 belong to PML
- c) 40 other fringe parties

BUREAUCRATS:

- iv) a) 109 BPS 20 & above
- b) 257 BPS 19 & above

Total: 366

2. SUMMARY OF PROSECUTION TILL 2 April 2001:

- i) 216 cases filed
- ii) 120 decided:
 - a) 89 court decisions

- b) 31 plea bargaining
 - iii) 172 cases still pending
- 3. CLASSIFICATION OF OFFENCES IN REFERENCES FILED:**
- i) 63 corruption and corrupt practices
 - ii) 65 assets beyond means
 - iii) 70 misuse of authority
 - iv) 31 embezzlement
 - v) 23 wilful default
 - vi) 9 under section 31A against absconders

4. PLEA BARGAINING:

- i) 87 cases received
- ii) 46 bargained
- iii) 25 under process
- iv) 13 rejected

Amount paid: Rs.774.305 million

Amount to be paid further: Rs.290.295 million

Total payable: Rs.1064.600 million

5. STATUS OF ACCUSED:

- i) Arrest warrants issued for 318 persons
- ii) 36 persons in NAB custody
- iii) 157 persons in judicial lock up
- iv) 56 persons released
- v) 69 persons are at large

6. BANK DEFAULT CASES:

- i) On 31 January 2001 direct recovery: 37.341 billion
- ii) Money recovered through plea bargaining:: 1.064 billion
- iii) Recovery through courts: 1.056 billion

Total recovery: 40 billion

Adding other recoveries e.g. PTCL, CDA, Customs duty evasion: 11 billion

Hence total recoveries amount to Rs. 51 billion

7. NAB'S IMPACT ABROAD:

- i) Arrest of Admiral (Retd.) Mansoor-ul-Haq
- ii) Co-operation of the UK Authorities appropos corruption of Benazir Bhutto & Asif Ali Zardari

8. NAB'S OTHER AREAS OF ACTION:

- i) Land scam
- ii) Co-operatives
- iii) Organized illegal emigration
- iv) Utility bills

302. We do not subscribe to the view that the performance of the NAB under its Chairman was not satisfactory in comparison to that of the Ehtesab Bureau and other functionaries created under the Ehtesab Act. Mr. Maqbool Elahi Malik has also placed on record copy of Operational Instruction No.1 (Marked Confidential) issued by NAB, salient features whereof read as under:

The genesis of corruption in Pakistan is rooted in our historical, social and political history. The inherited system of governance has led to concentration of powers and privileges, thus glamorizing corruption in the society. Corruption is not a cause but a symptom of breakdown of systems and ethics. Fortunately, the

tide is turning against the corruption, which lends a big support to NAB. At the same time, failing to deliver would have adverse consequences and therefore, cannot be ignored. The present government has taken the challenge up-front and NAB has to deliver with a spirit of JIHAD in the shortest possible time.

Para 2 of the Instruction lays down the aims and objectives of NAB within the parameters of the NAB Ordinance and seven-point agenda of the present Government. These are:

- a. Identification, investigation and prosecution of cases of corruption ensuring speedy disposal.
- b. Urgent recovery of the state money and other assets misappropriated through corruption, corrupt practices and misuse of authority.
- c. Induce a deterrence against corruption in the society in general and amongst corrupt institution/persons in particular.
- d. Develop a culture/mechanism of institutionalized accountability by every public/private organization.
- e. Structure NAB's organization on a long term basis which is task oriented by highly trained professionals.

The Instructions, amongst others, contain caution to be exercised against the individual acts of misconduct or misuse of authority, focus on operation, the capacity factor prioritization-parameters and process, review of ongoing cases, limiting factors, i.e. the society's balance is not disturbed, the economic activity is not damaged and the campaign is conducted without harassment, principles of operational functions, functional matters, investigation functions, overseas investigations, teamwork, actions following formal investigations, plea bargaining within the parameters of the law, prosecution functions, functional spectrum and organization, pre-trial function, organizational aspect, etc. The directions contained in the operational instruction No.1 appear to be laudable provided they are implemented in letter and spirit. However, apart from any internal instructions issued by the NAB for carrying out the objectives of the NAB Ordinance, it would be appropriate that rules as envisaged under the NAB Ordinance are framed as expeditiously as possible to make the process of accountability transparent in a coherent manner and in the light of the observations made in this judgment.

ACCOUNTABILITY OF ARMED FORCES

303. It was contended that section 5(m) of the impugned Ordinance, which defines holders of public office, excludes a person who is a member of any of the Armed Forces of Pakistan, or for the time being, is subject to any law relating to any of the said Forces, therefore, it is discriminatory in so far as the accountability of the Armed Forces is concerned.

304. The learned counsel for the petitioners have overlooked the constitutional safeguards provided to a person who is a member of the Armed Forces of Pakistan, or who is for the time being subject to any law for his actions being challenged under constitutional jurisdiction of the High Court by virtue of Article 199(2)(3) of the Constitution as well as Article 8, which lays down that the laws inconsistent with or in derogation of Fundamental rights shall be void. Sub-clause (a) of Clause (3) of Article 8 provides as under:

- (3) The provisions of this Article shall not apply to-

- (a) any law relating to members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them.

305. Article 63(1) providing for disqualifications for membership of Majlis-e-Shoora (Parliament), in sub-clause (g) thereof, lays down: (g) he is propagating any opinion, or acting in any manner, prejudicial to the Ideology of Pakistan, or the sovereignty, integrity or security of Pakistan, or morality, or the maintenance of public order, or the integrity or independence of the judiciary of Pakistan, or which defames or brings into ridicule the judiciary or the Armed Forces of Pakistan". The above is the rationale for not including the members of the Armed Forces within the purview of the NAB Ordinance. This, however, does not mean that they are immune from accountability. The Pakistan Army Act, 1952 (XXXIX of 1952) (hereinafter called the Act) as well as the Pakistan Army Act Rules, 1954 (hereinafter called the Rules) are self-contained Codes, which provide for prosecution and punishment in cases involving corruption, corrupt practices, illegal gratification and for matters connected therewith and incidental thereto. Officers and persons enrolled in army service are subject to section 2 of the Act. Offences of corruption and corrupt practices etc. corresponding to and ejusdem generis with the offences contained in section 9 of the NAB Ordinance, 1999 are provided for in sections 27, 40, 42, 47 and 55 of the Act. Section 27 of the Act prescribes offences against property or persons of inhabitant of country where serving which is punishable with rigorous imprisonment for a term which may extend to fourteen years; Section 40 of the Act deals with fraudulent offences in respect of property which is punishable with rigorous imprisonment for a term which may extend to five years; Illegal gratification falls under Section 42 of the Act, which is punishable with rigorous imprisonment for a term which may extend to five years; Section 47 relates to False documents which is punishable with rigorous imprisonment for a term which may extend to seven years; and Section 55 of the Act provides for violation of good order and discipline and prescribes punishment for its breach, which may extend to five years.

306. Section 176 of the Act prescribes power of the Federal Government to make rules for the purposes thereof. Rule 13 read with Rule 157 of the Rules deal with investigation of charges, remand for trial, court of inquiry and summary of evidence. Sections 80 to 142, contained in Chapters IX to XI of the Act provide for constitution, jurisdiction and powers of Court Martial.

307. Viewed in the above perspective, it is wrong to contend that members of the Armed Forces are immune from accountability [for] they are subject to accountability in accordance with the methodology laid down in the Act and the Rules.

ACCOUNTABILITY OF NATIONAL ACCOUNTABILITY BUREAU

308. The accounts of the National Accountability Bureau shall be kept in such form and in accordance with such principles and methods as the Auditor General of Pakistan may prescribe.

309. The accounts shall be audited by the Auditor General, Pakistan annually and his report shall be submitted to the President of Pakistan.

310. The Chairman NAB shall submit his Annual Report to the President of Pakistan as to affairs and performance of the National Accountability Bureau by 15th January of each succeeding year.

311. A mechanism shall be evolved by the Chairman NAB for redressal of the grievances against the functionaries of the National Accountability Bureau.

ACCOUNTABILITY OF SUPERIOR JUDICIARY

312. Under Article 209 of the Constitution of the Islamic Republic of Pakistan, 1973, the Supreme Judicial Council of Pakistan consists of: (a) the Chief Justice of Pakistan; (b) the two next most senior Judges of the Supreme Court; and (c) the two most senior Chief Justices of High Courts.

Clause (5) of the above Article reads as under:

(5) If, on information received from the Council or from any other source, the President is of the opinion that a Judge of the Supreme Court or of a High Court-

(a) may be incapable of properly performing the duties of his office by reason of physical or mental incapacity; or

(b) may have been guilty of misconduct,

the President shall direct the Council to inquire into the matter.

A perusal of the above clause indicates that the right to move the Supreme Judicial Council (SJC) against a Judge of the Superior Courts under Article 209 of the Constitution is not available to any individual. Secondly, the President alone on the advice of Prime Minister or the Cabinet as the case may be, can refer a case of the Judge of the Superior Courts to Supreme Judicial Council for holding an enquiry against him. Thirdly, the jurisdiction of [the] Supreme Judicial Council to hold an enquiry against the Judge of a Superior Court arises only when a reference is made to it by the President in this behalf. Fourthly, the enquiry by the Supreme Judicial Council against the Judge of a Superior Court under Article 209 *ibid*, is limited only to two points, namely (i) the incapacity of the Judge to perform the duties of his office properly arising from any physical or mental incapacity and (ii) misconduct of the Judge concerned. Lastly, the findings of the Supreme Judicial Council in such an enquiry are recommendatory in nature and the action, if any, is to be taken by the President on the advice of the Prime Minister or the Cabinet (*Malik Asad Ali v. Federation of Pakistan* (PLD 1998 SC 161)). However, in order to make the Supreme Judicial Council more effective and functional and to ensure that the Judges of the Superior Courts observe the Code of Conduct in letter and spirit, the Chief Justice of Pakistan/Chairman Supreme Judicial Council convened meetings of the Council on 29 March 2000, 13 April 2000 and 30 April 2000 respectively wherein decisions, *inter alia*, were taken to make it obligatory on every Judge to take all steps necessary to expedite cases, and effectively control the processing thereof with a view to deciding the same expeditiously and to strictly adhere to the Code of Conduct, pursuant to the provisions contained in Articles II, IX and X of the Code of Conduct. Article X provides for quick disposal of cases. The Judges of the Superior Courts have to work and conduct themselves under the Code of Conduct already prescribed for them. They are oath-bound to preserve the Code and act in accordance with its dictates. The Code of Conduct is a fairly comprehensive document and covers both the public and private conduct of Judges. It lays down essential norms of behaviour to be observed in the interest of maintaining decorum and judicial propriety. The Supreme Judicial Council is a unique institution, which comprises the senior most Judges in judicial hierarchy and entrusted with the onerous responsibility of deciding complaints that are referred to it through references by the

President alone. It is an essential prerequisite of the independence of judiciary that there is put in place a system of accountability. It should, therefore, be the endeavour of the Judges of the Superior Courts to make the Code fully applicable and ensure that it is strictly adhered to. As held in the case of *Zafar Ali Shah (supra)*, the Judges of the Superior Courts are not immune from accountability. They are accountable only in the manner laid down under Article 209 of the Constitution. We may also observe that no question was raised by the learned counsel for the petitioners in regard to the accountability of Judges vis-a-vis NAB Ordinance. However, we thought it in the fitness of things to reaffirm the observations in the case of *Zafar Ali Shah (supra)* that the Judges of the Superior Courts are not immune from accountability and that it is for the President to make a reference if in a case such a course is desirable at his end.

PAST AND CLOSED TRANSACTIONS

313. M/s Abdul Hafeez Pirzada, K.M.A.Samdani and M.Akram Sheikh vehemently argued and reiterated that the impugned Ordinance should be struck down as a whole on the ground of being void. They argued that even if some of the provisions contained therein are good and the others bad, the good ones will also have to be struck down for the reason that the doctrine of severability is not attracted in such a case. In support of their contention they placed reliance on *Yousaf Ali v. Muhammad Aslam Zia* (PLD 1958 SC [Pak.] 104), wherein it was held that

“Where the Legislature clothes an order with finality, it always assumes that the order which it declares to be final is within the powers of the authority making it, and no party can plead as final an order made in excess of the powers of the authority making it, in the eye of the law such order being void and non-existent. And if on the basis of a void order subsequent orders have been passed either by the same authority or by other authorities, the whole series of such orders, together with the superstructure of rights and obligations built upon them, must, unless some statute of principle of law recognizing as legal the changed position of the parties is in operation, fall to the ground because such orders have as little legal foundation as the void order on which they are founded”.

The principle laid down in the case of *Yousaf Ali (supra)* is not attracted here, in that, neither the impugned legislation has been found to be void nor any order passed under the Ordinance purported to be void is subject matter here. The individual grievances of any of the petitioners are not being examined in these proceedings. Also refer *Zafar Ali Shah (supra)* vide paragraph No.283 whereof it was observed :

On the question of legislative power in relation to Court's declaration of law, the matter stands concluded by the judgment of this Court in *Muhammad Yusuf v. The Chief Settlement and Rehabilitation Commissioner Pakistan, Lahore and another* (PLD 1968 SC 101) in the following terms:

“This judgment was delivered on the 2nd November 1964, and its consequence was that as from that date all Courts subordinate to the Supreme Court and all executive and quasi-judicial authorities were obliged by virtue of the Constitution to apply the rule as laid down by the Supreme Court in cases coming up before them for decision. It did not have, and it cannot be contended that it had, the effect of altering the law as from the commencement of the Act so as to render void of its own force all relevant orders of the Settlement Authorities or of the

High Court made in the light of the earlier interpretation which was that the exercise of the delegated power was subject to the provisions in Chapter VI of the Act”.

In *Zafar Ali Shah* a specific direction was given that the Government shall accelerate the process of accountability in a coherent and transparent manner justly, fairly, equitably and in accordance with law. It was also observed that “the order passed therein will not affect the trials conducted and convictions recorded including proceedings for accountability pursuant to various orders made and Orders/laws promulgated by the Chief Executive or any person exercising powers or jurisdiction under his authority and the pending trials/proceedings may continue subject to this order”. We see no reason to modify the above order of an eleven-Member Bench of this Court which is even otherwise binding on this Bench.

314. We, therefore, direct that this Order shall not affect the trials conducted and convictions recorded or any order passed or proceedings taken thereunder and the pending trials/proceedings may continue subject to this order.

CREDIBILITY OF JUDICIAL PROCESS

315. An Accountability Judge has to bear in mind that expeditious trial and its early conclusion are necessary for the ends of justice and credibility of the judicial process. Any dilatory tactics of the accused shall not prevent the Court from concluding the trials most expeditiously, within the time frame laid down in the NAB Ordinance. Any observation made by this Court in this Order shall have no bearing on the merits of the cases pending before the Accountability Courts, which shall be decided in accordance with law. Care must be taken by the Accountability Courts to ensure that the credibility of the judicial process is not undermined in any manner whatsoever.

316. Before concluding we would like to record our highest appreciation for Mr. Aitzaz Ahsan, Senior ASC; Mr. Muhammad Akram Sheikh, Senior ASC; Mr. Abdul Hafeez Pirzada, Senior ASC; Mr. K.M.A. Samdani, ASC; Ch. Mushtaq Ahmad Khan, Senior ASC; Mr. Muhammad Ikram Ch., ASC; Dr. A. Basit, ASC; Dr. Z. Baber Awan, ASC; Mr. Abdul Haleem Pirzada, Senior ASC; the learned Attorney General for Pakistan, Mr. Abid Hasan Minto, Senior ASC and Mr. Maqbool Ilahi Malik, Advocate General, Punjab assisted by their team members, for the valuable assistance rendered to the Court in resolving this complex matter of great public importance. We also record our highest appreciation for setting an exemplary tradition by the learned counsel appearing on either side, in particular, the Senior Advocates of this Court in limiting the amount of time allowed to each side for arguments. Such limits can be helpful to the Court and the parties but should be imposed with care and caution and only after consultation with counsel to ensure a fair hearing.

317. We, therefore, allow these petitions with the observations that this order and the directions contained therein shall come into force with immediate effect. However, the Federal Government is directed to formally promulgate appropriate legislative instruments, as soon as possible, but preferably, within a period of two months from today in order to make necessary amendments, modifications, alterations, or substitutions, as the case may be, to give effect to the above directions. No costs.

CRIMINAL LAW

The four cases in this section examine some key words and phrases commonly found in corruption offences.

In R v Hinchey, the Supreme Court of Canada was faced with determining the meaning of section 121(1)(c) of the Criminal Code. This provides:

*121(1) Every one commits an offence who ...
(c) being an official or employee of the government, demands, accepts or offers or agrees to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind directly or indirectly, by himself or through a member of his family or through any one for his benefit, unless he has the consent in writing of the head of the branch of government that employs him or of which he is an official, the proof of which lies on him.*

As Cory J notes in paragraph 94

There can be no doubt of the importance and significance of this section. It is designed to ensure the integrity and trustworthiness of officials and employees of the government. Federal, provincial and municipal governments carry on business on a very large scale. The magnitude and the quantity of contracts which governments enter into is of such an extent that it is extremely significant not only to the business community but to all Canadians. This is not an adverse comment on the actions of government but rather a reflection of the reality of today's society. The magnitude and importance of government business requires not only the complete integrity of government employees and officers conducting government business but also that this integrity and trustworthiness be readily apparent to society as a whole.... The fundamental importance of the subsection must be apparent to all. Its aim is to ensure the integrity of government employees. This vitally important aim and purpose should be taken into consideration in the interpretation and application of the section.

Whilst decision to allow the appeal against conviction is unanimous, the court is split 4-3 on the scope of the mens rea of the offence. In particular whether the offence has the potential to trap conduct which should not be considered criminal and thus punishes offenders undeserving of sanction. Cory J, for the minority, puts it as follows (at paragraph 95):

Section 121(1)(c) ... makes it an offence for an employee to accept or agree to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind directly or indirectly, by himself or through a member of his family, unless he has the consent in writing of the government that employs him. Thus if a

government employee accepts, on a rainy day, a ride downtown from a friend who does business with the government he has received a benefit. That could hold true as well for the cup of coffee or occasional lunch bought by the friend for the government employee. Obviously the section was never designed to include in its prohibition these very minor benefits. Nor should it apply to the exchange of those lunches and dinners that has long been a pattern of behaviour between old friends. However, benefits on a larger scale might well warrant closer scrutiny and require the obtaining of permission from the government employing the official. A reasonable balance must be struck that recognizes both the great dangers involved in paying benefits to government employees and the normal exchange of minor favours between friends.

However, Madam Justice L'Heureux-Dubé, giving the majority judgment, takes a very different view and asserts that the conclusion reached by minority "results in a virtual rewriting of the provision and one contrary to the object and spirit of the law" (para 1).

HINCHEY v R

Supreme Court of Canada

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

April 26, December 12 1996

The facts appear in the judgment of CORY, J. (paras 86-89)

Cases referred to in the judgment:

2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool) [1996] 3 SCR 919

Hoefele v. The Queen, 94 DTC 1878

Knox Contracting Ltd. v. Canada, [1990] 2 SCR 338

Manulife Bank of Canada v. Conlin, [1996] 3 SCR 415

Ontario v. Canadian Pacific Ltd., [1995] 2 SCR 1031

Pezzelato v. The Queen, 96 DTC 1285

R. v. Chase, [1987] 2 SCR 293

R. v. Cooper, [1978] 1 SCR 860

R. v. DeSousa, [1992] 2 SCR 944

R. v. Dubas, [1992] BCJ No. 2935 (QL), aff'd (1995), 60 BCAC 202

R. v. Fisher (1994) 88 CCC (3d) 103

R. v. Greenwood (1991) 8 CR (4th) 235

R. v. Guiller, Ont. Dist. Ct., September 23, 1985, unreported

R. v. Hau, [1994] BCJ No. 677 (QL)

R. v. Lafrenière, [1994] OJ No. 437 (QL)

R. v. Lohnes, [1992] 1 SCR 167

R. v. Johnston, [1995] OJ No. 3118 (QL)
R. v. Martineau, [1990] 2 SCR 633
R. v. Nova Scotia Pharmaceutical Society, [1992] 2 SCR 606
R. v. Ruddock (1978) 39 CCC (2d) 65
R. v. Smith, [1987] 1 SCR 1045
R. v. Tanguay (1975) 24 CCC (2d) 77
R. v. Zundel, [1992] 2 SCR 731
R. v. Zelensky, [1978] 2 SCR 940
R. v. Zundel, [1992] 2 SCR 731
RJR-MacDonald v. Canada (Attorney General) [1995] 3 SCR 199
Verdun v. Toronto-Dominion Bank, [1996] 3 SCR 550
Vine Estate v. Minister of National Revenue (1989) 29 FTR 59
United States v. Evans, 572 F.2d 455 (1978)

For the appellant: *David F. Hurley.*

For the respondent: *Colin J. Flynn, Q.C.*

For the intervener: *Robert J. Frater*

The judgment of La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. was delivered by **L'HEUREUX-DUBÉ J.**

1. I have had the advantage of reading the reasons of Justice Cory and I agree with his view that this appeal should be allowed. As he has expressed, the persistent interference of the trial judge, along with the errors committed during the charge to the jury, do not permit the conclusion that the appellant received a fair trial. Where I part company from my colleague, however, is with regard to the proper interpretation of s. 121(1)(c) of the *Criminal Code*, R.S.C. 1985, c. C-46. In my view, the conclusion he comes to results in a virtual rewriting of the provision and one contrary to the object and spirit of the law.

2 This appeal is brought on the basis that the trial judge, and subsequently the Court of Appeal, improperly defined the *mens rea* for this offence. In his address to the jury, the trial judge stated that a conviction should be entered if, *inter alia*, the Crown had proved that the appellant possessed an "intention to cause the external circumstances of the offence". According to the appellant, this instruction is problematic in that it, in effect, creates a strict liability offence whereby persons lacking a "criminal intention" can fall within the literal wording of the section.

3 I have great difficulty with this particular submission. Quite simply, this offence cannot be one of strict liability as it requires a *bona fide* mental element. At a minimum, the charge given to the jury required they find that the appellant possessed an intention to commit a prohibited act, while having subjective knowledge of the circumstances. As Doherty J.A. recognized when dealing with this very offence in *R. v. Greenwood* (1991), 8 C.R. (4th) 235 (Ont. C.A.), at pp. 255-56:

A conscious choice to perform a prohibited act, combined with knowledge that all or at least some of the relevant circumstances exist, is a well-recognized form of criminal culpability: see *R. v. Sault Ste. Marie (City)*, supra, at p. 1324 (S.C.R.), pp. 373-374 (C.C.C.), (pp. 52-54 C.R.); A. W. Mewett and M. Manning, *Criminal Law -- 2d. ed.* (Toronto: Butterworths, 1985), pp. 116-120; Law Reform Commission of Canada, *Criminal Law -- The General Part (Working Paper 29)* (1982), pp. 24-26. Knowledge combined with a volitional act may be seen as a minimum level of culpability. However, for many crimes which do not require proof that any consequence flowed or was intended to flow from the doing of the prohibited act in the relevant circumstances, a volitional act combined with knowledge of the relevant circumstances generally constitutes the only culpability requirement. Indeed, in its recent work, *Recodifying the Criminal Law (Working Paper No. 31)* (1987), at pp. 21-23, the Law Reform Commission of Canada, in its proposed General Part for a new *Criminal Code*, recommends, where the definition of a crime does not require proof of a particular consequence, that the culpability or fault requirement consist of a volitional act done with knowledge of, or recklessness as to, the existence of the circumstances set out in the statutory definition. The Crown's submission is firmly rooted in contemporary notions of criminal culpability.

4 I agree. Clearly, what the appellant takes issue with is not that s. 121(1)(c) lacks a fault requirement, but that the offence, as it was set out by the trial judge, has the potential to trap conduct which should not be considered criminal, and thus punish offenders undeserving of sanction. This is the thrust of the reasons of my colleague, and it is this issue which I propose to address.

5 The provision of the Code at issue here reads as follows:

121. (1) Every one commits an offence who ...
(c) being an official or employee of the government, demands, accepts or offers or agrees to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind directly or indirectly, by himself or through a member of his family or through any one for his benefit, unless he has the consent in writing of the head of the branch of government that employs him or of which he is an official, the proof of which lies on him.

6 After an examination of the provision, Cory J. concludes (at para. 116) that this offence encompasses the following elements. To constitute the *actus reus*, the conduct must include:

- (a) the giving of a "commission, reward, advantage or benefit of any kind" by a person having "dealings with the government";
- (b) the receipt of the "commission, reward, advantage or benefit of any kind" by a government employee;

(c) the absence of the consent of the government employee's superior to the receipt of the benefit; and
(d) that the "commission, reward, advantage or benefit of any kind must consist of something of value which constituted a profit to the employee derived at least in part from the employee's relation to or position with the government."

7 As to the mental element, the accused must have knowledge of the elements set out in (a), (b) and (c) and also must know that he was receiving the benefit at least in part because of his position in government.

8 I have no difficulty with the elements (a), (b) and (c) as detailed by Cory J. In my view, however, the effect of component (d) is to add an additional physical and mental element to the provision. I would note that this element is not a feature of Parliament's drafting, but was read into the section by my colleague. He has added these requirements in order to limit what is, in his view, an otherwise overly broad section.

9 This conclusion is, in my view, quite unnecessary. The section, properly read, captures no more conduct than is strictly necessary to achieve its purpose. Accordingly, I come to a considerably different result with regard to the essential elements of this provision.

Interpretation of s. 121(1)(c)

10 My colleague, Cory J. begins his analysis of the section with the following proposition (at para. 95):

Before considering the acts which form an integral part of the crime and the element of blameworthiness, it is necessary to consider the possible scope or breadth of application of the section.

11 Essentially, his approach to this case follows this very guideline. Rather than attempting to interpret the applicable section by analyzing its intent and the objective of Parliament in enacting it, my colleague begins from the position that we must tailor the breadth first. In my view, this is a backward manner of interpretation. I suggest that it is improper that the breadth of a section's potential application should be our guiding principle.

12 In interpreting any section of the Criminal Code, or indeed, of any statute, it is always crucial to begin by considering the section itself and the rationale which is underlying it. This is in accordance with the contextual approach I have discussed recently in *Manulife Bank of Canada v. Conlin*, [1996] 3 S.C.R. 415, *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550, and *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919. It follows that a proper understanding of the provision must begin with an examination of all relevant and admissible indicators of legislative meaning in an attempt to discern the section's purpose. Therefore, I propose to begin with this analysis.

Purpose of s. 121(1)(c)

13 There is little doubt that section 121 was enacted for the important goal of preserving the integrity of government. This section of the Criminal Code is one of the myriad ways in which the government seeks to achieve this purpose. For example, a glance at the surrounding Criminal Code sections 119 to 125 reveals different methods by which the law attempts to deter conduct by persons dealing with or employed by government. Obviously, the criminal law is not the only method utilized; a variety of other statutes contain provisions which deal with corrupt or fraudulent practices, while there are also conflict of interest and ethical guidelines to regulate behaviour. See for example Financial Administration Act, R.S.C., 1985, c. F-11, sections 80 and 81; Conflict of Interest and Post-Employment Code for Public Office Holders (1994).

14 It is hardly necessary for me to expand on the importance of having a government which demonstrates integrity. Suffice it to say that our democratic system would have great difficulty functioning efficiently if its integrity was constantly in question. While this has not traditionally been a major problem in Canada, we are not immune to seeing officials fall from grace as the result of a violation of the important trust we place in their integrity. See, for example, *R. v. Cooper*, [1978] 1 S.C.R. 860. I would merely add that the importance of preserving integrity in the government has arguably increased given the need to maintain the public's confidence in government in an age where it continues to play an ever increasing role in the quality of everyday people's lives. As the U.S. Congress has stated about its own anti-corruption measures:

The necessity for maintaining high ethical standards of behaviour in the Government becomes greater as its activities become more complex and bring it into closer and closer contact with the private sector of the Nation's economy. (As quoted in *United States v. Evans*, 572 F.2d 455 (5th Cir. 1978), at p. 480).

15 It is quite accepted that criminal law has a role to play in this area. Protecting the integrity of government is crucial to the proper functioning of a democratic system. Criminal law has a historic and well-established role in helping to preserve that integrity.

16 Section 121(1)(c) has a special role to play in this regard. This Court has decided on several occasions that the crucial purpose encompassed by this section is not merely to preserve the integrity of government, *but to preserve the appearance of the integrity as well*. In *Greenwood, supra*, at pp. 250-51, Doherty J.A. made several remarks in this respect regarding the purpose of s. 121(1)(c):

Canadian courts have repeatedly recognized that s. 121(1)(c) exists to preserve both the integrity of the public service and the appearance of integrity of the public service. The government's business must be free

from any suggestion of "under-the-table" rewards or benefits made to those who conduct business on behalf of the government by those who stand to gain from those dealings: see, e.g., *R. v. Cooper*, supra, at p. 875 (S.C.R.), p. 29 (C.C.C.); *Giguere*, supra, at p. 462 (S.C.R.), p. 12 (C.C.C.) (pp. 12-13 C.R.); *R. v. Cooper (No. 2)* (1977), 4 C.R. (3d) S-10, 35 C.C.C. (2d) 35 (Ont. C.A.), at p. 36 (C.C.C.) (p. S-11 C.R.); *R. v. Sinasac* (1977), 35 C.C.C. (2d) 81 (Ont. C.A.), at p. 84.

That integrity is compromised not only by bribery and corruption in their crassest forms, but by other insidious arrangements whereby a government employee profits from his or her position or employment by way of a private benefit or advantage received from a person having dealings with the government. Such advantages or benefits can create the appearance of impropriety and suggest that the loyalty of the employee has been divided between his or her government employer and the private benefactor. I adopt the comments of Judge Lyon of the Ontario District Court, who on imposing sentence on one Gerald McKendry (the government employee who received the benefits referred to in *R. v. Cooper*, supra) said, in a passage quoted with approval in *R. v. Ruddock* (1978), 25 N.S.R. (2d) 77, 36 A.P.R. 77, 39 C.C.C. (2d) 65 (C.A.), at p. 71 (C.C.C.):

"It is obvious in my view that altogether apart from s. 110(1)(c) (now s. 121(1)(c)) that the appearance of objective, uncorrupted impartiality must be of the highest importance. This indeed is an ethic which has been given the full support of the criminal law in the section that I have made reference to, and the reason for that, I think, is obvious because the appearance of justice is equally important as justice itself. And the appearance of honesty and integrity in dealings by Government employees particularly where large sums of public money is (*sic*) involved must be at all costs preserved lest the failure to do so could result in *de facto* corruption, one perhaps sliding imperceptibly into the other. It is clearly for this reason that s. 110(c) has been enacted."

The need to preserve the appearance of integrity within the public service requires that the words "advantage or benefit" include all gifts which can potentially compromise that appearance of integrity.

17 I substantially agree with this statement. In particular, I believe Lyon J.A. was correct when he indicated that preserving the appearance of integrity, and the fact that the government is fairly dispensing justice, are, in this context, as important as the fact that the government possesses *actual* integrity and dispenses actual justice. The two concepts are, however, analytically distinct. For a government, actual integrity is achieved when its employees remain free of any type of corruption. On the other hand, it is not necessary for a corrupt practice to take place in order for the *appearance of integrity* to be harmed. Protecting these appearances is more than a trivial concern. This section recognizes that the democratic process can be harmed just as easily by the *appearance* of impropriety as with actual impropriety itself.

18 In my view, given the heavy trust and responsibility taken on by the holding of a public office or employ, it is appropriate that government officials are correspondingly held to codes of conduct which, for an ordinary person, would be quite severe. For the public, who is the ultimate beneficiary of honest government, it is not so easy to sort out which benefits are legitimate and which are laden with a sinister motivation. Moreover, it is inefficient for a government to be paralyzed by rumour and innuendo while an inquiry is made into the motivation behind a certain benefit or advantage conferred on an official. What Parliament is saying through this provision is that the damage sought to be prevented is actually done *once the benefit is conferred*, and not after an *ex post facto* analysis which demonstrates that no harm was intended. It is from the point of the conferral of the benefit forward that the appearance of integrity has been slighted.

19 It follows, therefore, that I do not share the view of Cory J., at para. 94, where he sets out the purpose of the section as follows:

If government contracts can be bought by benefits paid to government employees the entire civil service becomes suspect and is dishonoured. The fundamental importance of the subsection must be apparent to all. *Its aim is to ensure the integrity of government employees.* This vitally important aim and purpose should be taken into consideration in the interpretation and application of the section. [Emphasis added.]

Upon finding this purpose, my colleague goes on to find that there must be actual misconduct for there to be damage done to the government's integrity. I do not share this view. Rather, Parliament has explicitly stated that such damage can also occur where benefits are received by government employees even where no ill motive existed. It is for this reason that the net in s. 121(1)(c) was cast so wide.

20 I find support for this conclusion through a comparison of the surrounding provisions in s. 121. If preventing the actual corruption of government employees were the purpose of s. 121(1)(c), there would be little need for s. 121(1)(a), as the two provisions would be virtually identical. This section reads as follows:

121. (1) Every one commits an offence who
(a) directly or indirectly
(i) gives, offers or agrees to give or offer to an official or to any member of his family, or to any one for the benefit of an official, or
(ii) being an official, demands, accepts or offers or agrees to accept from any person for himself or another person,
a loan, reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

- (iii) the transaction of business with or any matter of business relating to the government, or
- (iv) a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow, whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be;

21 This section clearly tries to preserve the *actual integrity* of government employees by deterring them from taking benefits in return for giving or promising some sort of reward to the benefactor. It is noteworthy that no actual return need be made to be trapped under the section. It is sufficient for culpability if the gift was given for an ulterior purpose, in that it was designed to compromise the integrity of the employee. The purpose behind the section recognizes that the integrity of government employees can be compromised when they accept rewards *because of their position in government*. This is in stark contrast, however, to section 121(1)(c) which does not explicitly require the reward to come as a result of the employee's position. It does not have to. This is not the evil the section is designed to prevent.

22 Furthermore, the very nature of the offence that Parliament has enacted supports this notion. In *Greenwood, supra*, at p. 247, Doherty J.A. characterized this offence as a "conduct" crime, meaning that it does not require a particular result to flow from the commission of the prohibited act. I agree with this assessment, and, furthermore, find it quite useful in illustrating the difference between my position and that of Cory J. In his text *Criminal Law* (3rd ed. 1993), at pp. 30-31, Professor Gillies draws a distinction between "conduct" crimes and "result" crimes:

The so-called "conduct" crime is one in which the behaviour which is personal to D is itself the mischief the crime is aimed at discouraging, viz., the actus reus does not extend to proof of substantive harm caused by this personal activity. The "result" crime is one the actus reus of which consists of conduct personal to D, and the causation of substantive harm by this conduct. ...The conduct crime is aimed at deterring behaviour which has the potential to inflict substantive harm. The result crime penalises the actual infliction of this harm, and in so doing deters its infliction.

The actual wording of s. 121(1)(c) clearly requires no consequence, as it is designed to deter behaviour which has the *potential* to inflict serious harm. In my view, the interpretation suggested by Cory J. has transformed this offence into a "result" crime. According to his view, before a conviction can be entered, the Crown must prove that the benefit was the result of some corrupt purpose. I cannot agree with this conclusion. In my view, it is clear that no "result" is required by the provision.

23 In summary, the purpose of s. 121(1)(c) is to protect and preserve the appearance of the government's integrity. The section accomplishes this task by criminalizing behaviour whereby a government official or employee, under certain circumstances, accepts a benefit by a person who has dealings with the government.

24 My colleague, however, appears to have rejected this as a valid criminal law purpose. In his reasons, he expresses concern about situations where benefits might be accepted absent a corrupt intention. It would seem that at the heart of this analysis is the assumption that Parliament did not intend to criminalize this action, as "no reasonable member of the community would regard [it] as blameworthy" (para. 97). In "tailoring" the provision to avoid capturing violators who lack a corrupt intention, Cory J. is essentially finding that the criminal law should not be involved in these types of situations.

25 It is necessary, therefore, to do an examination into the proper limitations of the criminal law. Before coming to the conclusion that certain conduct should or should not be considered "criminal", I believe that we must examine whether Parliament has the authority to attach sanctions to such conduct. For the purposes of this appeal, it is not necessary for me to exhaustively define the exact limits of the criminal law; however, a look at some of the underlying principles in this area would be helpful in resolving the difficult issues raised here.

26 The question of the proper scope of the criminal law has been oft considered by both academics and jurists. *Mewett & Manning on Criminal Law* (3rd ed. 1994), at pp. 16-17, have set out the issue in the following way:

How does one determine what acts ought to be subject to criminal sanctions? Some acts, such as a breach of contract or negligent behaviour, may cause untold damage and yet not be criminally punishable while others, such as the theft of a piece of garbage or a minor assault, may cause little or no damage and yet be subject to criminal sanctions. In fact, the harm caused, while one element to be considered, is only one element. Indeed, in some crimes such as conspiracy or attempt, no harm at all may actually materialize. . . . Criminal law is premised on the belief that there are some acts that ought to be prevented and on the belief that a criminal process is the best way to achieve this. . . . the essence of criminal law is its public nature. A crime is, in fact, not a wrong against the actual person harmed, if there is one -- the victim as he may be called (although it may also and coincidentally be a civil wrong against him) -- but a wrong against the community as a whole. The prevention -- or lessening, since total prevention is not possible -- of crime cannot be left to an individual's choice but is the responsibility of any member of the community and, in particular, those who represent the state -- the police or the prosecuting authorities.

27 Given this public nature, it is fitting that Parliament has consistently played the major role in defining exactly what type of conduct can be considered criminal in nature. This power is outlined in the *Constitution Act, 1867*, where the federal government is given the exclusive power to set out and regulate the criminal law. It is not just the provinces who are prevented from establishing criminal offences; the judiciary is also prevented from re-enacting or creating sanctions pursuant to the common law as a result of section 9 of the *Criminal Code*.

28 Since 1982, however, the major limitation upon parliamentary supremacy with respect to the criminal law has been the *Canadian Charter of Rights and Freedoms*. All legislative provisions of Parliament are now subject to review under the *Charter*, and where a statute conflicts with the fundamental values expressed therein, the provision cannot stand if it was not enacted for a pressing objective and tailored to suit this need. In fact, as was exemplified in *R. v. Zundel*, [1992] 2 S.C.R. 731, where this Court struck down the criminal prohibition against publishing false news, it will occasionally come to pass that an entire section of the *Code* will be invalidated because it simply cannot be rationalized with the *Charter*. Nevertheless, where, as is the case here, the values of the *Charter* do not come into play, Parliament generally must be left to its role of asserting the public good through the criminal law.

29 Cory J. recently addressed the proper scope of the criminal law in *Knox Contracting Ltd. v. Canada*, [1990] 2 S.C.R. 338, at p. 348, and stated:

A very helpful definition of criminal law can be found in the *Reference re Validity of Section 5(a) of the Dairy Industry Act (Margarine Reference)*, [1949] S.C.R. 1. In that case Rand J. stated at p. 49:

“A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened”.

Dickson J., as he then was, in dissenting reasons in *R. v. Hauser*, [1979] 1 S.C.R. 984, defined the subject in this way at p. 1026:

“Head 27 of s. 91 of the *British North America Act* empowers Parliament to make substantive laws prohibiting, with penal consequences, acts or omissions considered to be harmful to the State, or to persons or property within the State”.

30 I agree with this description. Parliament, therefore, retains the power to designate the specific acts which it considers harmful to the State. The criminal law is not “frozen as of some particular time”: *R. v. Zelensky*, [1978] 2 S.C.R. 940, at p. 951. This principle was expressed in greater detail in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, where the appellants argued that legislation controlling the advertisement of tobacco

products, the *Tobacco Products Control Act*, was not validly enacted by the federal government as it did not have "an affinity with a traditional criminal law concern" (p. 259). La Forest J., for a majority of the Court on this issue, dismissed this ground of appeal for the following reasons (at pp. 259-61):

It has long been recognized that Parliament's power to legislate with respect to the criminal law must, of necessity, include the power to create new crimes. This was made clear as early as 1931, when the Privy Council upheld the validity of the *Combines Investigation Act*, R.S.C. 1927, c. 26, in *PATA*, *supra*. That legislation criminalized a wide array of commercial activities not hitherto perceived to have an affinity with criminal law concerns. However, Lord Atkin explained that this fact alone was not sufficient to preclude the application of the criminal law power. He stated, at pp. 323-24:

In their Lordships' opinion s. 498 of the Criminal Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion Parliament to legislate as to matters falling within the class of subjects, "the criminal law including the procedure in criminal matters" (s. 91, head 27). The substance of the Act is by s. 2 to define, and by s. 32 to make criminal, combines which the legislature in the public interest intends to prohibit. *The definition is wide, and may cover activities which have not hitherto been considered to be criminal.* But only those combines are affected "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others"; and *if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. "Criminal law" means "the criminal law in its widest sense": Attorney-General for Ontario v. Hamilton Street Ry. Co., [1903] A.C. 524. It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes. . . . It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes. . . .* (Emphasis added.)

Soon after that decision, in *Attorney-General for British Columbia v. Attorney-General for Canada*, [1937] A.C. 368, the Privy Council adopted similar reasoning to uphold a prohibition on price discrimination under the criminal law power. Later, this Court, following in large part the reasoning employed by the Privy Council in *PATA*, *supra*, sustained a prohibition of resale price maintenance under the criminal law power (*Campbell v. The Queen*, [1965] S.C.R. vii) and a

federal law authorizing the courts to make orders prohibiting the continuation of illegal practices or to dissolve illegal mergers; see *Goodyear Tire, supra*. In the *Goodyear Tire* case, at p. 311, Rand J. reaffirmed the reasoning in the *PATA* case and made the following observation:

It is accepted that head 27 of s. 91 of the Confederation statute is to be interpreted in the widest sense, but that breadth of scope contemplates neither a static catalogue of offences nor order of sanctions. The evolving and transforming types and patterns of social and economic activities are constantly calling for new penal controls and limitations and that new modes of enforcement and punishment adapted to the changing conditions are not to be taken as being equally within the ambit of parliamentary power is, in my opinion, not seriously arguable. In my view, the reasoning in *PATA* and *Goodyear Tire* is directly applicable here. The simple fact that neither tobacco consumption nor tobacco advertising have been illegal in the past in no way precludes Parliament from criminalizing either of those activities today.

31 The notion of criminality, thus, is not a static one, but one which very much changes over time. As society changes, the conception of what types of conduct can properly be considered criminal also evolves. There are a myriad of different activities which at one point in time were considered legal, but which we now consider criminal. The offence of criminal harassment is one obvious example. For many years, it was not recognized as criminal to persistently follow someone and cause them to fear for their safety, so long as no contact was made. Now, that has distinctly changed with the addition of s. 264 of the *Code*, which makes this conduct a crime. In my view, this principle was expressed well in *R. v. Lafrenière*, [1994] O.J. No. 437 (Ont. Ct. (Prov. Div.)) by Greco Prov. Div. J., who stated the following with regard to the criminal harassment provisions (at para. 7):

If one analyzes the section closely it becomes apparent that conduct or behaviour by an accused which had previously been viewed as innocent, in the sense that it was not criminal conduct, in certain circumstances and under certain conditions may now become criminal conduct. See also *R. v. Hau*, [1994] B.C.J. No. 677 (Prov. Ct.).

32 In addition, we should not be swayed by the fact that the underlying activity in this case, receiving a benefit or advantage, happens to be quite legal. Such is also the case in a number of criminal provisions. Nevertheless, the law recognizes that in certain circumstances perfectly legal activity can become criminal. As MacDonnell Prov. Div. J. correctly recognized with respect to the criminal harassment provisions:

It is important to recognize that the conduct referred to in the four categories in ss. 264(2) is not per se unlawful. Indeed, if it were, there

would have been no need to enact s. 264. It is not per se criminal to follow someone, to communicate with them, or even to watch and beset a place where they are (unless one has the specific intent set out in s. 423(1) of the Code). It is not even an offence to engage in "threatening conduct", unless that conduct falls within one of the specific sections of the Code dealing with threats, such as ss. 264.1, 265(1)(b), 346(1), 423(1)(a) or (b), and 424. In enacting s. 264, Parliament has taken conduct which by itself is lawful and, in certain circumstances, made it criminal. [Emphasis added.](*R. v. Johnston*, [1995] O.J. No. 3118 (Ont. Ct. (Prov. Div.)), at para. 29.)

33 This is quite analogous to the situation here. While it is true that in most cases, nothing could be more innocent than accepting a gift or a benefit from someone, under certain circumstances that type of conduct can be considered criminal. There is nothing inherently improper in criminalizing the receipt of benefits.

34 The importance of this discussion is simply that once we recognize that our conception of criminality is somewhat fluid, it is a factor to consider in determining the proper limits of the criminal sanction. My colleague suggests that a government employee who receives benefits from someone who has dealings with the government does not commit a criminal offence. Essentially, he is saying that Parliament did not mean to enact such a law, because this conduct, without more, could not constitute a criminal act. I disagree. Parliament has identified what it considers an evil against the public, has set out a legitimate objective, and has written a prohibition into the statute which restricts specific actions. In my view, this is a valid exercise of the criminal law power, and as such, the judiciary should not rewrite it to suit its own particular conception of what type of conduct can be considered criminal. As Lamer J. (as he then was) recognized in *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1070, adopting Borins Dist. Ct. J. in *R. v. Guiller*, Ont. Dist. Ct., September 23, 1985, unreported, at p. 15:

It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment.

35 I agree with this approach. It should not, however, be taken that I am suggesting that the courts have no role to play in helping to interpret criminal provisions and ensure that they remain carefully tailored to what Parliament intended. As Doherty J.A. describes it in *Greenwood*, *supra*, at p. 246:

The courts, however, play a crucial role in the process through the interpretation of the language used by Parliament, and the application of certain common law principles which, in the main, operate to set the

necessary fault requirement: see *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299....

Doherty J.A., however, went on to expand upon this by saying that this interpretative role should be informed by certain concerns (at pp. 246-47):

In addition to these specific interpretative aids, the general underlying purpose of the criminal law must inform the interpretation of any provision which creates a crime. The criminal law is essentially a means whereby society seeks to prevent, and, failing that, punish blameworthy conduct which strikes at the fundamental values of the community. The criminal law is, however, a weapon of last resort intended for use only in cases where the conduct is so inconsistent with the shared morality of society so as to warrant public condemnation and punishment: see *The Criminal Law in Canadian Society* (Government of Canada, 1982), *Libman v. R.*, [1985] 2 S.C.R. 178 at 212. There must be at least a rough equivalence between what judges say is criminal and what the community regards as morally blameworthy. *Judicial interpretation of statutory language so as to declare conduct criminal which members of the community view as innocent or morally neutral does a disservice to the overall operation of the criminal law*: see Law Reform Commission of Canada, *Our Criminal Law* (1976); Sayre, "Public Welfare Offences" (1933), 33 Col. L.R. 55; J.L. Edwards, *Mens Rea in Statutory Offences* (1955) at pp. 244-251. [Emphasis added.]

36 I agree with this approach, so long as the focus remains upon *interpretation*. I repeat that judges should not attempt to rewrite a statute under the guise of interpreting it. If Parliament chooses to criminalize conduct which, notwithstanding *Charter* scrutiny, appears to be outside of what a judge considers "criminal", there must be a sense of deference to the legislated authority which has specifically written in these elements. In my view, what Doherty J.A. actually recognized when he stated that the judiciary should not declare innocent conduct criminal is a principle of statutory construction which decrees that Parliament does not intend through the criminal law to trap trivial, non-criminal conduct. As Gonthier J. expressed in *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at p. 1082:

Where a provision is open to two or more interpretations, the absurdity principle may be employed to reject interpretations which lead to negative consequences, as such consequences are presumed to have been unintended by the legislature. In particular, because the legislature is presumed not to have intended to attach penal consequences to trivial or minimal violations of a provision, the absurdity principle allows for the narrowing of the scope of the provision.

37 Finally, I would also add that in considering whether the effect of the law conforms to the "underlying purpose of the criminal law" we must not focus narrowly on the impugned provision. Often, a particular provision may seem harsh on its face, but a number of defences exist which reduce its severity. In that sense, a judge in searching to discover the proper meaning of a provision must consider the whole of the law and how it will be applied, as opposed to the section in the abstract, before choosing an interpretation.

38 In this regard, I would also point out that the section at issue here is like few others in that it offers a simple, complete and exonerating defence to any government employee. Inherent in the reasons of Cory J. is that the section might trap conduct which, although it might appear corrupt on the surface, might truly be quite innocent. Unlike fraud, or bribery offences, however, this section offers an easy solution to any employee concerned about the propriety of his or her conduct. All the employee must do to be completely absolved of responsibility is *get the consent of his or her superior in writing*. In my view, this does not impose a particularly onerous requirement. Where the employee has any doubts about accepting a gift, Parliament has made it clear that it would rather the person get the consent of his or her superior. At least one commentator has suggested that this defence should be enough to clarify any potential problems with the *mens rea* of the section: John C. Pearson, Annotation to *R. v. Greenwood* (1992), 8 C.R. (4th) 236.

39 It is with this background in mind that I approach the interpretation of this particular section of the *Code*. There can be no question that this section deals with a serious offence and that Parliament intended to deal with it seriously. Charges must proceed by way of indictment, and there is a maximum penalty of five years' imprisonment.

Actus Reus of s. 121(1)(c)

40 The interpretation of the section was recently considered in *Greenwood, supra*, by the Ontario Court of Appeal. My colleague takes the position that this decision properly defines the approach we should take to this section. While I am in agreement with much of what was said by Doherty J.A. in that case, I ultimately find myself in disagreement with his conclusions.

41 The language of s. 121(1)(c) consists of three separate elements which can be broken down into the following components:

- (a) the giving of a "commission, reward, advantage or benefit of any kind" by a person having "dealings with the government";
- (b) the receipt of that "commission, reward, advantage or benefit of any kind" by a government employee; and
- (c) the absence of the consent of the government employee's superior to the receipt of the "commission, reward, advantage or benefit of any kind".

42 Nevertheless, these elements contain many terms which require the clarification of the courts. Without this interpretation, I agree with Cory J. that this section would have a virtually unlimited meaning. Interpretation in this

regard is of course a standard feature of the criminal law, and should not be taken as suggesting that a provision does not offer sufficient particularity to the public. In this regard, I substantially agree with Arbour J.A., in *R. v. Fisher* (1994), 88 C.C.C. (3d) 103 (Ont. C.A.), at pp. 109-10, who in replying to a constitutional challenge to the very section at issue here, made the following remarks:

In its substantive conception, fair notice requires not only that the law be brought home to persons governed by it, but that the law convey in an intelligible way what the proscribed conduct is. The fact that citizens would be surprised to find how broadly the net has been cast by Parliament in criminalizing corruption in the public service does not mean that the law is broad to the point of vagueness....

The decision of this court in *Greenwood, supra*, elaborates upon the meaning of the statutory components of s. 121(1)(c). As so interpreted, the enactment provides adequate guidance to government employees who are required to comply with s. 121(1)(c) of the *Criminal Code*, and it also curtails appropriately discretionary enforcement. The text of that provision, as judicially interpreted, cannot, in my view, be said to be unconstitutionally vague. See also: *Ontario v. Canadian Pacific Ltd.*, *supra*; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

43 This approach, of course, recognizes that judicial interpretation has a crucial role to play in giving fair notice to the public. It is not merely whether the statute on its plain reading conveys accurate notice, but how it will be read in its proper context which must be considered as well.

44 In *Greenwood, supra*, Doherty J.A. concentrated his focus mainly upon the interpretation of the term "commission, reward, advantage or benefit of any kind". He came to the conclusion that this wording had the potential to trap a large scope of non-criminal conduct and thus it was important to limit it as much as possible. His starting point was that a literal reading of the term "advantage or benefit of any kind" included gifts and all sorts of trivial favours, including the situation where a person having dealings with the government purchases a government employee a cup of coffee. Cory J. has come to the same conclusion.

45 Doherty J.A. believed that the key to interpreting the rather open-ended term "advantage or benefit" was the concept of profit (at p. 252):

It is noteworthy that the other offences created by s. 121(1) also used the words "advantage or benefit", without any apparent qualification. The offences created by those sections, however, limit the scope of those words by requiring that the advantage or benefit be given or received for a specific purpose, (s. 121(1)(a), (d), (e) and (f)) or in relation to the giver's dealings with the government (s. 121(1)(b)): see *R. v. Giguere, supra*, at p. 458 (S.C.R.), p. 9 (C.C.C.). Those sections differentiate between criminal benefits and other benefits by reference

to the giver's or recipient's state of mind. No such limitation is found in s. 121(1)(c). However, that section creates a crime which is as serious and serves the same purpose as the other offences created by s. 121. It is therefore necessary to choose, from the available definitions, meanings for the words "advantage or benefit" which limit s. 121(1)(c) to its intended purpose.

In my view, the word "profit" found in both the definition of "advantage" and "benefit" sounds the keynote for the meaning of those words in the context of s. 121(1)(c). *A government employee receives an advantage or benefit when that employee receives something of value which, in all of the circumstances, the trier of fact concludes constitutes a profit to the employee (or a family member) derived, in part at least, because the employee is a government employee, or because of the nature of the work done by the employee for the government.* This definition encompasses not only arrangements involving a quid pro quo but also those more subtle forms of potential corruption whereby an employee gets something from an individual who has dealings with the government because he or she is a government employee, even though the giver expects nothing in return and the employee has done nothing to earn the thing given. [Emphasis added.]

46 In essence, for the purpose of not trapping the recipient of a trivial benefit, Doherty J.A. introduced a new element into the section. With the greatest of respect, it is neither desirable nor necessary to do so. In my view, Parliament worded this section broadly and did not intend to restrict its application solely to situations where the gift was motivated by the recipient's position in government. I believe it is possible to limit the section's potentially wide application through statutory interpretation without introducing an additional element.

47 I propose to examine each component of the *actus reus* in order to determine whether the section contains adequate safeguards to prevent the recipient of a minor benefit from falling into the criminal system.

(a) *the giving of a "commission, reward, advantage or benefit of any kind" by a person having "dealings with the government"*

48 The first component of the section is that a commission, reward, advantage or benefit of any kind be given by a person having dealings with the government. I agree with Cory J. that at first glance this section appears to have virtually unlimited application. On a literal interpretation, it is difficult to find a person in modern society who does not have some form of dealings with the government. It cannot have been the intention of Parliament to encompass every person in Canada, and many living abroad, into the section. Given the important purpose of preserving integrity, it would appear to me that the section is not interested in regulating the ordinary dealings which go on between Canadians and the government, but is truly concerned with persons who at the time of the commission of the offence had specific or ongoing

business dealings with the government and that the gift was such that it could have an effect on those dealings.

49 I come to this conclusion for two reasons. First, in the related s. 121(1)(b), the wider term "dealings of any kind" is used as opposed to the present section which merely employs the term "dealings". It is reasonable to assume that Parliament deliberately chose to omit the additional words "of any kind" and in doing so, intended to ascribe a narrower meaning to "dealings" in s. 121(1)(c).

50 Second, I would point out that while the English provision of the *Criminal Code* uses the wide term "dealings", the French version of the text is expressed in a narrower manner. It states:

étant fonctionnaire ou employé du gouvernement, exige, accepte ou offre ou convient d'accepter d'une personne *qui a des relations d'affaires* avec le gouvernement une commission, une récompense, un avantage ou un bénéfice de quelque nature. . . . [Emphasis added.]

The French text means, literally, that the giver must be conducting *business dealings*, or have business relations with the government. Since the two versions are somewhat different, we must attempt to find a shared meaning: R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 223; Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), at p. 275. It does not appear that the sections are contradictory; rather, the English version is open to different interpretations while the French version is open to just one. Given the purpose of the statute, which is to preserve the appearance of integrity, I believe the French version is the applicable one. I find it hard to see how the purpose of the statute would be furthered by accepting the broader English meaning. As the French version eliminates any ambiguity in the statute, it is incumbent upon the Court to accept this narrower meaning.

51 Therefore, I conclude that the proper interpretation of this term is the narrow one, whereby only where persons are in the process of having commercial dealings with the government at the time of the offence is the conduct trapped under the section. I find it unnecessary to expand at length about what would constitute "business dealings" for the purpose of the section. This was not the principal argument before this Court, and there is no doubt that this factor would be satisfied on the facts of this case. I believe the term is easily amenable to judicial interpretation and should not cause any difficulty.

(b) *the receipt of that "commission, reward, advantage or benefit of any kind" by a government employee*

52 It is this portion of the provision which would appear to attract the greatest scrutiny of both Doherty J.A. in *Greenwood* and Cory J. here. The concern appears to be that the words "advantage or benefit" are used without any

qualification and seem to be virtually unlimited. Indeed, Cory J. points out that the words "of any kind" would seem to make the section virtually limitless. He concludes by saying (at para. 95):

The section makes it an offence for an employee to accept or agree to accept from a person who has dealings with the government a commission, reward, advantage or benefit *of any kind* directly or indirectly, by himself or through a member of his family, unless he has the consent in writing of the government that employs him. Thus if a government employee accepts, on a rainy day, a ride downtown from a friend who does business with the government he has received a benefit. That could hold true as well for the cup of coffee or occasional lunch bought by the friend for the government employee. [Emphasis in original.]

53 I do not agree that the phrase "of any kind" was meant to widen the scope of the provision's reach. It was not worded or intended to mean "of whatever amount" or "of any value" such that the recipient of a cup of coffee should come within the confines of the section. On the contrary, I believe that Parliament's true intent in adding the words "of any kind" was to trap diverse *forms* of benefits, as opposed to indicating that it would be criminal to accept benefits of *any* value. To the extent that the term could support both interpretations, I once again look at the French version of the *Criminal Code*, which sets out the section in the following way:

étant fonctionnaire ou employé du gouvernement, exige, accepte ou offre ou convient d'accepter d'une personne qui a des relations d'affaires avec le gouvernement, une commission, une récompense, *un avantage ou un bénéfice de quelque nature*, directement ou indirectement, par lui-même ou par l'intermédiaire d'un membre de sa famille ou de toute personne à son profit, à moins d'avoir obtenu, du chef de la division de gouvernement qui l'emploie ou dont il est fonctionnaire, un consentement écrit dont la preuve lui incombe. [Emphasis added.]

54 Once again, this wording of the provision sheds some light on the latent ambiguity. The term "*de quelque nature*" operates somewhat differently from "of any kind" and strongly supports the interpretation I have suggested above. It indicates that what Parliament was truly intending by the section was to attract diverse forms of benefits. Thus, a government employee who receives a house at no cost is in the same position as one who happens to receive cash compensation.

55 I believe that the approach taken in *Pezzelato v. The Queen*, 96 D.T.C. 1285 (T.C.C.), in this regard is quite instructive. The decision deals with s. 6(1)(a) of the *Income Tax Act*, which is concerned with whether a person receives a benefit "of any kind whatever received or enjoyed . . . in the year in respect of, in the course of, or by virtue of an office or employment".

56 While the specific facts of *Pezzelato* are not particularly helpful as the main question was whether it was a benefit received by virtue of the appellant's employment, the pragmatic approach taken to the term "benefit of any kind" by Bowman T.C.C.J. merits consideration. I recognize of course that as a taxation case, this decision deals with markedly different principles; however it is interesting in that it states clearly that the term "benefit of any kind" is not unlimited in scope (at p. 1288):

The sole question is: was it a benefit? The word in the French version is "*avantage*". The matter has been much litigated in this court and in higher courts. Before I deal with the cases, I should like to approach the problem simply as a matter of principle and of common sense. Notwithstanding the breadth of its wording section 6 is not intended to create an artificial concept of income from employment. Rather, it is designed to recognize the numerous and varied ways in which an employee may be remunerated for his or her services and to bring them within the net of taxation. It is not intended to expand beyond the ordinary understanding of the word benefit (*avantage*) things that are not benefits at all. In other words, the wide net that section 6 casts relates to the manner in which the benefit is conferred, not to the definition of the benefit.

The words "of any kind whatever" do not appear to add anything to or extend the ordinary meaning of benefit. A benefit is, after all, a benefit. If something is not a benefit it does not become one by adding the words "of any kind whatever". I can only assume that the additional words are not intended to add to the meaning of benefit, but to prevent the meaning of the word from being restricted by being interpreted as (*ejusdem*) *generis* with board and lodging. See also *Vine Estate v. Minister of National Revenue* (1989), 29 F.T.R. 59, at p. 67.

57 I come to a similar conclusion here. In my view, the words "of any kind" do not add to the term "benefit" in any way other than to suggest that Parliament intended to trap benefits other than those of a strict monetary nature.

58 This of course does not completely address the question of what exactly Parliament did intend to encompass through the terms it used. The words "benefit" and "advantage" by themselves can still be understood to capture a wide variety of conduct. My colleague is rightly concerned about this section imposing a criminal sanction for a benefit received which is so minimal it clearly does not warrant such a harsh reprisal. I agree that such an interpretation would be clearly absurd, and as such is not one which should be followed. As stated in *Driedger, supra*, at p. 79:

Where it appears that the consequences of adopting an interpretation would be absurd, the courts are entitled to reject it in favour of a plausible alternative that avoids the absurdity.

59 Given the absurd consequences of adopting an unlimited wide meaning of the term "advantage or benefit" it is incumbent to search out an interpretation which avoids these consequences. In my view, many of these can be avoided by a stricter reading of the term, and a recognition that it requires the beneficiary to have secured a material or tangible gain before falling into the confines of the section. In this regard, I have no difficulty with the description of this as a "profit" by Doherty J.A. I merely differ from him in the conclusion that this profit must have come from the accused's position in government.

60 Cory J., however, concludes that without this strict confining on the term, the provision will attract too wide a scope of conduct. He cites, *inter alia*, a government employee who accepts an innocent cup of coffee or occasional lunch from a friend, or receives a lift from someone when caught in the rain, and points out that these people could be caught by a literal reading of benefit, or even profit. I would note that he has in fact gone farther than Doherty J.A. in *Greenwood, supra*, and required a subjective awareness of the motivation behind the gift as well.

61 This is not the first time our Court has been faced with a *Criminal Code* section with potentially wide application, nor is it the only section in the *Code* which, if literally interpreted, could capture innocent activity. While I agree with my colleague that we do not want to capture the recipient of a cup of coffee, his reasons have done much more than that. Cory J.'s definition would exclude anyone who did not intend to receive this benefit because of his or her position in government. This seems to be completely contrary to the section's role in preserving the appearance of integrity in government.

62 I cite, as an example, the hypothetical situation of a government employee who has business dealings with a lifelong friend who has construction contracts with the government. Suppose this friend, out of genuine friendship, decides to build his friend a \$200,000 house at no cost. According to Cory J., this type of situation would not fall within the scope of the section if the government employee had a genuine belief that this gift was strictly out of friendship. In my view, this is exactly the type of situation the section was designed to capture.

63 While the occasional free lunch or dinner might not concern the public, the conclusion may well be different in a situation where the friend purchases lunch or dinner every day, or for a sustained period of time. What may cast a shadow upon the appearance of integrity will likely depend on a number of different factors. I wish to point out that to impose a restriction, as I believe my colleague has done, which puts all of these transactions out of reach is a virtual rewriting of the section; it is to do what Parliament has specifically restrained from doing. In my view, as much as is possible within the valid corners of the law, and absent constitutional considerations which mandate otherwise, we should respect Parliament's wishes on these matters and not impose unwanted hindrances.

64 I believe the term "advantage or benefit" can be interpreted in a manner which does not include the recipient of a cup of coffee. In *Hoefele v. The Queen*, 94 D.T.C. 1878 (T.C.C.), the court found that to constitute a benefit worthy of measurement, it needed to be a "material economic advantage" (p. 1880). It was recognized, therefore, that trivial advantages did not satisfy the confines of the law. In a taxation sense, a benefit does not occur when the payment is a reimbursement or does not advance the recipient's position in any material sense.

65 The decision of *R. v. Dubas*, [1992] B.C.J. No. 2935 (S.C.), affirmed without reference to this point (1995), 60 B.C.A.C. 202, is also instructive in narrowing the section's application. In that decision, the Deputy Minister of Health for British Columbia was charged after it became known that he had accepted a hotel room and hotel expenses from a company which manufactured high technology hospital equipment and often sold this equipment to agents of the ministry. MacDonell J. utilized the following approach in deciding the case (at paras. 29-30):

It is apparent from the authorities that all of the circumstances must be considered in deciding whether Mr. Dubas received a benefit or not. In deciding that, the purpose of the trip has to be considered: whether it was essentially on government business and, if so, what advantage was there to Mr. Dubas to receive free accommodation. Was it the government, or the taxpayers of British Columbia, who received the benefit by not having to pay for the trips which would otherwise be paid for by the Ministry, or was the benefit for Siemens? . . .

With respect to Count 1, I am of the view that no benefit was received by Mr. Dubas from Siemens Electric Ltd. with respect to the February/March, 1986 trip. All that was provided was accommodation of which the Minister was aware and approved. Mr. Dubas was there on government business and, if the trip were authorized and had the accommodation not been offered, he would be entitled to charge out the expenses for it. In neither case does he personally benefit. Accordingly, I conclude that the Crown has failed to prove beyond a reasonable doubt the guilt of the accused under Count 1.

66 In my view, this reasoning is quite appropriate. While conduct similar to that in the *Dubas* case might attract sanction under a government's conflict of interest guidelines, it does not fall within the purpose or wording of s. 121(1)(c). It is true that the appearance of integrity may be harmed by such conduct, but it is not because the government employee *personally benefits*. This particular section is designed to prevent an employee from actually benefiting. Where this does not occur, the criminal sanction is not warranted.

67 This would also address many of the situations suggested by Cory J. Where friends take each other to dinner on a reciprocating basis, it is unfair to suggest that one "benefits" by receiving a dinner on an isolated occasion. It would be acceptable for an accused in such a situation to raise evidence

which showed that this was part of an ongoing relationship between friends who periodically exchanged dinners. Where the benefits, however, were obviously one-sided, it might lead to a different conclusion. This would be a matter for the trier of fact to consider on all the facts of the case, and its unique circumstances.

68 In this regard, it is important to consider the relationship between the parties as well as the scope of the benefit. Obviously, the closer the relationship, the less likely the gift should be perceived as an advantage or benefit to the recipient. The size of the gift is also a crucial indicator. Where a gift is trivial, like a cup of coffee, I fail to see how it could ever be seen as a true "benefit" to someone. The same situation is not apparent when the gift is a car, a large sum of money, or a house. In these cases, a trier of fact might well find that the person has benefited from the gift well beyond anything he or she has contributed. Simply stated, it is a question of fact for the jury to determine based on all the evidence in the case. In most instances, this determination should not be a difficult one. In fact, while this case deals with the potential application of the section, the appellant was unable to cite one reported case where the Crown actually pursued someone for the receipt of a "trivial" benefit. Where it would be difficult, however, it would still not require a finding that it was conferred because of the person's role in government.

69 In my view, this interpretation removes the possibility that the section will trap trivial and unintended violations. Nevertheless, assuming that situations could still arise which do not warrant a criminal sanction, there might be another method to avoid entering a conviction: the principle of *de minimis non curat lex*, that "the law does not concern itself with trifles". This type of solution to cases where an accused has "technically" violated a *Code* section has been proposed by the Canadian Bar Association, in *Principles of Criminal Liability: Proposals for a New General Part of the Criminal Code of Canada* (1992), and others: see Professor Stuart, *Canadian Criminal Law: A Treatise* (3rd ed. 1995) at pp. 542-46. I am aware, however, that this principle's potential application as a defence to criminal culpability has not yet been decided by this Court, and would appear to be the subject of some debate in the courts below. Since a resolution of this issue is not strictly necessary to decide this case, I would prefer to leave this issue for another day.

70 In summary, the *actus reus* of the offence provides adequate safeguards to prevent an overly broad application. This in itself is sufficient to dispose of this appeal. However, as Cory J. discussed the *mens rea* of the offence at length in his reasons, I propose to make some comments on this issue as well.

Mens rea of s. 121(1)(c)

71 As aforementioned, this offence constitutes a "conduct" crime, and as such, requires that the accused, to be culpable, know of the conduct he or she committed, and have knowledge of the circumstances in which it occurred. As such, in order to prove the offence in s. 121(1)(c), it is necessary for the Crown to prove the following fault elements. For the purposes of the present

case, I will ignore the question of the onus of proving a superior's consent in setting out the necessary requirements, which are:

- (a) an employee's conscious decision to accept what in all of the circumstances is found to be a "commission, reward, advantage or benefit of any kind"; and
- (b) knowledge (or wilful blindness) at the time of the receipt that the giver was having dealings with the government and that the employee's superior had not consented to his or her receipt of the "commission, reward, advantage or benefit of any kind".

As I stated at the outset, this level of *mens rea* is recognized as a valid form of criminal culpability, and thus there is no need to add any additional components.

72 I do not wish to be misunderstood, however, as suggesting that the motivation behind a particular benefit is a completely irrelevant consideration. On the contrary, it is an important factor in determining the appropriate level of culpability. Where a corrupt intention actually exists on the part of the employee receiving the benefit, it is a factor to consider in determining an appropriate punishment. As Lamer C.J. recognized in *R. v. Martineau*, [1990] 2 S.C.R. 633, at pp. 645-46:

The effect of s. 213 is to violate the principle that punishment must be proportionate to the moral blameworthiness of the offender, or as Professor Hart puts it in *Punishment and Responsibility* (1968), at p. 162, *the fundamental principle of a morally based system of law that those causing harm intentionally be punished more severely than those causing harm unintentionally*. The rationale underlying the principle that subjective foresight of death is required before a person is labelled and punished as a murderer is linked to the more general principle that criminal liability for a particular result is not justified except where the actor possesses a culpable mental state in respect of that result: see *R. v. Bernard*, [1988] 2 S.C.R. 833, per McIntyre J., and *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.), *per* Martin J.A. In my view, in a free and democratic society that values the autonomy and free will of the individual, the stigma and punishment attaching to the most serious of crimes, murder, should be reserved for those who choose to intentionally cause death or who choose to inflict bodily harm that they know is likely to cause death. The essential role of requiring subjective foresight of death in the context of murder is to maintain a proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender. [Emphasis added.]

73 This approach was applied by the Nova Scotia Court of Appeal in sentencing an accused for this very offence in *R. v. Ruddock* (1978), 39 C.C.C. (2d) 65, at p. 72:

In my opinion, there are varying degrees of culpability envisaged by s. 110(c). By that I mean that it seems to me that a Government official who directly demands a commission, etc., from some one who has dealings with the Government on the pretext that unless such commission is forthcoming he will sidetrack such dealings, has committed a more serious breach of the section than say, Mr. Tanguay (*R. v. Tanguay* (1975), 24 C.C.C. (2d) 77) who accepted a colour television set valued at \$305 from a contractor doing business with Central Mortgage and Housing Corporation (of which Mr. Tanguay was assistant director). In his case the Quebec Court of Appeal substituted an absolute discharge for the suspension of sentence ordered by the trial Court.

74 The decision in *R. v. Tanguay* (1975), 24 C.C.C. (2d) 77 (Que. C.A.), is an excellent example of this point. In that case, no corrupt motive appears to have been alleged by the Crown against the accused; nevertheless, he accepted what was at that time a rather expensive television set from someone with whom he regularly had business dealings. On a comparative scale, however, given the lack of ill motive and relatively small nature of the benefit, an absolute discharge was an appropriate resolution.

75 Clearly, where a government employee actually possessed a corrupt intention in accepting a benefit it will usually merit a higher sentence than the person lacking such a motive. Similarly, persons accepting smaller benefits which are less likely to impact on the *actual* integrity of the government can be dealt with through the discharge provisions in s. 736 of the *Criminal Code*: Pearson, Annotation to *R. v. Greenwood*, *supra*.

76 While I feel this is sufficient to satisfy the demands of this case, I wish to briefly address the particular manner in which my colleague has dealt with the fault element of this offence. Although I differed with the manner in which Doherty J.A., in *Greenwood*, *supra*, defined the *actus reus* of s. 121(1)(c), had I accepted his definition of the physical elements, I would also have agreed with his position regarding the corresponding *mens rea* elements rather than that proposed by Cory J.

77 After a thorough analysis, Doherty J.A., at pp. 252-53, concluded that the crucial question of whether a gift received by a government official constituted a benefit or advantage depended on an objective appraisal of the circumstances:

In considering whether the gift constituted a benefit or advantage, the nature of the gift, the prior relationship if any, between the giver and the recipient, the manner in which the gift was made, the employee's function with the government, the nature of the giver's dealings with the government, the connection, if any, between the employee's job and the giver's dealings, *and the state of mind of the giver and the receiver*

would all have evidentiary significance, as no doubt would other factors which may arise in any given case. [Emphasis added.]

He went on to add that while this conclusion depended, to a certain extent, upon the accused's state of mind, it was solely a matter of determining whether the *actus reus* had been proved (at pp. 253-54):

It must be stressed that in deciding whether the thing given to the employee constitutes a benefit or advantage for the purposes of s. 121(1)(c), one is concerned with an aspect of the conduct requirement (*actus reus*) of the offence and not with the fault requirement (*mens rea*). The question is settled by an objective assessment of all of the relevant evidence and not exclusively by reference to the recipient's subjective state of mind. The fact that the employee did or did not regard a gift as a profit by him from his employment is but one factor to be considered in deciding whether the gift amounts to an "advantage or benefit" for the purposes of s. 121(1)(c).

This objective approach to the elements of the conduct requirement is typified by *R. v. Chase*, [1987] 2 S.C.R. 293, where McIntyre J., for the court, in defining the conduct requirement for the crime of sexual assault, said at p. 302:

"Sexual assault is an assault within any one of the definitions of that concept in s. 244(1) of the *Criminal Code* which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. *The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one:* "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?" (*Taylor, supra*, per Laycraft C.J.A., at p. 269). The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant (see S.J. Usprich, "A New Crime in Old Battles: Definitional Problems with Sexual Assault" (1987), 29 *Crim. L.Q.* 200, at p. 204). *The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual.* If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances." [Emphasis added by Doherty J.A.]

Doherty J.A. felt that once the Crown had proved this element of the *actus reus*, it was unnecessary to go farther and prove that the accused knew exactly why the benefit had been conferred. He rejected the need for a "corrupt" or "dishonest" motive to ground a conviction. He came to this conclusion based on the clear statutory language to this effect, and because of the important purpose behind s. 121(1)(c). Cory J. found this approach unacceptable and found that a corrupt intention needed to be established, despite the explicit absence of such a requirement in the statute. In his view, whenever the mental element of an offence must be established subjectively, each aspect of the *actus reus* requires a corresponding subjective mental awareness.

78 With respect, I prefer the approach of Doherty J.A. in this regard. Several decisions of this Court have established that subjective mental awareness need not attach to every part of the conduct requirement of a particular crime: *R. v. DeSousa*, [1992] 2 S.C.R. 944; *R. v. Chase*, [1987] 2 S.C.R. 293; *R. v. Lohnes*, [1992] 1 S.C.R. 167. The analogy to *Chase* in particular is quite appropriate. While the Crown must prove that an actor knew that he had received some form of benefit, it is not necessary to prove as an essential element that the accused knew the benefit was received because of his position in government.

79 I also have some concern with the phraseology that my colleague has adopted with regard to the necessary mental elements of criminal offences. Specifically, he states, in discussing whether an objective or subjective *mens rea* should be adopted for an offence (at para. 106):

In some circumstances the mental element should be assessed on an objective basis. For example, in regulatory offences the mental element of blameworthiness may be assessed objectively. See *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154. The same holds true for dangerous driving; see *R. v. Hundal*, [1993] 1 S.C.R. 867. Similarly *R. v. Gosset*, [1993] 3 S.C.R. 76, dealt with the careless use of a firearm in a charge of manslaughter and the mental element was assessed objectively. The same approach was taken in *R. v. Finlay*, [1993] 3 S.C.R. 103, where the accused was charged with careless storage of a firearm. However, unless the wording of the section creating the crime indicates otherwise or the nature of the crime itself dictates a different approach, then the *mens rea* or blameworthy aspect must be assessed subjectively.

At another point, he cites from Professor Stuart, who in his text *Canadian Criminal Law supra*, at p. 194, states:

Where the definition of the crime contains no *mens rea* words, and cannot be interpreted as a crime of objective negligence, it should be interpreted as an offence of subjective *mens rea*.... The only authority to the contrary is the Supreme Court in *DeSousa*, *Creighton* and *Godin*

reading in an objective rather than a subjective substantive standard in interpreting crimes relying on so-called predicate offences. This must surely be confined to that special category of offence. The approach of our courts to unlawful act manslaughter has long been objective at a time when the established tradition has been to interpret other Criminal Code offences as requiring the subjective standard.

80 In my view, both of these excerpts appear to suggest that the *mens rea* of an offence is simply the assessing of the "blameworthy aspect" which is either subjective or objective. I am somewhat uncomfortable with the way Professor Stuart refers to "an offence of subjective *mens rea*", suggesting that an offence must be either subjective or objective with no possible middle ground. In fact, quite often the *mens rea* of an offence will be comprised of both objective and subjective elements. This has been recognized by this Court on more than one occasion: *Nova Scotia Pharmaceutical Society, supra*; *Lohnes, supra*. In order to avoid confusion, I prefer to clearly state that the *mens rea* of a particular offence is composed of the totality of its component fault elements. The mere fact that most criminal offences require *some* subjective component does not mean that every element of the offence requires such a state of mind. See also Eric Colvin, *Principles of Criminal Law* (2nd ed. 1991), at p. 55.

81 I also disagree with the statement of Professor Stuart which would appear to confine objective fault standards to offences which have such a component specifically written into the statute, or to so-called "predicate offences" like unlawful act manslaughter. This approach is simply not consistent with the way in which this Court has defined standards of fault. One good example is the unanimous decision of *Lohnes, supra*. On that occasion, this Court read an objective fault element into the offence of "causing a disturbance" under s. 175(1)(a). The section reads as follows:

175(1) Every one who
(a) not being in a dwelling-house, causes a disturbance in or near a public place,
(i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language, ...
is guilty of an offence punishable on summary conviction.

82 Much like the scenario I suggested above, this offence actually possesses both a subjective and an objective fault element. In order to be convicted, an accused must first subjectively intend to cause the underlying act which leads to the disturbance, i.e. fighting, swearing, etc. Once that occurs, the remaining element is determined on an objective standard. Whether the accused intended a disturbance to result or not is of no consequence. As McLachlin J. wrote (at p. 182), what is necessary for a finding of guilt is that "the disturbance must be one which may reasonably have been foreseen in the particular circumstances of time and place".

83 I believe *Lohnes* is quite instructive in this regard. Nevertheless, I feel it is wise to refrain from making bold pronouncements on the question of which crimes can legitimately possess objective fault elements; see *Martineau, supra*, at p. 682 *per* Sopinka J. In my view, this will often depend on the wording of a particular section as well as its legislative purpose and context. Many of the issues raised by Cory J. have not been firmly decided by this Court and I feel it should be left to an appropriate case to resolve them.

Disposition

84 I would allow the appellant's appeal. Therefore, the judgment of the Court of Appeal must be set aside, and a new trial ordered. The charge to the jury on s. 121(1)(c) should be in accord with these reasons.

The reasons of Sopinka, Cory and Iacobucci JJ. were delivered by
CORY J.:

85. At issue on this appeal is the interpretation and application of s. 121(1)(c) of the *Criminal Code*, R.S.C., 1985, c. C-46. That section makes it an offence for an official or employee of the government to accept from a person who has dealings with the government a benefit of any kind directly or indirectly, by himself or through a member of his family, unless he has the consent in writing of the head of the branch of government that employs him.

Factual Background

86. The appellant Morgan Hinchey was employed as a district engineer by the Department of Transportation for the Province of Newfoundland. Beothuck Crushing and Paving Limited is a construction company engaged in the construction of roads for the Province and various municipalities. During the summer and fall of 1984, James Wall, the General Manager and one of the owners of Beothuck, placed Barbara Hinchey, the wife of the appellant, on the payroll of the company as a standby flag person. Barbara Hinchey was never asked to do any work by Beothuck yet she received payments from the company in the amount of some \$7,400. Beothuck also provided Barbara Hinchey with a record of employment confirming that she had been employed for 20 weeks as a flag person from July 30, 1984 to December 14, 1984, thereby qualifying for unemployment insurance benefits. She made an application for unemployment insurance benefits based upon the employment record and received \$11,100.

87. The appellant, as district engineer of the Department of Transportation, had a great deal of experience in the construction industry. He was in charge of overseeing the construction of roads for the Province and municipal authorities within the Province. In that position he frequently dealt with James Wall acting on behalf of Beothuck which was principally engaged in road construction work. The appellant had the authority to direct, suspend and generally supervise the work done by Beothuck. Prior to the time James Wall offered to put the appellant's wife on the payroll of Beothuck he and the appellant had business dealings but they were neither close friends nor did they have a social relationship.

88. The appellant was aware that his wife received cheques for 20 weeks from Beothuck and yet had not been called upon to work during that period. He was aware that standby flag persons did not usually get paid when they were not working; that Beothuck was laying off people doing flag work in September and October; and that despite this practice his wife had remained on the payroll without working. He was aware that the cheques payable to Barbara Hinchey were put in a special envelope and delivered to himself or his wife. He knew that he had not sought or obtained the consent of his employer to the receipt of any benefit. When the RCMP were investigating the situation, the appellant falsely told them that his wife had been working for Beothuck on a fox farm. He met with James Wall and obtained his agreement that he would confirm the fox farm story if questioned by the police. He also convinced his wife to present the same story.

89. The appellant and his wife were charged with two counts of fraud (counts 1 and 3) and the appellant with a breach of s. 121(1)(c) of the *Criminal Code* (count 2). They were convicted on all three charges following a trial by jury. The Court of Appeal for Newfoundland unanimously allowed their appeal against the two fraud convictions and a new trial was directed on those counts: (1994), 123 Nfld. & P.E.I.R. 222, 382 A.P.R. 222. The Court, however, dismissed the appeal against the appellant's conviction for breach of s. 121(1)(c). Leave was granted to the appellant by this Court to appeal his conviction under that section: [1995] 1 S.C.R. viii.

Court of Appeal

90. In dismissing the appeal from the s. 121(1)(c) conviction, Gushue J.A. (with whom Marshall and Steele JJ.A. concurred) wrote (at p. 226):

While at least some of the errors made by the trial judge in his charge could apply also to count No. 2, there can be no doubt that the requisite elements of that offence were proven. Indeed, it is not denied by Morgan Hinchey that he, as an official or employee of Government, directly accepted or agreed to accept rewards, advantages or benefits from Beothuck, and/or indirectly through Barbara Hinchey. Further, it was established that this was done without the consent in writing of the appropriate Government official or officials. As to the mental element, it was necessary for the Crown to prove only that Morgan Hinchey intended to cause the above external circumstances of the offence. The onus was on him to prove otherwise and this was not done.

91. Gushue J.A. was of the view that even if any of the trial judge's errors of law were relevant to count No. 2, the provisions of s. 686(1)(b)(iii) would apply because there was no substantial wrong or miscarriage of justice in the registering of this particular conviction. I would observe that although the reference to the onus resting on the accused may be in error it has no effect on the outcome since it was established that the appellant knew he did not have his employer's consent to receive a benefit.

92. ...

The Relevant Section of the Code

93. 121(1) provides that:

Every one commits an offence who

(a) directly or indirectly

(i) gives, offers or agrees to give or offer to an official or to any member of his family, or to any one for the benefit of an official, or

(ii) being an official, demands, accepts or offers or agrees to accept from any person for himself or another person,

a loan, reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

(iii) the transaction of business with or any matter of business relating to the government, or

(iv) a claim against Her Majesty or any benefit that Her Majesty is authorized or is entitled to bestow,

whether or not, in fact, the official is able to cooperate, render assistance, exercise influence or do or omit to do what is proposed, as the case may be;

(b) having dealings of any kind with the government, pays a commission or reward to or confers an advantage or benefit of any kind on an employee or official of the government with which he deals, or to any member of his family, or to any one for the benefit of the employee or official, with respect to those dealings, unless he has the consent in writing of the head of the branch of government with which he deals, the proof of which lies on him;

(c) being an official or employee of the government, demands, accepts or offers or agrees to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind directly or indirectly, by himself or through a member of his family or through any one for his benefit, unless he has the consent in writing of the head of the branch of government that employs him or of which he is an official, the proof of which lies on him;

(d) having or pretending to have influence with the government or with a minister of the government or an official, demands, accepts or offers or agrees to accept for himself or another person a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

(i) anything mentioned in subparagraph (a)(iii) or (iv), or

(ii) the appointment of any person, including himself, to an office;

(e) gives, offers or agrees to give or offer to a minister of the government or an official a reward, advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with

(i) anything mentioned in subparagraph (a)(iii) or (iv), or

(ii) the appointment of any person, including himself, to an office; or

- (f) having made a tender to obtain a contract with the government
- (i) gives, offers or agrees to give or offer to another person who has made a tender or to a member of his family, or to another person for the benefit of that person, a reward, advantage or benefit of any kind as consideration for the withdrawal of the tender of that person, or
- (ii) demands, accepts or offers or agrees to accept from another person who has made a tender a reward, advantage or benefit of any kind as consideration for the withdrawal of his tender. [Emphasis added.]

The Importance of s. 121(1)(c)

94. There can be no doubt of the importance and significance of this section. It is designed to ensure the integrity and trustworthiness of officials and employees of the government. Federal, provincial and municipal governments carry on business on a very large scale. The magnitude and the quantity of contracts which governments enter into is of such an extent that it is extremely significant not only to the business community but to all Canadians. This is not an adverse comment on the actions of government but rather a reflection of the reality of today's society. The magnitude and importance of government business requires not only the complete integrity of government employees and officers conducting government business but also that this integrity and trustworthiness be readily apparent to society as a whole. Should government contracts be awarded on the basis of benefits paid to government employees rather than merit and cost this will weaken and tear the very fabric of both government and society. If government contracts can be bought by benefits paid to government employees the entire civil service becomes suspect and is dishonoured. The fundamental importance of the subsection must be apparent to all. Its aim is to ensure the integrity of government employees. This vitally important aim and purpose should be taken into consideration in the interpretation and application of the section.

Constituent Elements of s. 121(1)(c)

95. Section 121(1)(c), like all crimes, requires proof of an act or a failure to act known as the *actus reus* coupled with an element of fault or blameworthiness referred to as the *mens rea*. Before considering the acts which form an integral part of the crime and the element of blameworthiness, it is necessary to consider the possible scope or breadth of application of the section. The section makes it an offence for an employee to accept or agree to accept from a person who has dealings with the government a commission, reward, advantage or benefit of *any kind* directly or indirectly, by himself or through a member of his family, unless he has the consent in writing of the government that employs him. Thus if a government employee accepts, on a rainy day, a ride downtown from a friend who does business with the government he has received a benefit. That could hold true as well for the cup of coffee or occasional lunch bought by the friend for the government employee. Obviously the section was never designed to include in its prohibition these very minor benefits. Nor should it apply to the exchange of those lunches and dinners that has long been a pattern of behaviour between old friends. However, benefits on a larger scale might well warrant closer scrutiny and

require the obtaining of permission from the government employing the official. A reasonable balance must be struck that recognizes both the great dangers involved in paying benefits to government employees and the normal exchange of minor favours between friends.

96. It will be remembered that the Newfoundland Court of Appeal determined that the blameworthiness aspect or mental element of the offence was satisfied if the Crown established that the accused:

- (i) knowing that he was an official or employee of the government;
- (ii) directly or indirectly accepted a reward, advantage or benefit
- (iii) from a person whom he knew had dealings with the government and
- (iv) knew that he did not have the consent of his superior to receive that reward, advantage or benefit.

This was the manner in which the trial judge instructed the jury with regard to the section. It is the position of the appellant that this approach was improper and establishes an inadequate basis for the mental element of blameworthiness.

97. The same section was considered by the Ontario Court of Appeal in *R. v. Greenwood* (1991), 8 C.R. (4th) 235. In his careful reasons Doherty J.A. found that the purpose of the section was to preserve both the integrity of the public service and the appearance of integrity of the public service. He recognized that this aspect of the section had been repeatedly recognized in cases such as *R. v. Cooper*, [1978] 1 S.C.R. 860; *R. v. Giguère*, [1983] 2 S.C.R. 448; *R. v. Sinasac* (1977), 35 C.C.C. (2d) 81 (Ont. C.A.). He stressed that it was important to bear in mind that the underlying purpose in defining the boundaries of the section was to ensure that it did not encompass conduct of the accused which no reasonable member of the community would regard as blameworthy. In this regard he stated (at p. 251): "The need to preserve the appearance of integrity within the public service requires that the words 'advantage or benefit' include all gifts which can potentially compromise that appearance of integrity". While the purpose of s. 121(1)(c) is an important one, its potentially wide application, given the far-flung business activities of modern government and the numbers of people engaged in performing those activities, requires that one must also recognize the limits of that purpose. The section is not intended to make government employees social pariahs who cannot, without the consent of their superior, engage in the routine familial and social relationships which constitute an integral part of our society. He noted that appropriate limits on interpretation of the section could be effected by restricting the meaning of the constituent elements of the offence or by reading into it a *mens rea* requirement which ensures that only morally blameworthy activity comes within its purview.

98. Doherty J.A. pointed out that s. 121(1)(c) differed from the other subsections of that section in that ss. 121(1)(a), (b), (d), (e) and (f) make it a crime to offer or receive an advantage in consideration for or in relation to the giver's dealings with the government. Thus he determined that the scope of

criminal liability must be wider in s. 121(1)(c) and that the fault requirement for that subsection was different from the others.

99. He identified the *actus reus* of the offence to be (at p. 247):

- (a) the giving of a "commission, reward, advantage or benefit of any kind" by a person "having dealings with the government";
- (b) the receipt of that "commission, reward, advantage or benefit of any kind" by a government employee; and
- (c) the absence of the consent of the government employee's superior to the receipt of the "commission, reward, advantage or benefit of any kind".

100. In his view the meaning of the expression "commission, reward, advantage or benefit of any kind" included gifts consisting of something of value which constituted a profit to the employee derived, at least in part, from the employee's relation to the government. He concluded that unless this definition was met, the giving of something of value was not such a commission, reward, advantage or benefit but a gift, and the conduct would not come within the scope of s. 121(1)(c).

101. As for the mental element or fault aspect he found (at pp. 262-63) that it could be found in :

- (a) an employee's conscious decision to accept what in all the circumstances is found to be a "commission, reward, advantage or benefit of any kind"; and
- (b) knowledge (or wilful blindness) at the time of the receipt that the giver had dealings with the government and that the employee's superior had not consented to his or her receipt of the "commission, reward, advantage or benefit of any kind".

102. I am in general agreement with the reasoning of Doherty J.A. as to the *actus reus* of the offence but I would, with respect, differ as to the mental element or blameworthy requirement.

The Requirement of a Mental Element and the Nature of that Mental Element Required for s. 121(1)(c)

103. Section 121(1)(c) does not set out the mental element which is required for this crime. In those circumstances, before the advent of the *Canadian Charter of Rights and Freedoms*, the mental element of blameworthiness had to be read into the section. See *R. v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299.

104. With the passage of the *Charter* it was apparent that s. 7 of the *Charter* requires that every crime include a mental element of fault. See for example *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636. The mental element is an essential factor of every offence. No matter how important s. 121(1)(c) may be to ensuring the maintenance of high standards of public servants our criminal law requires that the requisite *mens rea* be established. Every individual accused of a crime is entitled to no less.

105. Depending on the wording and the provisions of the particular section and the context in which it appears the constitutional requirement of *mens rea* or blameworthiness may be satisfied in different ways. A criminal offence will usually require proof of a positive state of mind such as intent which can be inferred from the acts and words of the accused or by his recklessness or wilful blindness.

106. In some circumstances the mental element should be assessed on an objective basis. For example, in regulatory offences the mental element of blameworthiness may be assessed objectively. See *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154. The same holds true for dangerous driving; see *R. v. Hundal*, [1993] 1 S.C.R. 867. Similarly *R. v. Gosset*, [1993] 3 S.C.R. 76, dealt with the careless use of a firearm in a charge of manslaughter and the mental element was assessed objectively. The same approach was taken in *R. v. Finlay*, [1993] 3 S.C.R. 103, where the accused was charged with careless storage of a firearm. However, unless the wording of the section creating the crime indicates otherwise or the nature of the crime itself dictates a different approach, then the *mens rea* or blameworthy aspect must be assessed subjectively. See the reasons of McLachlin J. in *R. v. Théroux*, [1993] 2 S.C.R. 5, at p. 18. There she wrote:

Most scholars and jurists agree that, leaving aside offences where the *actus reus* is negligence or inadvertence and offences of absolute liability, the test for *mens rea* is subjective. The test is not whether a reasonable person would have foreseen the consequences of the prohibited act, but whether the accused subjectively appreciated those consequences at least as a possibility. In applying the subjective test, the court looks to the accused's intention and the facts as the accused believed them to be: G. Williams, *Textbook of Criminal Law* (2nd ed. 1983), at pp. 727-28.

Two collateral points must be made at this juncture. First, as Williams underlines, this inquiry has nothing to do with the accused's system of values. A person is not saved from conviction because he or she believes there is nothing wrong with what he or she is doing. The question is whether the accused subjectively appreciated that certain consequences would follow from his or her acts, not whether the accused believed the acts or their consequences to be moral. Just as the pathological killer would not be acquitted on the mere ground that he failed to see his act as morally reprehensible, so the defrauder will not be acquitted because he believed that what he was doing was honest.

The second collateral point is the oft-made observation that the Crown need not, in every case, show precisely what thought was in the accused's mind at the time of the criminal act. In certain cases, subjective awareness of the consequences can be inferred from the act itself, barring some explanation casting doubt on such inference. The fact that such an inference is made does not detract from the subjectivity of the test.

107. Professor Don Stuart, in his very helpful text *Canadian Criminal Law: A Treatise* (3rd ed. 1995), at p. 194, sets out the principle in these words:

Where the Criminal Code definitions of an offence include a clear *mens rea* word, such as "intentionally", "wilfully", "knowingly", Parliament has made its choice of the subjective test clear.

Where the definition of the crime contains no *mens rea* words, and cannot be interpreted as a crime of objective negligence, it should be interpreted as an offence of subjective *mens rea*. Decisions reading in subjective fault requirements for drug offences and the former offence of rape are still authoritative. McLachlin J., who delivered the majority judgment in *Creighton*, also authored the majority judgment in *Theroux* (1993) in which the Court interpreted the ambiguous word "fraudulent" to require a subjective *mens rea* requirement for theft and fraud. In *Clemente* (1994) the Supreme Court read into the offence of threatening to cause death or serious harm the requirement of an intent to intimidate or instill fear or an intent to be taken seriously.

The only authority to the contrary is the Supreme Court in *DeSousa*, *Creighton* and *Godin* reading in an objective rather than a subjective substantive standard in interpreting crimes relying on so-called predicate offences. This must surely be confined to that special category of offence. The approach of our courts to unlawful act manslaughter has long been objective at a time when the established tradition has been to interpret other Criminal Code offences as requiring the subjective standard.

108. He then sets out the policy favouring subjective awareness in this manner (at pp. 194-95):

It best reflects the need for state punishment only when allowance has been made for individual differences and all the circumstances. For most Criminal Code offences it has proved to be a workable test. The high conviction rate for drug offences, which require subjective *mens rea*, is convincing evidence that the subjective standard is not a recipe for lawlessness. Triers of fact are not duped by bogus defences. . . .

109. I am in substantial agreement with the position taken by Professor Stuart. There is nothing in the wording of s. 121(1)(c) or in the nature of the crime the section describes which indicates that an objective assessment of the mental element should be made. Accordingly, it should be assessed subjectively. It might well be that in light of the importance of s. 121(1)(c) the imposition of an objective standard of blameworthiness based solely upon knowledge of the *actus reus* elements of the offence could be achieved and readily justified. However that would be for Parliament to effect.

Recklessness

110. Whether or not an accused had the necessary subjective *mens rea* or mental state of blameworthiness required to commit a specific crime can of course be inferred from the actions and words of the accused. It has been recognized by this Court that the mental element for many offences is broadened or extended by the concepts of recklessness and wilful blindness. In *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, McIntyre J. recognized the significance of the concept of recklessness in determining whether the accused had the necessary intent to commit the offence of rape. At p. 582 he stated:

In accordance with well-established principles for the determination of criminal liability, recklessness, to form a part of the criminal *mens rea*, must have an element of the subjective. It is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance. It is in this sense that the term 'recklessness' is used in the criminal law and it is clearly distinct from the concept of civil negligence.

111. Further in *Théroux, supra*, it was held that fraudulent conduct could include recklessness in the sense of "knowledge of the likelihood of the prohibited consequences" (p. 10).

Wilful Blindness

112. The mental requirement of the crime may also be satisfied by applying the concept of wilful blindness. Glanville Williams in his textbook *Criminal Law: The General Part* (2nd ed. 1961), at pp. 157-58, explained the wilful blindness approach in these words:

... the rule is that if a party has his suspicion aroused but then deliberately omits to make further enquires, because he wishes to remain in ignorance, he is deemed to have knowledge...

In other words, there is a suspicion which the defendant deliberately omits to turn into certain knowledge. This is frequently expressed by saying that he "shut his eyes" to the fact, or that he was "wilfully blind." He observed that Lord Hewart C.J. expressed it by saying that: "the respondent deliberately refrained from making inquiries the result of which he might not care to have".

113. In *R. v. Jorgensen*, [1995] 4 S.C.R. 55, at p. 111, Sopinka J. noted that a finding of wilful blindness involves an affirmative answer to the question: "Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?" He went on to state: "The determination must be made in light of all the circumstances."

114. In *Sansregret, supra*, this Court held that the circumstances were not restricted to those immediately surrounding a particular offence but could be more broadly defined to include past events. McIntyre J. distinguished wilful blindness from recklessness and quoted with approval a passage from Glanville Williams with regard to its application (at pp. 584 and 586):

Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry....

The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of wilful blindness indistinguishable from the civil doctrine of negligence in not obtaining knowledge.

115. Although this would seem to be a rather narrow approach to wilful blindness it certainly can and should be applied in appropriate cases. As Professor Don Stuart points out in *Canadian Criminal Law, supra*, there is no reason to absolve those who are deliberately ignorant since a person who is deliberately ignorant of a likely risk is sufficiently culpable. At p. 212 he writes:

The saga of *Sansregret* does not make one sanguine about the doctrine of wilful blindness. However, if we are careful to maintain the subjective test, the extension to wilful blindness seems to be a sensible widening of the net. We should not absolve those who are deliberately ignorant. This could be applied as well to the concept of foresight or knowledge of consequences. One who is deliberately ignorant about a likely risk is sufficiently culpable.

I agree with these comments. The requisite *mens rea* for the crime can thus be established by demonstrating that the accused had the requisite intent or was reckless or wilfully blind.

What Then is the Requisite Mental Element for s. 121(1)(c)?

116. The requisite acts or *actus reus* necessary to constitute the crime are these:

- (a) the giving of a "commission, reward, advantage or benefit of any kind" by a person having "dealings with the government";
- (b) the receipt of the "commission, reward, advantage or benefit of any kind" by a government employee; and
- (c) the absence of the consent of the government employee's superior to the receipt of the benefit.

The commission, reward, advantage or benefit of any kind must consist of something of value which constituted a profit to the employee and was derived at least in part from the employee's relation to or position with the government.

117. In my view the mental element of blameworthiness for s. 121(1)(c) requires proof not only that the accused was aware or knew of the requisite elements of the offence but also that he knew that he received the benefit at least in part because of his position with the government; or that he was wilfully blind to circumstances which would lead to that conclusion; or was reckless as to the consequences of accepting the benefit without the consent and permission of his superior, that is to say he was aware of the risk of his actions breaching the subsection but nonetheless took the risk of proceeding in that manner.

118. Ample evidence was adduced upon which a jury properly instructed could have found Hinchey was guilty on any of these three bases. First, the requisite mental element could be established in this case as in others by considering the words and actions of the accused in light of the surrounding circumstances. For example, neither the accused nor his wife was a friend of James Wall. They did not customarily exchange gifts. The benefit received was substantial, it was paid somewhat surreptitiously and there was no work performed by the wife of the accused for the "salary" she received. The accused was aware of the benefit received by his wife. He knew that Wall was engaged in the construction of roads for the province and that in his position as District Engineer he would be dealing with Wall. He attempted to mislead the investigators into believing his wife had done work for Wall at his fox farm. At no time did the accused seek the consent of his employer to receive the benefit.

119. Thus the nature of the relationship between the accused and James Wall; the work James Wall did for the province; the position of the accused as District Engineer; the substantial amount of the benefit; the surreptitious payment of the benefit to the wife of the accused; the attempt to mislead the investigators all taken together would permit a reasonable jury to infer that the accused knew that a benefit had been paid to him, at least in part because of his position with the government, and without the consent of his employer. On that basis it would be open to the jury to convict.

120. When the requisite *mens rea* for s. 121(1)(c) is under consideration in a case a number of factors will have to be taken into account. They may include: the position in government held by the accused; the business and social relationship existing between the accused and the person paying the benefit; the amount and nature of the benefit; the manner in which the benefit was paid: for example were attempts made to disguise the benefit? Factors such as these when considered in the context of all the surrounding circumstances can provide the basis for the finder of fact to properly infer that the accused was aware of the requisite elements of the offence and that he had received the benefit at least in part because of his position with the government and enter a conviction.

121. This is the same pattern of reasoning that must be followed whenever the mental element or *mens rea* of an offence must be established on a subjective basis. It is certainly not an untoward burden to place on the Crown. Rather it is the norm and is applicable whenever the offence requires a subjective approach to be taken in determining the mental element of the crime.

122. I believe that the suggested approach to the mental element required by s. 121(1)(c) is appropriate. If the mental element were held to be no more than knowledge of the *actus reus* then the acceptance of any benefit could suffice to constitute the commission of the offence. The section could not have been designed to make a government clerk or secretary guilty of a crime as a result of accepting an invitation to dinner or a ticket to a hockey game from one known to do business with the government. On the other hand, a higher ranking government official who was for example responsible for the procurement of products for the government and who regularly accepted hockey tickets and dinners from a vendor of the products could well be on dangerous ground. There must be a way of distinguishing these situations and that, I venture to say, is by taking into account the suggested mental element of the offence. Its application would ensure that only those for whom the section was designed would come within its purview and yet ensure that this important section could be readily applied in appropriate circumstances.

123. Further, the facts of this case present a classic example of a situation where the wilful blindness and recklessness of the accused very properly should be taken into consideration. This position is, I believe, similar to that correctly taken by the Quebec Court of Appeal in *R. v. Rouleau* (1984), 14 C.C.C. (3d) 14.

124. The evidence presented in this case indicates that the *actus reus* of the offence was established and there was strong and cogent evidence upon which a jury properly instructed could find that the accused had the requisite intent or was wilfully blind to the situation or was reckless as to the consequences of his actions. On any of these bases the mental element could have been properly inferred and the accused could have properly been found guilty. Unfortunately the proper instructions were not given by the trial judge

as to the requisite intent. Further on a number of other matters the trial judge erred in his directions to the jury. In addition the conduct of the trial was to say the least unfortunate.

Errors in the Charge

125. With regard to s.121(1)(c) the trial judge ought to have instructed the jury that the conduct necessary to constitute the offence included

(a) the giving of a "commission, reward, advantage or benefit of any kind" by a person having "dealings with the government";

(b) the receipt of the "commission, reward, advantage or benefit of any kind" by a government employee; and

(c) the absence of the consent of the government employee's superior to the receipt of the benefit.

and that the commission, reward, advantage or benefit of any kind should be considered to consist of something of value which constitutes a profit to the employee derived at least in part from the employee's position with the government.

126. As to the mental element, the trial judge should have instructed the jury that based upon the words and actions of the accused they must be satisfied beyond a reasonable doubt that the accused had knowledge of the elements set out in (a), (b) and (c) and that he knew that he was receiving the benefit at least in part because of his position with the government.

127. Next, the jury should have been instructed that insofar as the mental element is concerned they could also find the accused guilty if they were satisfied beyond a reasonable doubt that the accused had been reckless or wilfully blind. With respect to recklessness, the jury should have been told that if they were satisfied beyond a reasonable doubt that the accused was aware that his conduct could bring about the result prohibited by s. 121(1)(c) and nevertheless persisted in that conduct, which is to say he was reckless as to the consequences of his actions, it was open to them to find that the accused was guilty.

128. As to wilful blindness, the jury should have been charged that having regard to all of the surrounding circumstances, they could find the accused guilty if they found that he was wilfully blind. The phrase "wilful blindness" means that the accused suspected that he was or would be guilty of an offence if he persisted in his conduct but despite this suspicion he refused to make inquiries that would confirm or deny his suspicions. In other words, notwithstanding his suspicions, he refused to ascertain the true state of affairs and chose instead to remain wilfully blind because to make inquiries would fix him with knowledge of the commission of the offence.

129. In summary, if the requisite actions or conduct were established and the jury was satisfied beyond a reasonable doubt that the appellant possessed the requisite intent or was reckless or wilfully blind as those terms have been described they could convict the accused....

Disposition

In the result the appeal is allowed. The order of the Court of Appeal is set aside and a new trial is directed on the count pertaining to s. 121(1)(c).

An issue involving mens rea was again raised in the cases of Harvey and Godden-Smith. This revolved around section 1(1) of the Prevention of Corruption Act 1906 which provides (as amended):

1. Punishment of corrupt transactions with agents

(1) If 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 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 forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

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 forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

If any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal;

(a) he shall be guilty of a misdemeanour ...

In **R v HARVEY** [1999] Crim LR 70, the applicants were convicted of conspiracy to corrupt contrary to section 1(1). They applied for leave to appeal contending, inter alia, that the word "corruptly" in the sub-section involved an element of dishonesty and that the judge ought to have directed the jury accordingly.

Dismissing the application, the Court of Appeal ruled that the word 'corruptly' for the purposes of the section

"... was to be construed as meaning deliberately offering money or other favours, with the intention that it should operate on the mind of the person to whom it was made so as to encourage him to enter into a corrupt bargain. It did not mean dishonesty, which was a different concept. It followed that the judge, in not directing the jury that dishonesty had any part to play in obtaining corruptly, gave a direction entirely in accordance with the law in its present form".

The issue was then re-visited by the Court of Appeal in the next case.

R v GODDEN-SMITH

Court of Appeal (Criminal Division)

Mance LJ, Sir Richard Tucker, Judge Gordon

13 June 2001

For the Crown: M Field

For the appellant: A Fraser

MANCE LJ (reading the judgment of the court):

1 On 8 December 1993 in the Crown Court at Norwich before HHJ Binns, the appellant was convicted of conspiracy to corrupt and was sentenced to two and a half years' imprisonment. He was acquitted on count one, conspiracy to defraud.

2 It is relevant to set out those accounts in somewhat greater detail. Count one, conspiracy to defraud contrary to common law, was particularised as follows:

“Michael John Cartin, Philip John Cox and Peter David Godden-Wood (the two co-defendants and the appellant) between 1st October 1989 and 26th January 1991, conspired together to defraud Norwich Union Insurance Group by dishonestly presenting for payment as if they represented an accurate market price for printing work invoices which showed false and inflated prices for such work.”

3 Count two (as I will refer to it although originally it was the third count on the indictment) was in respect of conspiracy to corrupt contrary to section 1(1) of the Criminal Law Act 1977 and was particularised:

“Michael John Cartin and Peter David Godden-Wood between the 1st day of May 1989 and the 26th January 1991 conspired together with other persons unknown to make corrupt gifts to Philip John Cox, an agent of the Norwich Union Insurance Group, as inducement or reward for doing an act in relation to his principals affairs, namely for maximising business transacted and payments made in relation to the principal and Wood Printing Group Limited and Portland Printing Services Limited.”

4 The two co-defendants pleaded guilty as follows: in the case of Philip Cox, to conspiracy to defraud and corruptly accepting a bribe (the original second count); he was sentenced to three years' imprisonment on each count concurrent. Michael John Cartin pleaded guilty to conspiracy to defraud and

conspiracy to corrupt and he was sentenced to two and a half years' imprisonment.

5 As was apparent from the date that we have already mentioned, this is a very old conviction. The delay arises from the fact that following conviction in 1993, we are told, the appellant absconded from custody. The case was accordingly stayed as regards any appeal from 1 March 1994. His application for leave to appeal was only reinstated on 25 May 2000 and was granted by the single judge.

6 In terms, the single judge only identified one ground on which he granted leave to appeal, but he did not exclude the other grounds and we have heard full argument on each and deal with all of them as appeals before us.

7 In outline, the facts are that the appellant was chairman (according to the evidence a "hands on" chairman) of a family printing business, the Wood Printing Group, which included both the companies referred to in count two, Wood Printing Group Limited and Portland Printing Services Limited. The group employed about 80 people. We have seen summary documents and information presumably extracted from Companies House which shows that the great majority of shares in Wood Printing Group Limited were held by appellant (some 29,280 in May 1990) and two relatives of his each held 9,760 shares.

8 Cartin, the co-defendant, was managing director. Much of the work of the company came from the Norwich Union and was brought in by Cartin. Norwich Union became the company's biggest customer. The second co-defendant Cox was the senior print buyer at Norwich Union, and the two counts with which the trial was concerned arose from the Norwich Union business.

9 It was alleged in respect of count two that in return for corrupt payments, made either directly in cash or by a shelf company called PE-EM Limited, Cox placed much greater business than would normally have been placed with the Wood Printing Group and maximised (to use the word in count two) the payments received from that company.

10 In return for this favoured treatment it was alleged by the Crown that he received the benefit of two cars, a green Granada and a Nova which were paid for by the printing group. He had facilitated for him a house mortgage which was funded, at least to a considerable extent, by them and he had regular cash sums deposited into his bank account out of which some £43,000 was paid to his benefit. It was alleged that the appellant and Cartin were involved in authorising some or all of these benefits.

11 The Crown called a number of witnesses, starting with Roger Green, a communications officer with the Norwich Union who was responsible for managing the Norwich Union Print Purchasing Department. He gave evidence

that there was a general guideline that no more than 10% of the annual spend to one supplier should be so contracted out to any single supplier. His team manager had been Mr Stephen Clarke who resigned in 1990 and was replaced by Cox on an annual salary of £15,000. In about October 1990, Cox's lifestyle improved considerably without obvious explanation. Green said he became suspicious and decided to monitor Cox's business and then discovered that approximately 22% of all Norwich Union printing business was being placed with either Wood Printing Group Limited or Portland Printing Services Limited or a combination. He challenged Cox, but Cox insisted that the group provided an excellent service with competitive prices.

12 Mr Peter Southgate, head of the Norwich Union Supplies Department, said that during December 1990 he noted an excessively high costing for an item of stock printing. He tested several orders prepared by Portland and found repeated examples of excessive pricing. Estimators, Messrs Shannon and White, instructed by the Norwich Union, reviewed a series of the printing group's contracts and gave evidence that they revealed an average mark up of 144% above normal costing, whereas other outside printers were invoicing at around 36%.

13 Mr Stephen Clarke was called. He was the senior print buyer with the Norwich Union until the end of 1990. He gave evidence about the relationship with the printing group. He said he had only met the appellant once. He usually dealt with Mr Cartin. At some point in 1990, Mr Cartin had asked whether he would like to join him in a new company being set up in East Anglia. He then met the appellant and Cartin and accepted their offer to become managing director of Oakwood Colour Press. Mr Cartin and the appellant dealt with all the financial aspects. He, Mr Clarke, simply became involved in the works. He said that Mr Cartin, who dealt with him on a day-to-day basis, appeared to be the driving force. He saw the appellant about once a week. His impression was that Mr Cartin was the managing director and in charge of everyday affairs while the appellant seemed to be concerned with the overall view.

14 At some point in the same period, PE-EM Associates, or PE-EM Limited, was set up and Cartin and Cox became directors. The Crown alleged that this company was set up to arrange the laundering of money of the printing group to Cox.

15 The position in relation to the Granada motor car was that it had originally been used by a Mr Lamport but was then repossessed by the printing group and thereafter came into Cox's possession. That was in 1990. In August 1990 Cox also negotiated the purchase of a Nova motor car and the Wood Printing Group asked Kestrel Contracts and Leasing to arrange a leasing agreement on the vehicle which they did. Sums were paid out of the printing group to fund the leasing of both vehicles.

16 A Mr Rushbrooke, who had joined the printing group in 1987, became the

Accounts Manager and he gave evidence that Mr Cartin had been taken on by Portland in about 1990, and that it was when he became managing director that the appellant had moved up to become chairman. He said that the appellant was not an absentee chairman. He did his fair share of work at the Barking premises. All cheques required two signatures and, apart from himself, Mr Rushbrooke, the other signatures were the appellant and Mr Cartin.

17 The Crown pointed to several cheques paid out where the payee was different from that on the stub. Mr Rushbrooke said that so far as invoices from Kestrel Contracts and Leasing were concerned, relating to the Nova car, Mr Rushbrooke had asked Mr Cartin about this and he said he was aware of it and that the company should keep on paying those invoices. That was an answer given in response to Crown counsel pointing out a difference between the way in which the cheques were made out and the name written on the stub.

18 Mr Rushbrooke said that on one occasion Mr Cox telephoned and asked to speak to the appellant. The appellant had replied that he did not want to speak to Mr Cox and had told Mr Rushbrooke to pass on a message saying that the mortgage was going through and would be completed in a few days. As will appear, that must have referred to the mortgage of which the appellant assisted or facilitated the arrangement for Cox and in respect of which the printing group made payments.

19 On another occasion the appellant had telephoned Mr Rushbrooke and had asked him to make out a cheque to PE-EM for £1800. He had done so and took it into his room while they both signed it. Cox was sitting there while they did so. The significance of that cheque was that it was dated 24 January 1991 and was found on Mr Cox when he was arrested on the next day.

20 Mr Rushbrooke said that the financial position of the Wood Printing Group had been fairly healthy at the beginning of 1990 but it had acquired cash flow problems. He had never suspected that PE-EM was anything other than a bona fide supplier of the printing group. The only thing that had seemed wrong was that it had had no secretarial support and no staff.

21 The appellant was arrested, as was Cox, on 25 January 1991. During a search of the Wood Printing Group offices, blank PE-EM notepaper was found, although the judge directed the jury, possibly more favourably to this appellant than the evidence justified, that there was no evidence that it was in his office as opposed to the managing director's and they should proceed as if it was not in the appellant's office.

22 The appellant was interviewed twice: firstly on 26 January and secondly on 3 May 1991. In the second interview he accepted that he had, he said at Mr Cartin's request, introduced a personal friend John Sinclair, who was a mortgage broker, to provide a mortgage for Mr Cox and that he had

subsequently acted as intermediary between Mr Sinclair and Mr Cox. This was a time when Mr Cox urgently required a mortgage; however the appellant said he knew nothing of any false application made by Cox. A false application had apparently been made by Mr Cox saying that he was employed by Oakwood Colour Press at the same address as the appellant's company.

23 The appellant did, however, acknowledge that to his knowledge the printing group had made what he called a loan of £8,900 to Mr Cox to enable him to buy a house. That payment was made to solicitors and it also appears that the sum of £1,100 was paid to solicitors by way of guaranteed indemnity premium. The loan, as the appellant described it in interview, was paid by cheque to the solicitors. The appellant was at that stage signing all the cheques because of the company's financial difficulties. It was paid with his agreement and was not, in fact, documented in any way as a loan, nor was there any evidence of any repayments by Cox.

24 So far as the Granada car was concerned, the appellant said in his first interview that he knew nothing about it. In his second interview, however, he said that it was arranged between Mr Cartin and Mr Cox that Cox would buy the car by way of rental payments paid by PE-EM. He said that he understood invoices were raised to cover those payments, though none was ever located. He pointed out that in general Cartin was given a free hand and that included producing quotes for the Norwich Union who were the printing group's best customer.

25 Similar, he said, was the position in respect of the Nova car. That too, according to his understanding, was a car in respect of which, although the printing group was making payments, Cox was due to make repayments. Again, however, there was no formal documentation whatever to evidence that. He said that Cartin did all the organising and the first he had known about this was when someone in the office had enquired about a certain standing order and the appellant had looked into it. Cartin had then told him that it was for Cox's wife.

26 The appellant told officers that in the summer of 1990 he discovered that Cartin was a director of PE-EM and had requested his resignation. He had believed PE-EM were charging for artworks supplied to the printing group. He thought that the cheque for £1800 was payment on account of such work and Cartin was requesting it for that purpose. He denied adamantly that it was the first instalment on the mortgage and was given to Cox for that purpose.

27 The appellant did not give evidence in his defence. On his behalf it was submitted that there was no such agreement with Cartin as Crown alleged was shown to have existed and that the Crown's case amounted to nothing more than an allegation of guilt by association. It was submitted that the appellant was, or may have been, caught up in the case because he did not appreciate what sort of man Cartin was before he had given him so much

power. It was pointed out that Cartin had resigned as a director of PE-EM in August 1990 and it was said there was no evidence that the appellant knew that he was a director of PE-EM before that.

28 It was submitted that there was nothing to show that the required knowledge or acts to justify any charge of conviction to corrupt. There was nothing to show that the appellant knew what was going on or approved of it or, more importantly, participated in it. On a particular day he would sign a large number of cheques, about 80, and he had to rely upon others in the firm to see that they were correct. During the trial the Crown's application to have admitted into evidence the guilty plea of the two co-defendants was rejected, so the matter proceeded on that basis.

29 This appeal has been argued before us by Mr Fraser, who was junior counsel at the 1993 trial. He has raised essentially three points, although he seeks to combine them for their cumulative effect. The first is that the judge was wrong to reject the submission of no case to answer at the conclusion of the Crown's evidence. The second is that there was an inconsistency between the jury's verdict of not guilty on count one and their verdict of guilty on count two. The third is that the judge took as the basis of his summing up a misunderstanding as to the correct legal meaning of the word "corruptly" in s.1 of the Prevention of Corruption Act 1986 and/or failed properly or adequately to direct the jury as to what was involved in count two.

30 Taking those points in turn, in his comprehensive skeleton counsel has addressed both the general points and a number of detailed points. The general points start from the proposition (which is undoubtedly correct) that the case against the appellant depended essentially on an inference or circumstantial evidence, and the judge gave in that connection the usual directions which are not in themselves criticised.

31 It is then submitted that the judge should not have left the matter to go before the jury since the evidence was, within the second limb of *R v Galbraith* [1981] 2 All ER 1060, 73 Cr App Rep 124, of tenuous character. It is suggested that in general terms the Crown's case amounted to no more than that the appellant must have known by virtue of his position what was going on, bearing in mind that it was quite obvious that there was irregular and outrageous conduct between Cartin and Cox. That is the foundation of the point made on guilt by association and the arguments of the defence at trial that there was no direct evidence of the appellant's knowledge of or agreement to give any of the relevant gifts.

32 As to the detailed points, for the most part they draw attention to the absence of evidence of specific involvement in relation to specific aspects of the transactions between Cartin and Cox. We need not go through them in detail and as such they are not, we think, in issue. The question is whether there is positive evidence beyond the mere general assertion, which we

accept could not possibly suffice, that in the circumstances the appellant must have known.

33 There are some specific criticisms of the judge's summing up. One of them we do take since counsel identified it orally and relied on it. That was a statement by the judge in the course of his summing up about PE-EM. It was made in the context of the judge's reminder about the evidence of Mr Frost. A cheque had evidently been made out, according to the stub in favour of PE-EM but when one looked at the cheque it appears to have been in favour of, probably, Mr Frost. Mr Frost explained its purpose as being to repay sums which he had passed to Mr Cox. The alternative is that the cheque may have been made out directly in favour of Mr Cox. Which it was is not very clear on the material before us. It does not matter.

34 The judge then said, in respect to the stub:

"That, of course, as you will see was made payable to PEM, according to the stub. He [Mr Frost] had never heard, he told you, of PEM Associates Limited and again the Crown say this reinforces what they are submitting to you about this payment. Their contention is that PEM Associates was used by people, used by both Cartin and Wood – that is the Crown's case."

35 Then Mr Field, counsel for the Crown, interposed the word "Cox". The judge continued:

"I am sorry, yes. Sorry Cartin and Wood that is right, used by Cartin and Wood to pay money to Mr Cox. The Crown say if this was a loan and the cheque was in repayment of the loan, why was it that PEM was set out as the person to whom the cheque was paid? These are matters which you will have to consider."

36 Mr Fraser submits that that was a prejudicial direction by the judge that there was direct evidence of the appellant's involvement in setting up and using PE-EM Associates. We do not think that that is what the judge was saying. What the judge was doing was recounting the Crown case which was that, whether or not there was direct evidence of such involvement, the whole purpose of PE-EM was to launder money from the printing group with the approval of both Cartin and Wood so that it could be passed to Cox. In that sense PE-EM was clearly, on the Crown's case, being used by Cartin and Wood. Whether Wood knew about it was, of course, a matter which was for the jury to determine; but we do not think that the judge was, in the passage we have recited, suggesting that Mr Frost had given any relevant evidence to the effect that Mr Wood knew about it, nor was he prejudging that question.

37 Counsel's intervention may or may not have been appropriate and may or may not have been correctly understood as to its intention by the judge; but whether that be so or not, what the judge said was unexceptional and

certainly in the context of this long trial and long summing up cannot give rise to criticism of the safety of the verdict.

38 The positive points which counsel for the Crown has highlighted in his skeleton are the points to which we next turn. We should say, however, that, unfortunately, it appears that the judge did not give any reasons in respect of his refusal of the submission of no case to answer. At any rate, we have no transcript and none has been found, nor do we have any transcript of the argument. But that, as counsel accepts, cannot be the end of the matter: we must consider for ourselves whether there was a case to answer justifying the judge's undoubted refusal of the submission.

39 The points which counsel for the Crown has highlighted are, firstly, the appellant's activity as a chairman who kept his hands on the business. Not in the sense that he engaged in every day-to-day detail, but certainly to the extent that he kept an overview and to the extent that in the relevant months, in view of the company's financial difficulties, he signed every cheque himself in order to monitor expenditure. These were, of course, his family companies. He had the dominating financial interest in them and a relevant background consideration, which the jury might well have had in mind, was that on the face of it any suborning or corrupting of other companies' employers to these companies' benefit would be in the interest of the appellant rather than of anyone else, although of course there might also be an interest on the part of a managing director in ensuring that the company's business did well and that his position was secure.

40 Secondly, the appellant, as we have said, signed all the cheques drawn in relevant months, which cheques included payments in excess of £30,000 to PE-EM Limited which in fact went to pay Cox.

41 Thirdly, he signed cheques which enabled the use of the Granada car by Cox, for example the cheques for rental which we have mentioned but also cheques for road tax. In his first interview he admitted very little about this car at all and in his second interview he acknowledged involvement in that monthly paperwork but claimed he was simply an intermediary and that Cox was going to buy the car under a hire purchase agreement which, as we have said, did not appear to have existed.

42 A similar position exists in respect of the Nova car, supposedly for Mrs Cox. That was arranged by Cartin but, according to his interview, he approved exactly the same arrangement whereby the print companies would pay for the car for Mr or Mrs Cox's use and Mr Cox, according to the appellant, would be invoiced. Again no such arrangement for invoicing was produced and no invoicing took place. The appellant could say to that that he was astonished, but no more.

43 Then there is the matter of the mortgage. As we have recounted, the appellant knew that Cox wanted a mortgage urgently. He introduced Cox to a

personal friend, Mr Sinclair. He denied in his first interview knowledge of any payments in respect of Cox's house. In his second interview, however, he admitted that he had agreed that the printing company should provide Cox's solicitor with the loan of some £8,900 for the deposit on the house and the cheque was paid to the solicitor accordingly. In respect of that, again, although that was supposed to be a loan, there was no agreement whatever and no sign of repayment.

44 Then there was the cheque for £1800 which the Crown suggested was associated with the mortgage repayments. That was dated 24 January 1991. It was found on Cox when he was arrested on the next day. It had been drawn up and the evidence (which we recounted) was that it had been drawn up at the appellant's request. He, of course, said that he in turn had been requested to draw it up by Cartin. The evidence showed that it had certainly been handed over to Cox by the appellant in person. It was made out in favour of PE-EM. That too was before the jury.

45 Finally, there was the fact that, when arrested, the appellant first denied knowing Cox at all. As the judge reminded the jury, he said: "I do not know Cox but my secretary will assist you with the other two."

46 That is Mr Cartin and someone else. Later in interview however he admitted that this denial was untrue. The judge properly gave a full direction which is not criticised.

47 It seems to us that that was compelling circumstantial evidence when combined with the undoubted increase in the volume of business between the print group and Norwich Union to a very high level. It seems to us that it amply justified the judge in leaving it to the jury to consider whether they were satisfied in respect of count two.

48 In those circumstances, we move to ground two: the suggestion of inconsistency between the verdicts on counts one and two. The judge gave very clear directions on both counts. In his summing up in respect of count one, he said:

"The Crown must prove that the object of the conspirators was to defraud the Norwich Union. To defraud is dishonestly to prejudice or to take the risk of prejudicing another's right."

49 Turning to count two, he said:

"This charges the defendant with conspiracy to corrupt, the agreement being alleged to have been made with Cartin and others unknown. I must tell you on that last point that the Crown here must prove an agreement by the defendant with Cartin . . .

The object of the conspiracy under count 2, as you see, differs from that set out in count 1 and the second line, the last five words there, it

was, say the Crown, to make corrupt gifts to Cox, as an agent of the Norwich Union Insurance Group, as an inducement or reward for doing an act in relation to his principal's affairs, namely for maximising business transacted and payments made in relation to the principal and Wood Printing Group Limited and Portland Printing Services Limited. You might, while I am dealing with the matters to which I am now coming, keep one eye on the wording of that charge. If the defendant was a party to such an agreement then he was a party to an agreement to commit an unlawful act. The word corrupt is a simple English adjective. It does not mean dishonest. It means purposefully doing an act which the law forbids as tending to corrupt. The law seeks to prevent the corruption of agents in the shape of their being put into positions of temptation. The word agent includes an employee, as Mr Cox undoubtedly was, of the Norwich Union. It is alleged that he was an agent, using a technical word, which as I have said includes an employee of the Norwich Union Group, and it does not seem to be disputed that such was the case.

It is an offence, an unlawful act, for a third party corruptly to give an employee any gift or anything having a money value, as an inducement for doing in relation to his employers, which is what a principal means in the definition I gave you earlier, in relation to the affairs of that principal and to do an act in relation to them.

An inducement is something bestowed before what is sought of the employee takes place. A reward is something which is bestowed after it has been done by him. The act, and in law that includes acts in the plural which the employee Cox was to do, is alleged to have been maximising the business transacted and payments made in relation to the Norwich Union Group and Wood Printing Ltd and Portland Printing Services Ltd.

Putting that, I hope, less formally the allegation under count 2 is that the defendant agreed with Cartin that they would make gifts of money and things which could be measured in money, an example of the latter being the alleged use of the Granada and Astra cars, to Cox the employee of the Norwich Union in order first to get him to put as much of the Norwich Union's – the employer here – printing business as possible in the way of the two Wood companies named in count two. Secondly, to obtain as much money as possible for the work done to fulfill that business.

It is not necessary to show under count 2 an intent to get money which clearly exceeded the value of the work. It would be sufficient if, in the contemplation of the defendant and Cartin, assuming that they were parties, and of course that has to be proved, that the Norwich Union would pay no more than fair prices for it, although in this case the

Crown have sought to say that there would be prices which were far in excess of anything that was reasonable.”

50 There was a clear distinction therefore in the summing up, as counsel accepted. Count one involved overcharging. Count two involved maximising business payments, in other words maximising them beyond normal volumes or volumes as they would have been but for the inducement, irrespective of whether overcharging was involved in any particular transaction.

51 On the material before us we see no basis on which the Crown could be said to have tied its hands under count two to overcharging. Counts one and two have, on their face, distinct objects and indeed there would be very little, if any, point in count two if it was confined, in the way in which counsel has suggested before us, to overcharging. The increase in turnover between the printing companies and the Norwich Union was an important aspect of the Crown’s case. We would add that even if count two does overlap, insofar as it embraces overcharging, the fact is that the jury because of its acquittal under count one must also have disregarded any overcharging under count two. The real thrust of count two remained and had nothing to do with overcharging; and that evidently led to the verdict of guilty pursuant to a very clear direction by the judge that count two does not depend upon overcharging.

52 So the jury’s conviction on count two makes perfectly good sense and is in no way inconsistent with its conclusion under count one. The jury must be taken to have accepted that although Mr Godden-Wood was not, or may not, have been involved in the detail of charging for individual transactions where there was on the face of it gross overcharging, what he was involved in was the overall strategy of procuring as much business as possible, with as high a turnover as possible, from the Norwich Union by gifts to Cox through the medium of PE-EM.

53 We observe finally in relation to this ground that, despite the attack now made on the judge’s summing up, at the time no objection whatever was made to what was, in our judgment, on this aspect a very clear and appropriate summing up, consistent with the counts and consistent with the way in which the case was put before the jury on the evidence.

54 We turn therefore to ground three. The appellant submits that the judge in the passages which we have read misunderstood the meaning of the word “corruption”, or misdirected the jury, or at any rate directed them inadequately as to its meaning. In our view, as we have indicated, the direction was clear. We think that he gave the jury full assistance as to its implications in the circumstances with which they were concerned.

55 The complaint is however made that he should have directed the jury to consider whether the appellant had acted dishonestly and he should have directed them in terms of a *Ghosh* direction along the lines of the Judicial Studies Board Standard Direction number 34. In our view, on this point there

is the clearest, very recent authority that such a direction is unnecessary and indeed inappropriate. It is to be found in the case of *R v Harvey* [1999] Crim LR 70 of which we have also seen a full transcript.

56 Not only do we consider that we should follow that decision, we also, in common we note with the distinguished commentator in the Criminal Law Review, agree with it. In terms of the directions which were given, there was, in our judgment, no material distinction between the direction which was given in *Harvey* and the direction which the judge gave in the present case. They were, in effect, identical.

57 It was submitted by the appellant before us that *Harvey* overlooked an important distinction between corruption in the context of public bodies and corruption in the context of private individuals or companies. In the latter context, it was (as we understood it) suggested that gifts or favours were more readily understandable and acceptable and that the courts should be careful not to interpret different legislation (the 1986 Act) in a way which was more stringent than common sense and common practice would have allowed.

58 We must say that we can see in the authorities no justification for that distinction. The meaning of corruption in the context of public bodies, or indeed in any public context including corruption of voters, has been established for many years (as this court pointed out in *Harvey*) in the sense in which the judge directed the present jury. That is both at common law and under the relevant legislation such as the Public Bodies and Local Councils Act 1889 section one; see *Cooper v Slade* (1858) 6 HL Cas 746 and *R v Parker* 82 Cr App Rep 69, [1985] Crim LR 589. It seems to us most improbable that Parliament intended any different meaning when it passed the 1986 Act to regulate private civil corruption and used the same word.

59 We do not think that a conclusion that the test is the same in both the public and private context risks in any way imposing an inappropriate burden on those engaged in private activity. It is only gifts or inducements which tend to corrupt and which tend to tempt which can be caught by the legislation. Although it may be a jury question as to what amounts to such a gift or purpose, the test seems to us appropriate.

60 It is true that there are as the Law Commission consultation paper legislating the Criminal Code Corruption (paper number 145) discusses, a number of first instance authorities and some dicta in this court in *R v Tweedie* [1984] QB 729, [1984] 2 All ER 136 which use the language of dishonesty. *Tweedie* in particular was considered by this court in *Harvey*. We are not only bound by *Harvey* but, as we have said, prefer the court's comprehensive review and conclusion in *Harvey*.

61 A faint suggestion was made, on paper at any rate, that *Harvey* only represents the law as from the date it was decided. That was an extraordinary proposition which would suggest that *Harvey* should not have been decided as it was. We are concerned with the substantive common law and even if,

contrary to the reasoning in *Harvey*, we were in doubt as to what it was at the time of this trial, we must take it to have been and to be as stated in *Harvey*. The trial judge on this argument correctly anticipated the effect of the law as it has subsequently been confirmed in this court to be. The suggestion that his decision should be set aside because, in effect, he was correct but ahead of his time is remarkable.

62 One final submission made under this head was that the judge's direction about the significance of corruption was insufficiently clear insofar as corruption involves impropriety. For the reasons we have indicated it is our view that the judge not only followed the correct legal test but we think gave, in the context of this case, ample indication as to what was meant in practice.

63 We would observe that in this case the count was one of conspiracy. In the passage which we have read, the judge actually pointed out to the jury that they had to be satisfied that the object of the conspiracy was to make corrupt gifts to Cox as an inducement or reward for doing an act consisting of maximising business transacted and payments made. If there had been any need for any further direction, beyond the standard direction relating to the meaning of the corruption, that meaning was in our view supplied by that passage.

64 Counsel invites us to look at the grounds of appeal cumulatively. Looking at them cumulatively, in our view, adds nothing to their weight individually. For those reasons this appeal fails and will be dismissed.

[Submissions were heard on the subject of sentence]

65 We now have before us an application for leave to appeal against sentence which was referred to the full court by the single judge. Having dealt with the appeal against conviction, we need not set out the facts of this matter in full or at all; we can assume that they have been read and understood.

66 The submission is that the sentence of two and a half years passed after a full trial, in other words without the benefit of a plea of guilty, was too high, bearing in mind also that it related to only one count, the lesser count of corruption, when compared with the sentences of three years passed in respect of Mr Cox on his pleas of guilty to conspiracy to defraud and corruptly accepting a bribe, and of two and a half years passed on Mr Cartin on his plea of guilty to conspiracy to defraud and conspiracy to corrupt.

67 In his sentencing remarks, the judge clearly had in mind the acquittal of this applicant in respect of the first count. He said it was difficult to be exact. He referred to the figure. He said £300,000 seemed a fair figure in respect of the sum defrauded but he bore in mind, as we have said, that this appellant was found not guilty in respect of conspiracy to defraud. He bore in mind that this appellant was not the prime mover on the Wood Printing Group side, but he was a willing participant particularly when called upon to do anything to

further the corruption of Cox, and he took his share of the proceeds of that corruption without hesitation; in other words, the increased business and profit. The judge pointed out that corruption was a very serious offence and this offence was in his view a particularly serious example of corruption.

68 It is said that the sentence was too high, bearing in mind that the appellant is a mature businessman of good character and reputation for whom this sentence and conviction had been disastrous, bearing in mind the substantial financial loss already suffered by his companies and bearing in mind the unlikelihood of any repetition; and that he passed a sentence which did not properly reflect the disparity in roles.

69 That has been the primary point put before us by counsel, although he has also in his written submissions suggested that the judge in sentencing did not honour the jury's acquittal on count one although the judge did refer to it. That suggestion was made on the basis that it was wrong to refer to benefit in terms of share of the proceeds of corruption.

70 We do not think that that was wrong in the sense that the corruption was (and the judge at any rate was certainly entitled to take that view, having heard the evidence) associated with the increase in turnover, and in that sense the increase in proceeds. Furthermore, out of that turnover, on the evidence (and again the judge was in the best position to judge the effect of the evidence), monies were taken by the appellant, as the judge recounted in his sentencing remarks. They were in a general sense corrupt monies even if they were only obtained by virtue of increased turnover without any overcharging, as the judge was bound to assume from the appellant's point of view in the light of the jury's verdict.

71 We have considered the points which counsel has made but this was, in our judgment, serious offending. Of course, we appreciate that having absconded the appellant is now in a position where he has to serve whatever sentence is passed and of course we appreciate that he is unfortunate enough to have been arrested for another offence and there may be a question whether his time in custody at present counts towards his previous sentence and towards the new offence. That is a matter which any future sentencer will no doubt bear in mind.

72 As far as we are concerned, we have to consider whether the sentence passed in respect of this conviction was inappropriate in length and whether we should grant leave to appeal and review it. In our view, it was not inappropriate. It was justified in view of the seriousness of the offence and we do not feel that we should grant leave to appeal.

As most corruption offences involve persons in the public service, the scope of the term "public servant" is of considerable importance. This is increasingly so in view of the privatisation programmes in many countries. In R v Natji the issue before the court was whether the words "... and public authorities of all descriptions" included the Crown.

R v NATJI

Court of Appeal (Criminal Division)

Lord Justice Mantell, Mr Justice Bennett; His Honour Judge Stephens QC

14 February 2002

Cases referred to in the judgment

R v Barret (George) [1976] 1 WLR 946

Griffiths v Smith [1941] A.C. 170

Johannesburg [1907] P 65

R v Manners, R v Holly [1976] 2 WLR 709

R v Newbould [1962] 2 QB 102

For the appellant: Mr I Krolick

For the respondent: Mr Sheridan

BENNETT, J giving the judgment of the court:

1 At his trial at the Crown Court at Southwark, the appellant faced two counts on the indictment. They were in identical terms save that they occurred at different times in 1996. The appellant was charged with corruption contrary to section 1(2) of the Public Bodies Corrupt Practices Act 1889. The particulars of the offences alleged that the appellant had corruptly promised £250 to Sean McKeon, an executive officer of the Home Office Immigration Nationality Department, as a reward for passing files in relation to two people to him.

2 Mr McKeon was an executive officer in the Immigration and Nationality Department of the Home Office. The appellant had worked under him in a different department. The appellant became an administrative officer in Mr McKeon's department but retired in 1989. In 1992 the appellant set up Premier Immigration Consultants. He and Mr McKeon set up a corrupt arrangement whereby Mr McKeon would pass to the appellant the home files relating to the appellant's clients. The appellant would then destroy the file, thereby gaining considerable delay in immigration procedures, possibly of up to 2 years, for his clients. The client of the appellant would pay £500 which would be split equally between the appellant and Mr McKeon.



3. Those facts were not in dispute in the Crown Court. Mr Krolick, on behalf of the appellant, submitted to the trial judge that there was no case to answer. In brief Mr Krolick's submissions were that Mr McKeon was an officer of the Crown and hence an agent of the Crown. Accordingly the undisputed facts gave rise to an offence under section 1 of the Prevention of Corruption Act 1906. The 1889 Act, under which the appellant was charged, did not apply to officers of the Crown because the Crown was not a public authority within section 7 of that Act. Thus the appellant had been charged under the wrong Act. No amendment to the indictment was possible because the Attorney-General's consent had not been obtained for a prosecution under section 2(1) of the 1906 Act. Mr Sheridan, who appeared on behalf of the prosecution, submitted that section 4(2) of the Prevention of Corruption Act 1916 which amended the expression "public body" in the 1889 Act was sufficiently wide to include the Immigration and Nationality Department of the Home Office and thus the 1889 Act was applicable.

4 The trial judge decided in favour of the prosecution for the reasons advanced by Mr Sheridan. Mr Krolick then tendered certain advice to the appellant. He pleaded guilty and on each count was sentenced to a term of imprisonment of 9 months suspended for 2 years, to run concurrent.

5 The appellant appeals with leave of the single judge.

6 Before us Mr Krolick, for the appellant, advanced similar but rather more detailed grounds. Before we come to his submissions we think it necessary to set out the statutory provisions in question.

Section 1(2) of the 1889 Act provides:-

Every person who shall by himself or by or in conjunction with any other person corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or another person, as an inducement to or reward for or otherwise on account of any member, officer, or servant of any public as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of a misdemeanour."

7 Section 2 of the 1889 Act provided that the penalty for such an offence after conviction on indictment is imprisonment for a term not exceeding 2 years or to a fine not exceeding £500 or to both. The maximum term of imprisonment is now 7 years and the fine is unlimited.

8 Section 7 of the 1889 Act provides:-

In this Act-

The expression "public body" means any council of a county or county [sic] of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to

act under and for the purposes of any Act relating to local government, or the public health, or to poor law or otherwise to administer money raised by rates in pursuance of any public general Act, but does not include any public body as defined existing elsewhere than in the United Kingdom.”



9 The relevant provision of section 1(1) of the Prevention of Corruption Act 1906 provides:-

If any person corruptly gives or agrees to give or offers any gift or consideration to agent as an inducement or reward for doing or forbearing to do, or for having after passing of this Act done or forborne to do, any act in relation to his principal's affair business, or for showing or 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 and liable, so far as this case is concerned conviction on indictment to a term of imprisonment not exceeding 2 years or to a fine not exceeding £500 or both.

The maximum sentence of imprisonment is now 7 years and the fine is unlimited.

10 Section 1(3) of the 1906 Act provides:-

A person serving under the Crown or under any corporation or any borough, county, or district council, or any board of guardians, is an agent within the meaning of this Act.”

11 Section 4 of the Prevention of Corruption Act 1916 provides:-

(2) In this Act and in the Public Bodies Corrupt Practices Act 1889, the expression “public body” includes in addition to the bodies mentioned in the last mentioned Act, local and public authorities of all descriptions [and companies which in accordance with Part V of the Local Government and Housing Act 1989 are under the control of one or more local authorities].”

The words in square brackets were added by the Local Government and Housing Act 1989.

12 It is common ground between Mr Krolick and Mr Sheridan that the expression “public body” in section 7 of the 1889 Act does not include the Crown. The point at issue before the trial judge and before us is whether the words “... and public authorities of all descriptions” in section 4(2) of the 1916 Act include the Crown. It is the prosecution contention, accepted by the trial judge, that those words are wide enough to include the Immigration and Nationality Department of the Home Office. As we understood the concise submissions of Mr Sheridan he accepted that Mr McKeon was an officer serving under the Crown at all relevant times. Mr Sheridan further conceded

that it would have been better had the appellant been charged under section 1(1) of the 1906 Act, for there is no doubt that had that been done the appellant would have had no defence whatsoever. Mr McKeon, being a person serving under the Crown, was an agent within the meaning of the 1906 Act.

13 The appellant's case is that the Crown, or a government department, is neither a local nor a public authority and that the 1889 Act does not apply therefore to civil servants. The appropriate statutory provision relating to civil servants is section 1 of the 1906 Act. The appellant was not charged under that Act and the Attorney General's permission was not sought for a prosecution thereunder.

14 Mr Krolick referred us to *R v Manners, R v Holly* [1976] 2 WLR 709, where an employee of the North Thames Gas Board and a regional director of a public works company were charged with corruption under the 1906 Act in respect of a gift or consideration made to the boards' employee by the company director. The trial judge ruled that the Gas Board was a "public body" within the meaning of the 1889 to 1916 Acts, as defined by section 4 of the 1916 Act. The defendants were convicted. On appeal it was argued that the judge had been wrong in law in ruling that the Board was a public body for the purposes of the 1916 Act. The appeals were dismissed. It was held by the Court of Appeal that since the Gas Board had been constituted under the Gas Act of 1948 to perform public or statutory duties for the benefit of the public and had not been operated to make a private profit it was a "public body" within section 4(2) of the 1916 Act and accordingly the judge's ruling had been correct.

15 The submission on behalf of the defendant to the Court of Appeal in that case was that the Act under which the Gas Board was empowered to act did not specify that it was a public body and accordingly it did not come within the 1916 Act. Lord Justice Lawton said at page 712:-

"The question for us has been what the words "public body" meant in 1916, not what the words "public authority" meant in statutes passed many years later. The use of the same or similar words in later statutes may be of some help; but we have reminded ourselves that many considerations affect the wording of statutes. This is illustrated by the reference to the Prevention of Corruption Acts 1889 - 1916 in section 62(2) of the Civil Aviation Act 1971. It seems to us likely that this reference was made because the parliamentary draughtsman knew of the judgment of Winn J. in *R v Newbould* [1962] 2 QB 102, which was strongly relied upon by Mr Beezley before this court. That judge had ruled that the National Coal Board was not a public body for the purposes of the Prevention of Corruption Act 1889 to 1916. He had based his ruling upon the absence of any reference to "public authority" in the Coal Industry Nationalisation Act 1946 and the application of the *eiusdem generis* rule."

16 The Court of Appeal held that Mr Justice Winn was wrong not only so far as the construction of the particular Act was concerned but also in respect of the *eiusdem generis* rule.

17 At page 713 Lord Justice Lawton continued:-

“The Act of 1906 extended the ambit of the act of 1889 to agents; persons serving under the Crown were deemed to be agents within the meaning of this act. The Act of 1916 was an amending one. It was passed rapidly through parliament following some criticisms made by Low J. of the penalties described by the Acts of 1889 and 1906: see “The Times”, September 18, 1916. Within a few weeks a draft bill was presented to parliament; it had two clauses later to become sections 1 and 2 of the Act of 1916. Section 4 (2) got into the Act as a result of an amendment moved by Lord Buckmaster in the House of Lords. The reason he gave for moving the amendment is irrelevant to its construction; but nothing in what he said has caused us to hesitate over what meaning we give to the words “local and public authorities of all descriptions” in the sub-section.

By 1916 the words “public authorities” have often been construed by the courts for the purpose of applying the Public Authorities Protection Act 1893. In the *Johannesburg* [1907] P 65, the issue was whether the Tyne Improvement Commission was a public authority for the purposes of that act. Sir Gorrell Barnes P, examined the statutes under which the commission performed its duties. It performed public duties; its powers were directed to public ends; it did not concern itself with making gain or profit saving so far as was necessary to enable it to perform its public duties in accordance with the Acts constituting it. This case was considered by the House of Lords in *Griffiths v Smith* [1941] A.C. 170 and approved: see the speech of Lord Porter at pp. 205-206. These two cases, taken together, support the definition of a public authority given in Halsbury’s Laws of England 3d Ed., Vol 30 (1959), para 1317:

“A public authority is a body, not necessarily a county council, municipal corporation or other local authority, which has public or statutory duties to perform, and which performs those duties and carries out its transactions for the benefit of the public and not for private profit”.

When this definition is applied to the North Thames Gas Board it is clear that it is a public body. It was constituted pursuant to section 1 of the Gas Act 1948 to...”.

Lord Justice Lawton then set out the relevant provision of the Gas Act.

18 The Defendant appealed to the House of Lords which dismissed the appeal and wholly confirmed the Court of Appeal’s judgment. [1977] 2 WLR 178.

19 We were also referred to *R v Barret (George)* [1976] 1 WLR 946. The defendant was appointed an additional superintendent registrar of births, deaths and marriages and while acting in that capacity, he accepted £4 for arranging a marriage ceremony at an early date. He pleaded not guilty to a count alleging that he, being an additional superintendent registrar, and an agent of the Crown within the meaning of the 1906 Act, corruptly accepted money as an inducement or reward for doing an act in relation to his principal's affairs. The trial judge ruled that as a matter of law the defendant was, in the performance of his duties, "a servant of the Crown". The defendant thereupon changed his plea to one of guilty. He appealed. The appeal was dismissed. It was held that the registration of births, deaths and marriages was a function of central government and the effect of a celebration of marriage on the personal status of the parties to a marriage was of concern to the state. It further held that an additional superintendent registrar acted on behalf of the Crown in the performance of his duties and was appointed so to act under the provisions of the Registration Service Act 1953. Accordingly the defendant was serving under the Crown within the meaning of section 1 of the 1906 Act and was thus an agent within the meaning of the 1906 Act.

20 In that case the Court of Appeal rejected the defendant's argument that he was not a servant of the Crown and that he was an independent office holder appointed for the purpose of carrying out the prescribed statutory duties assigned to his office. It is thus not directly relevant to the instant case. However, in our opinion, some assistance can be derived from a passage in the judgment of Lord Justice James who gave the judgment of the Court, at page 951:-

"The registration of births, deaths and marriages is one of the functions of central government. The Registrar General is appointed under the Great Seal. The celebration of marriage affects the status of the parties to the marriage and change of personal status is the concern of the state. The duties of an additional superintendent registrar are performed by him on behalf of the Crown, it being necessary for the Crown to exercise its function through some human agency."

21 Mr Krolick therefore submitted that the Crown did not fall within the definition of "public authority" set out in Halsbury's Laws of England referred to by Lord Justice Lawton at page 713 of *Manners*. The Crown represents the state and carries out its duties on behalf of the state.

22 Mr Sheridan emphasised that the definition of "public body" in the 1916 Act was "public authorities of all descriptions" (emphasis supplied). He submitted that the definition of a public body set out in *Manners* encapsulated the role of the Immigration Department as part of the Home Office. The Home Office was a body which has, he submitted, a public or statutory duty to perform for the benefit of the public and clearly does not act for profit. Mr Sheridan sought to persuade us that the absence of any reference to "the Crown" in section 4(2)

of the 1916 Act is irrelevant because the wording of the sub-section is sufficiently wide to include the Crown.

23 Mr Sheridan further drew our attention to sections 6 and 7 of the Human Rights Act 1998. He submitted, correctly, that the definition of a “public authority” in that Act included “any person certain of whose functions are functions of a public nature”- see section 6(3)(b) of the Human Rights Act 1998. Accordingly it was submitted that the actions and decisions of a member of the Immigration Department, made in respect of the statutory duties of that Department are subject to review under the Human Rights Act because those duties are carried out by a person in the employ of a “public authority”.

24 So far as the definition is concerned under the Human Rights Act 1998 no doubt Mr Sheridan is correct. But we do not think that helpful in construing the definition of the expression “public body” or “public authorities of all descriptions” under section 4(2) of the 1916 Act. As Lord Justice Lawton said in *Manners* in the passage at page 712 to which we have referred, the question for this court is what the words “public authority of all descriptions” meant in 1916.

25 There is no doubt in our view that section 7 of the 1889 Act did not bring the Crown within the expression “public body”. Furthermore, unless the Crown can be brought within the words “public authorities of all descriptions” within section 4(2) of the 1916 Act, the 1889 Act does not apply to the instant case.

26. Next we move to the 1906 Act. We observe that section 1, at least in so far as the Crown is concerned, was not an amendment or extension of the 1889 Act but was a free standing measure. We repeat that it is common ground in this case that Mr McKeon was an agent of the Crown within the meaning of the 1906 Act and thus a prosecution could have been brought under that Act. Thus if, as we believe to be the case, section 1 of the 1906 Act applies to civil servants because they are agents of the Crown, we find it difficult to understand why the draughtsman of section 4(2) of the 1916 Act should have intended to have included the Crown within the expression “public authorities of all descriptions”. There was no need to do so because the position of civil servants was already taken care of by section 1 of the 1906 Act. It is to be noted that there is no mention whatsoever in section 4 of the Crown at all. Furthermore we do not consider that the words “public authorities of all descriptions” by necessary implication includes the Crown.

27 Further support can be gained for that view from a consideration of section 2 of the 1916 Act, which provides:-

Where in any proceedings against a person for an offence under the Prevention of Corruption Act 1906 or the Public Bodies Corrupt Practices Act 1989 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 a public body by or from a person, or agent or a person, holding or seeking to obtain a contract from [Her] Majesty or any government body, the money should be deemed to have been paid and received corruptly as such inducement or reward as is mentioned in such Act unless the contrary is proved.”

It is apparent from a consideration of section 2 of the 1916 Act that the draughtsman is making a distinction between the Crown and any government department and “a public body”. If the words in section 4(2) of the 1916 Act “public authorities of all descriptions” included the Crown or a government department then the wording of section 2 in so far as the Crown and any government department were referred to was unnecessary.

28 Accordingly, we are of the view that the definition of “public body” in section 7 of the 1889 Act, as amended by section 4(2) of the 1916 Act, does not include a government department and/or the Crown. Mr McKeon was an agent of the Crown. The appellant, with leave from the Attorney-General, ought to have been prosecuted under section 1(1) of the 1906 Act. Accordingly the appellant’s conviction is unsustainable. The appeal must be allowed and the conviction set aside.

EVIDENCE

A presumption of corruption is a common feature in anti-corruption legislation in many jurisdictions. For example, it appears in section 2 of the Prevention of Corruption Act 1916 in England and Wales (which still forms the basis for the anti-corruption law in several Commonwealth countries) and is a key feature of the National Accountability Bureau Ordinance 1999 (see p.XX below).

A common concern is that the imposition of such a presumption may violate the constitutional right (or right under the European Convention on Human Rights) to the presumption of innocence. Indeed, the Corruption Bill 2003, which will update the law on corruption in England and Wales (and in doing so repeal the 1916 statute) does not include any presumption of corruption.

*The issue itself can sometimes be avoided through the use of a conspiracy charge (see the case of *R v Attorney General ex parte Rockall* (Bulletin 3, p.XX)). Similarly, corruption in public office may also be prosecuted under the common law (*R v Bowden* [1996] 1 WLR 98).*

In 2000, a document entitled “Points for Prosecutors” was published in the UK by the Legal Secretariat to the Law Officers which was developed to “assist prosecutors in providing a consistent response to challenges to a selection of legislative provisions where [European Convention on Human Rights] issues are likely to be raised”. In dealing with the section 2 presumption, several arguments are suggested to reinforce the argument that presumption of corruption is compatible with article 6 rights (the presumption of innocence):

- Provisions which shift a burden to the accused are not necessarily incompatible with the Convention. Article 6(2) does not prohibit rules that transfer a burden of proof to the accused, provided that the overall burden remains with the prosecution, and the provision is confined with “reasonable limits which take into account ... what is at stake and maintain the rights of the defence” *Salabiaku v France* (1988) 13 EHRR 379*
- It is well-established in domestic law that the overall burden of proof is upon the prosecution and that the prosecution must establish guilt beyond reasonable doubt. Section 2 creates only a rebuttable presumption of fact, which the defence may disprove and which is not unreasonable. The Commission considered a similar type of provision in *X v UK* (Application 5124/71) in relation to the offence of living off the earnings of prostitution, and considered it did not offend against the Convention*
- The presumption will not come into effect unless the prosecution can establish beyond reasonable doubt that money, gifts or other consideration was paid, given to or received by a public employee **and** that the person providing the payment was holding or seeking a Government contract. Unless this heavy duty is discharged, there is no question of requiring the accused to establish a defence*

- *The accused is required only to show facts on a balance of probabilities which are peculiarly within his own knowledge and which it is not open to the prosecution to investigate*
- *The legislation is aimed at a particularly insidious and elusive crime, which undermines integrity in public life. The provision fairly balances the right of the accused to expect the prosecution to prove the case against him, with the importance of detecting and punishing corruption in the public service*

There is considerable jurisprudence from the European Court of Human Rights on the issue of the presumption of innocence. In the case of R (on the application of Elliot) v Secretary of State for the Home (below) the Secretary of State had ordered the return of the applicant to Hong Kong where he was accused of accepting bribes contrary to the Prevention of Bribery Ordinance. Section 24(1) of the Ordinance provides that “the burden of proving a defence of lawful authority or unreasonable excuse shall be upon the accused”. In reaching his decision, the Secretary of State indicated that he considered the European Convention on Human Rights did not require contracting parties to impose its own standards on third states. Further, there was no real risk of any denial of article 6 rights. The case provided the Divisional Court with the opportunity of reviewing the relevant European jurisprudence on whether the “reverse onus” provisions violated the presumption of innocence.

R (ON THE APPLICATION OF ELLIOT) v SECRETARY OF STATE FOR THE HOME DEPARTMENT

Divisional Court

Rose LJ and Silber J

18 July 2001

Cases referred to in the judgment:

Attorney-General v Hui Hin Hon [1995] 5 HKPLR 100
Attorney-General of Hong Kong v Lee Kwong-kut [1993] AC 951
AG v Malta (Application No 16641/90)
Bates (Application No 26280/95)
Brown v Stott [2001] 2 WLR 817
Drozd and Janousek v France [1992] 14 EHRR 745
H (Application No 15023/89)
Hoang v France 16 EHRR 53
Ex parte Launder (No 1) [1997] 1 WLR 839
Manamela [2000] 5 LRC 65
R v DPP ex parte Kebilene [2000] 2 AC 326
R v DPP ex parte Kebilene and others [1999] 3 WLR 972
R v Edwards [1975] QB 27
Salabiaku v France 13 EHRR 379

Soering v UK 11 EHRR 439
X (Application 5124/71)

For the applicant: *Clare Montgomery QC and John Hardy*
For the respondent: *James Eadie*

LORD JUSTICE ROSE: giving the judgment of the court

1. The applicant, with the permission of the Divisional Court, challenges a decision of the Secretary of State, on 19th January 2000, to order his return to the Hong Kong Special Administrative Region (HKSAR) under section 12(1) of the Extradition Act 1989. The Secretary of State considered, by reference to section 12 (1) and (2), that it would not be wrong, unjust or oppressive to return him. He set out his reasons at some length.

2. The applicant's extradition is sought for trial on six charges of accepting an advantage contrary to section 9(1) of the Prevention of Bribery Ordinance which, so far as is presently relevant, provides

“Any agent who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his (a) doing ... any act in relation to his principal's affairs or business... shall be guilty of an offence”.

By section 24 of the Ordinance “the burden of proving a defence of lawful authority or unreasonable excuse shall be upon the accused”. The single ground of challenge now pursued is that as this reverse onus provision violates the presumption of innocence in Article 6(2) of the European Convention on Human Rights, the Secretary of State's consideration of the issues was flawed and the matter should be remitted to him for further consideration.

3. The Secretary of State's decision letter indicates in paragraph 2, (of which no criticism is made) the steps he took in approaching the matter and the test he applied in exercising his general discretion, in accordance with *Ex parte Launder (No 1)* [1997] 1 WLR 839 at 8541-1-855A, namely whether it would be wrong, unjust or oppressive to order the applicant's return. He referred, in paragraph 3, to “the need to consider the particular circumstances of Mr Elliot's case”. He said, in paragraph 5, that his function was not to act as a trier of fact and he referred, in paragraph 9, to the serious nature of the extradition crimes. He noted in paragraphs 12 to 16 that three of the defence witnesses Mr Clements, Mr Galama and Mr Jenwajiporn were said to be not likely to attend a trial in HKSAR and unidentified witnesses from the Peoples Republic of China would not be available.

4. He then dealt with the reverse onus and Article 6(2) in the following terms in paragraph 18:

“The Secretary of State considers that it would not be unjust to order return because of the nature of the offence created by sections 9 and 24 of the Bribery Ordinance. In summary, his reasons for so concluding are as follows:

(1) There has been no clear authority under the Convention to the effect that a State’s responsibility is engaged if a person is returned or extradited to a jurisdiction in which any trial might violate Article 6. The European Court has noted that “the Convention does not require the Contracting parties to impose its standard on [third] States”: *Drozd and Janousek v France* [1992] 14 EHRR 745. At most, even if in principle a State’s responsibility can be engaged in such a case, the European Court is likely to require a clear risk of a ‘flagrant denial’ of the rights in Article 6 in the requesting jurisdiction: see *Launder v the United Kingdom (supra)* at page 20)

(2) In any event, the Secretary of State considers that sections 9 and 24 of the Bribery Ordinance would not be held by the European Court to violate Article 6(2) of the Convention, because (a) the ‘presumption’ is rebuttable (b) section 24 does not deprive Mr Elliot of all means of defending himself and (c) the HKSAR courts enjoy a genuine freedom of assessment at trial in deciding whether or not the advantage alleged to have been accepted by Mr Elliot was accepted without lawful authority or reasonable excuse. It follows that the Secretary of State does not consider there to be a real risk of any denial, still less a “flagrant” denial, of Article 6 rights,

(3) The Secretary of State considers that, if (a) sections 9 and 24 of the Bribery Ordinance were considered applying English law (including *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] AC 951 and, more recently, *R v Director of Public prosecutions ex parte Kebilene and others* [1999] 3 WLR 972, especially the judgment of Lord Hope), and (b) the main provisions of the Human Rights Act 1998 [‘the 1998 Act’] were in force or it was otherwise permissible to challenge unambiguous primary legislation on the basis of incompatibility with the convention, it is by no means clear that sections 9 and 24 of the Bribery Ordinance would be held to be incompatible with the provisions of the 1998 Act.

(4) The Secretary of State considers in any event that, given the principles set out in *Lee Kwong-kut* and *Kebilene*, the judgment as to whether in all the circumstances sections 9 and 24 of the Bribery Ordinance do violate the presumption of innocence in an unjustifiable manner is pre-eminently one for the HKSAR courts. Local factors and needs play an important part in making the judgment. The Secretary of State notes in this respect the recognition in the Privy Council (on appeal from Hong Kong) and in the Hong Kong courts of (a) the problems created by bribery in Hong Kong and (b) the difficulty of proving bribery.

(5) The Secretary of State considers that the HKSAR courts would be likely at least to derive considerable assistance from the principles set out in *Lee Kwong-kut* (as they have done in other cases following *Lee Kwong-kut* - see for example the case cited by Professor Yash Ghai: *Attorney-General v Hui Hin Hon* [1995] 5 HKPLR 100), and from Lord Hope's judgment in *Kebilene*, whether or not technically obliged to apply Privy Council decisions on appeal from Hong Kong (such as *Lee Kwong-kut*). The Secretary of State, in any event, is satisfied that the HKSAR courts would properly and fairly consider and determine any challenge based on an alleged unjustifiable interference with the presumption of innocence."

5. For the applicant, Miss Montgomery QC submitted that there is no sign that the Secretary of State considered the facts, his reasoning in paragraph 18 is confused and inconsistent and his counsel's submissions cannot be a substitute for evidence as to his reasons. Sub paragraph (1) is defective in not considering the terms of Article 6, and no proper conclusion could be reached in sub paragraph (2) as to whether there has been a flagrant denial of Article 6 rights without a consideration of the facts. Whereas sub-paragraphs (1) and (2) assume that potential violation of article 6 is a matter for the Secretary of State, sub-paragraphs (4) and (5) show an abdication of responsibility by the Secretary of State, wrong in law, in suggesting that fairness is a matter for the HKSAR courts not him. Further, the conclusion in sub-paragraph (3) that it is by no means clear that the Bribery Ordinance would be held incompatible with the Human Rights Act 1998 is at variance with the conclusion in sub-paragraph (2) that Article 6 was not violated. These matters, submitted Miss Montgomery, show that no adequate consideration was given by the Secretary of State to the reverse burden of proof. In so far as the Secretary of State decided that section 24 did not violate Article 6(2) and the presumption of innocence in Article 11(1) of the Hong Kong Bill of Rights he was also wrong in law.

6. In support of these submissions she took us first to the Hong Kong legislation, then to the facts and, finally, to the English, European and South African authorities.

7. There are, it is common ground, three elements of a section 9 offence by an agent - firstly, absence of lawful authority or reasonable excuse, secondly, soliciting or accepting and, thirdly, acting in relation to his principal's affairs. The first element, she submitted, is the most important and, by section 24, the burden of proof in relation to it is cast on the defence. Section 14(1) of the Ordinance empowers the Commissioner to require by notice a person suspected of an offence to furnish a written statement of his property, expenditure and liabilities and section 14(4) imposes an obligation to respond in the time specified in the notice. By section 20(b), a failure to comply with such a notice "may be adduced in evidence and made the subject of comment by the court and the prosecution".

8. As to the facts, charges 1 and 2 relate to arrangements between the applicant's employer, Standard Bank, and the Agriculture Bank of China for the deposit by Standard Bank of US \$30 million and US\$ 20 million. The defence is that, although money was received by the applicant it was passed on by him to persons in China. Charges 3 to 6 relate to discounting bills of exchange for which the applicant admits he benefited from returned commission. His defence is that these payments were made in

relation to a previous business before he joined Standard Bank and he passed the benefit to his former partner Mr Clements. Unwillingness of defence witnesses to go to Hong Kong, Miss Montgomery submitted, will reduce the impact of their evidence, although it could still be provided by other means e.g. on commission, or video link.

9. As to the law, Miss Montgomery submitted that there is a single strand discernible from all jurisdictions, namely, the court looks at what is at stake and balances the interests of society against those of the defendant, taking into account such factors as the severity of punishment possible, the nature of the crime and the way in which the burden of proof operates. A proportionate rebuttable reverse burden will be upheld. Because of the existence of this single legal strand, the Secretary of State was not justified in seeking to tease out individual strands. In support of this submission, Miss Montgomery took us to a number of authorities.

10. In *Salabiaku v France* 13 EHRR 379 the applicant had been acquitted of the criminal offence of unlawful importation of narcotics, but convicted of the customs offence of smuggling which was punishable by up to 3 months imprisonment. The French Customs Code deemed liability for the offence where possession was proved. That presumption was irrebuttable but its severity was moderated by the courts' unfettered power of assessment of the evidence, so that an accused could exculpate himself by force majeure from an event it was absolutely impossible to avoid. The ECHR held that there was no breach of Article 6(2). In paragraph 27 of its judgment, the court said

“Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention and, accordingly to define the constituent elements of the resulting offence. In particular, and again in principle, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence”.

In paragraph 28 the court said:

“Presumptions of fact or law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law... Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.”

Miss Montgomery stressed that *Salabiaku* was concerned principally with customs law, not the wider scene of dangerous drugs. It asserted the need to strike a balance, which is consistent with the English authorities.

In *Hoang v France* 16 EHRR 53 the applicant had been convicted of unlawful narcotics importation and customs evasion. The ECHR rejected his complaint that the presumption relied on against *Salabiaku* and three other presumptions under the French Customs Code breached Article 6(2). He did not rely on the statutory defence to the three other presumptions that he had acted from necessity or as a result of an unavoidable mistake. In paragraph 34 of its judgment the ECHR said the applicant:

“was not in fact deprived of all means of defending himself .. he could try to demonstrate that he had acted from necessity or as a result of unavoidable mistake. The presumption of his responsibility was not an irrebuttable one”.

In paragraph 36 the court pointed out that the French Court of Appeal had refrained from automatic reliance on the presumptions.

11. In *AG of Hong Kong v Lee Kwong-kut* the Privy Council considered the impact of Article 11(1) of the Hong Kong Bill of Rights, which asserts “the right to be presumed innocent until proved guilty according to law” on two different provisions in Hong Kong Ordinances. In the first appeal it was held that Article 11(1) was contravened by a provision which criminalised possession of anything reasonably suspected of having been stolen or unlawfully obtained by a person, who does not give an account to the satisfaction of the magistrate how he came by the same. In the second appeal it was held that Article 11(1) was not infringed by an absolute prohibition on engaging in activities with others who you know or have reasonable grounds to believe carry on drug trafficking, with special statutory defences which the defendant had to prove on the balance of probabilities: such an onus was held to be justifiable in the context of the war against drug trafficking. At 962 Lord Woolf, giving the opinion of the Privy Council, cited the judgment of Lawton LJ in *R v Edwards* [1975] QB 27 at 39 to 40 where he referred to the evolution of

“an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged ... it is limited to offences arising under enactment’s which prohibit the doing of an act saving specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely upon the exception”.

At 969c, having referred to the terms of the judgment in *Salabiaku* already cited, Lord Woolf said

“This statement provides a valuable illustration of the collective effect of the decision in other jurisdictions apart from Canada to which their Lordships have been referred on equivalent provisions to Article 11(1) in other constitutional documents. Even though they are not subject to any express limitation they are considered to have an implicit degree of flexibility. The situation is the same in relation to Article 11 (1). This implicit flexibility allows a balance to be drawn between the interest of the person charged and

the State.”

At 969f he went on

Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which Article 11(1) enshrines. The less significant the departure from the normal principle the simpler it will be to justify exceptions. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that the exception will be regarded as unacceptable. In deciding what are the essential ingredients, the language of the relevant statutory provision will be important. However what will be decisive will be the substance and reality of the language creating the offence rather than its form. If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless ... it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

Lord Woolf went on to refer to the two-stage approach adopted by the courts of Canada which “in the end tend to come to the same conclusion as would be reached in other jurisdictions.” At 973 c, in a passage on which Miss Montgomery particularly relied, Lord Woolf said, by reference to the provisions under consideration in the first appeal,

“The substantive effect of the statutory provision is to place the onus on the defence to establish that he can give an explanation as to his innocent possession of the property. That is the most significant element of the offence. It reduces the burden on the prosecution to proving possession by the defendant and facts from which a reasonable suspicion can be inferred that the property has been stolen or obtained unlawfully, matters which are likely to be a formality in the majority of cases. It therefore, contravenes Article 11(1) of the Hong Kong Bill.”

At 973d, by reference to the other provisions under consideration, Lord Woolf said

“Unless the prosecution can prove that the defendant has been involved in a transaction involving the relevant person’s proceeds of drug trafficking ... and that at the time he had the necessary knowledge or reasonable grounds to believe the specified facts the defendant is entitled to be acquitted. However once the defendant knows or has reasonable grounds to believe that the relevant person is a person who carries on or has carried out drug trafficking or has benefited from drug trafficking, then the defendant knows that he is at risk of committing an offence and that he can only safely deal with that person if he is in a position to satisfy the section.

At 973g he went on

“It would be extremely difficult, if not virtually impossible, for the prosecution to fulfil the burden of proving that the defendant had not taken those steps. In the context of the

war against drug trafficking, for a defendant to bear that onus... is manifestly reasonable and clearly does not offend Article 11(1).

12. In *R v DPP ex parte Kebilene* [2000] 2 AC 326, Miss Montgomery accepted that what was said in relation to burden is obiter. But she relied on passages in the judgment of Lord Bingham of Cornhill CJ in the Divisional Court at 344f, 345d and 346c, asserting the incompatibility with the presumption of innocence and Article 6(2) of the provisions of s16A of the Prevention of Terrorism (Temporary Provisions) Act 1989. This makes it an offence to possess an article in circumstances giving rise to a reasonable suspicion that it is for acts of terrorism, the burden being on the defence to prove that that was not the purpose and a burden being placed on the defendant in relation to proof of possession. This judgment was reversed in the House of Lords. At 378 to 379 in the House of Lords, Lord Hope of Craighead observed that, in deciding whether a statutory provision is vulnerable to challenge on the ground of incompatibility with Article 6(2), it is first necessary to distinguish between the shifting evidential burden and the ultimate persuasive burden on the balance of probabilities on a defendant. Statutory presumptions placing an evidential burden on the accused do not breach the presumption of innocence. As to persuasive burdens, a mandatory presumption of guilt as to an essential element of the offence is inconsistent with the presumption of innocence. A discretionary presumption of guilt may not be inconsistent, depending on the tribunal of facts' view as to the cogency of the evidence. Provisions in relation to an exemption or proviso which the accused must establish to avoid conviction, but which are not an essential element of the offence, may or may not violate the presumption of innocence depending on the circumstances. At 386c Lord Hope adopted three questions, suggested by counsel, for considering where the balance lies:

“(1) what does the prosecution have to prove in order to transfer the onus to the defence? (2) what is the burden on the accused - does it relate to something which is likely to be difficult for him to prove, or does it relate to something likely to be within his knowledge or (I would add) to which he readily has access? (3) what is the nature of the threat faced by society which the provision is designed to combat?”

Having considered each question in relation to s16A he concluded at 387g.

“It would not be appropriate for us in this case to attempt to resolve the difficult question whether the balance between the needs of society and the presumption of innocence has been struck in the right place. But it seems to me that this is a question which is still open to argument.”

Miss Montgomery submitted that the Secretary of State does not seem to have asked, still less answered, the three questions referred to by Lord Hope. At 397-398 Lord Hobhouse, having referred to *Salabiaku* and *Hoang* identified arguable points in relation to whether section 16A is incompatible with the Convention and said at 398b:

“The judgments and decisions of the European Court of Human Rights and the Commission (account of which must be taken under section 2 of the Act) show that

they are not necessarily incompatible with the Convention.”

He referred to the difficulty of the concepts and commented that Lord Woolf’s approach in *Lee Kwong-kut* “may have been more stringent than is required under the European Convention.”

13. In the light of these authorities, Miss Montgomery submitted that there is no divergence between the approaches shown by the European and English courts, Accordingly, she submitted, there is no justification for the Secretary of State to say that Article 6 would not be violated unless he looks at the way it operates. A correct approach by the Secretary of State would necessarily involve him in analysing the legal provisions in Hong Kong and considering their application in this case. She relied on *Soering v UK* 11 EHRR 439. In paragraph 113 of the judgment the court said

“the right to a fair trial in criminal proceedings, embodied in Article 6, holds a prominent place in a democratic society. The court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risked suffering a flagrant denial of a fair trial in the requesting country. “

She submitted that [this] leaves open whether, in an extradition case, it is relevant that there is a risk of an unfair trial contrary to Article 6. *In Drozd and Janousek v France and Spain* 14 EHRR 745 a person convicted in Andorra chose to serve his sentence in France and sought to challenge the fairness of his trial in Andorra which is not a party to the European Convention. It was held that there was no jurisdiction to examine the merits from the point of view of Article 6. Paragraph 110 of the judgment states:

“France was not obliged to verify whether the proceedings which resulted in conviction were compatible with all the requirements of Article 6 of the Convention. To require such a review of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 would also thwart the current trend towards strengthening international co-operation in the administration of justice, and which is in principal in the interests of the person concerned. The contracting state is however obliged to refuse their co-operation if it emerges that the conviction is the result of a flagrant denial of justice.

Miss Montgomery submitted that this authority emphasises the need for some assessment of possible violation even in a country not bound by the Convention and, where something so fundamental as a reverse burden arises, some assessment is necessary. The Secretary of State’s conclusions in paragraph 18 that there either was not or might not be a violation is both surprising and unjustified in the absence of supporting reasons. She submitted that the most important element of the offence charged against the applicant casts a burden on him in the form of a mandatory presumption on the balance of probabilities in circumstances where such a presumption was unnecessary because of the compulsory interrogation provisions of section 14. Furthermore, the presumption applies to all corruption cases not just those involving public bodies. Furthermore, the defence is under real difficulty in establishing the necessary facts because of the unwillingness of defence witnesses to attend and the

delay which has already occurred. There is in the present case no freedom of assessment by the court as occurred in *Salabiaku* and *Hoang*. The gravity of the offence is to be gauged by the maximum punishment of seven years.

14. Miss Montgomery also took us to the Law Commission Report on Corruption [1998 No 248] and the discussion of the presumption of corruption in Part IV of that Report. She did not suggest that the Law Commission expressed any clear or concluded view as to the impact of Article 6 in the light of the Strasbourg decisions. Indeed, at paragraph 4.36, the Commission said it was difficult to be sure whether the presumption of corrupt receipt unless the contrary is proved under section 2 of the Prevention of Corruption Act 1916 is likely to be regarded as a breach of Article 6.

15. Miss Montgomery referred us to *Manamela* [2000] 5 LRC 65 where the South African Constitutional Court held that a reverse burden was not proportionate in a handling case, in that an evidential burden which would have been less invasive could have been used. She also relied on *Brown v Stott* [2001] 2 WLR 817 where the Privy Council held that there was no incompatibility with a defendant's rights under Article 6 for the prosecution to rely on an admission that the defendant was the driver of a motor car, that admission having been obtained under compulsion pursuant to s 172 of the Road Traffic Act 1988. At 825b Lord Bingham of Cornhill said:

“what a fair trial requires cannot, however, be the subject of a single unvarying rule or collection of rules. It is proper to take account of the facts and circumstances of particular cases, as the European Court has consistently done.”

Lord Bingham went on to review the Strasbourg jurisprudence in relation to the presumption of innocence and quoted a passage from the speech of Lord Hope in *ex parte Kebilene* at 385

“the cases show that although Article 6(2) in absolute terms is not regarded as imposing absolute prohibition on reverse onus clauses whether they be evidential (presumptions of fact) or persuasive (presumptions of law), in each case the question would be whether the presumption is within reasonable limits.”

At 836b Lord Bingham said..

“The jurisprudence of the European Court very clearly establishes that while the overall facts of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within Article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for. The general language of the Convention could have led to the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently eschewed by the court throughout its history. The case law shows that the court has paid very close attention to the facts of particular cases coming before it, giving effect to factual differences and recognising differences of degree The court has also recognised the need for a fair balance between the

general interest of the community and the personal rights of the individual, the search for which the balance has been described as inherent in the whole of the Convention.”

At 852a Lord Hope identified the questions which the jurisprudence of the European Court requires to be addressed in relation to alleged incompatibility with an Article 6 right..

“(1) is the right which is in question an absolute right, or is it a right which is open to modification or restriction because it is not absolute?

(2) if it is not absolute does the modification or restriction which is contended for have a legitimate aim in the public interest?

(3) if so, is there a reasonable relationship of proportionality between the means employed and the aim sought to be realised?”

16. Miss Montgomery submitted, in the light of her review of the authorities, that there is no whisper of a division between the English, Strasbourg and Commonwealth approaches. The governing principle is that a balance must be struck between society and the individual. All jurisdictions accept that there may be a reverse onus but it is necessary to analyse the facts of the particular case to decide whether there is a violation. She submitted that there was no sign that the Secretary of State recognised that single principle and applied it conscientiously in the present case, nor any sign of the necessary process of analysis to reach a rational and legally unimpeachable decision. She accepted that the Secretary of State is not able to judge local factors to a nicety. He can and must weigh what factors point away from extradition so that he does not violate Article 6. She accepted the Secretary of State could reach a conclusion that it was right to return the applicant to Hong Kong but he could only properly do so having taken the relevant facts into account.

17. On behalf of the Secretary of State Mr Eadie submitted that he had asked himself the right questions in accordance with *ex parte Launder No 1*, namely whether it would be wrong, unjust or oppressive to return the applicant and had given a clear answer in the first sentence of paragraph 18 that it would not. It was legitimate for him to approach that question by reference to the European authorities such as *Janousek* and *Soering*, dealing with extradition by reference to whether there may be a flagrant denial of justice and by reference to other European authorities dealing with reverse onus, such as *Salabiaku* and *Hoang* and the English authorities in the Privy Council and House of Lords in a domestic context. By those separate yardsticks the over-arching question of whether it is just to return the applicant can be properly judged. There is, he submitted, no difference between the principle to be applied in reverse onus cases. But the broadly stated principles in *Salabiaku* as to balance have to be applied to particular facts. He submitted that on the authorities there appears to be a difference of approach in that the Strasbourg jurisprudence is more permissive to reverse onus cases than Lord Woolf’s approach in *Lee Kwong-kut*. Lord Woolf’s analysis places particular emphasis on the ingredients of the criminal offence, whereas the Strasbourg approach does not. In consequence, the Secretary of State was able to give a fairly confident conclusion in relation to the European authorities whereas his conclusion based on the English authorities was necessarily more guarded. Despite this more guarded conclusion, he was entitled to reach the clear conclusion that it would not be unjust to order the

applicant's return. So far from abdicating his responsibilities, in paragraph 18(4) and (5) he properly recognised that the matters relevant to whether a return was just could not be resolved by him at this stage as local factors and needs were important and had to be properly determined locally. He expressly considered the most important relevant factors, namely the ingredients of the offence, the reverse burden and the penalty, defence difficulties in relation to witnesses and the broad justification for the legislation.

18. In support of these submissions, Mr Eadie dealt first with the facts. In relation to the first charge, the flow of money to the applicant is documented. In relation to the second charge there are no records because the payments to the applicant are said to have been made in cash. The defence in relation to charge 1 is that the money was received as agent for Chinese nationals not in relation to his principal's affairs. The defence in relation to charge 2 is that no cash was ever received. The issue as to whether receipt was in connection with the principal's affairs was an element which the prosecution must prove and there is no category of documents relevant to this issue falling within section 14. In relation to charge 2 the issue is between the applicant and Heng as to whether or not cash was paid. In consequence the reverse onus provisions have no role to play in relation to charge 1 or to charge 2. As to charges 3 to 6, there is documentary evidence showing the flow of money to the applicant's bank account. The defence is that it was thereafter paid out on unspecified dates to Clements, who was the applicant's former partner. If that is right, it is a matter solely within the applicant's knowledge. The other strand of the defence is that the applicant had the authority of his superior at Standard Bank, Mr Wilde, a prosecution witness, who knew of these old business activities before the applicant joined Standard Bank. There is no suggestion that Mr Wilde, will not be able to give evidence in Hong Kong and he, if the applicant is right, will be able to support the defence case.

19. As to the European authorities on extradition, Mr Eadie submitted that *Janousek* establishes that there has to be a real risk of a flagrant denial of justice, not merely a possible violation of Article 6, before a state's responsibility is engaged: he relies on paragraph 110 of the judgment already cited. In *Lauder* Application 2729/95 the Commission rejected, as manifestly ill-founded, a complaint of a breach of Article 6 where it was open to the applicant, if extradited to Hong Kong, to raise an objection before the HKSAR court as to whether a fair trial could take place. Furthermore, he submitted, *Salabiaku* shows that the presumption of innocence is not solely confined to the procedure at trial but can apply to domestic law, states are free to define the elements of offences within their jurisdiction, including creating offences of strict liability, and there are presumptions of fact and law in all jurisdictions, which are permissible by reference to the concept of reasonableness; the real concern is with irrebuttable presumptions whereby a defendant is deprived of the means of defending himself. *Hoang* shows that the distinction between persuasive and evidential burdens plays no role in Strasbourg (see the dissenting opinion in the Commission at pages 76 and 77). At paragraph 34 of the judgment, the court concluded, that although the Paris Court of Appeal had applied four presumptions against the defendant, he was not deprived of all means of defending himself as there was a defence of acting from necessity or as a result of unavoidable mistake so the presumption of responsibility was not irrebuttable. At paragraph 36, the court pointed out that the Court of Appeal had weighed the evidence before it and refrained from any automatic reliance on the presumption.

20. Accordingly, Mr Eadie submitted that the Strasbourg jurisprudence relies on whether a defendant has been deprived of all means of defending himself, whether the presumptions are rebuttable and whether the court can rely on a defendant's evidence or is obliged to convict.

21. Mr Eadie further relied on four Commission decisions. In *Bates* (Application No 26280/95) the Commission declared inadmissible a complaint in relation to the reverse onus under section 5(5) of the Dangerous Dogs Act 1991 which presumed that a dog was a pitbull terrier unless the contrary was shown by the accused. The Commission pointed out that the applicant had the opportunity to defend himself and produce evidence. In 'X' (Application 5124/71), the Commission rejected a complaint that in relation to an offence of living on earnings the presumption of knowingly living on the immoral earnings of prostitution unless the contrary was proved was a violation of Article 6(2). In 'H' (Application No 15023/89) the Commission declared inadmissible a complaint in relation to the burden of proof on the defence under the McNaghton Rules in relation to insanity. In *AG v Malta* (Application No 16641/90) the Commission rejected as inadmissible a complaint about a reverse onus provision presuming a company director guilty of an offence by a company unless he proved the offence was committed without his knowledge and that he exercised due diligence. The Commission stressed that the presumption was not irrebuttable.

22. As to the English authorities, Mr Eadie submitted that although, as in *Salabiaku*, they require a balance to be struck, Lord Woolf at 972e in *Lee Kwong-kut* said that normally:

“the court can ask itself whether under the provision in question, the prosecution is required to prove the important elements of the offence; while the defendant is reasonably given the burden of establishing a proviso or an exemption or the like of the type indicated by Lawton LJ, if this is the situation Article 11(1) is not contravened.”

At 973a, however, Lord Woolf also referred to. “the need to balance the interests of the individual in society which are at the heart of the justification of an exception to the general rule.”

Lord Woolf's approach, submitted Mr Eadie, carries through the analysis of Lord Bingham of Cornhill in *ex Parte Kebilene* at 344c

“the task of the court is ... to study the substantial effect of a legislative provision said to infringe the presumption of innocence in order to decide whether in practical terms it does or not.”

Lord Bingham went on to refer to the gravamen of the offence and its crucial ingredients of possession and terrorist purpose neither of which needed to be proved by the prosecution to the criminal standard. In the House of Lords, Lord Hope at 385f was critical of Lord Bingham for not taking justification into account, though it appears at 345c Lord Bingham did have regard to justification factors, while not being persuaded that they altered his conclusion. All the members of the House of Lords in *ex parte*

Kebilene concluded that whether section 16A was compatible with Article 6(2) was capable of argument. (see Lord Steyn, with whom Lord Slynn agreed, at 365h and 372a and Lord Cooke at 374b in addition to the speeches of Lord Hope and Lord Hobhouse already cited).

23. Mr Eadie further submitted that, until the facts of a particular case are known, it may be very difficult to form a judgment, so the Secretary of State's views can only be preliminary and regard must be had to the importance of local factors. Mr Eadie also relied on the passage in the speech of Lord Hobhouse in *ex parte Kebilene* at 398c which highlights the possible difference between Lord Woolf's approach in *Lee Kwong-kut* and the European jurisprudence. It is also a matter for the debate, submitted Mr Eadie, as to how Lord Woolf's approach fits in with that of Lord Hope in *ex parte Kebilene*. In the light of these considerations, Mr Eadie submitted, there is no necessary inconsistency in the Secretary of State reaching a clearer conclusion by reference to the Strasbourg jurisprudence than to the English jurisprudence.

24. It has been necessary, not only as a matter of courtesy but also as an aid to analysis, to rehearse the very helpful submissions to this court at some length. But the conclusions which follow can, in our judgment, be shortly stated and they are unaffected by the House of Lords decision in *R v Lambert* 5th July 2001 [2001] UKHL 37 handed down after we heard argument in this case.

25. It is clear beyond peradventure that the Secretary of State correctly directed himself by reference to *ex parte Launder No 1* and clearly answered the crucial question that it was not unjust to return the applicant to Hong Kong because of the nature of the offences created by the Bribery Ordinance. Paragraph 18(1) of his decision unimpeachably rehearses the effect of the Strasbourg jurisprudence, namely, a clear risk of a flagrant denial of Article 6 rights in the requesting jurisdiction is necessary before extradition could be refused. (see *Soering* and *Janousek*). The Secretary of State was also entitled to conclude that the HKSAR courts enjoy freedom of assessment at trial and there is no real risk of any denial, still less a flagrant denial, of Article 6 rights. Furthermore, the Secretary of State was entitled to conclude that *Lee Kwong-kut* and *ex parte Kebilene* do not demonstrate that sections 9 and 24 of the Bribery Ordinance would be held incompatible with the provisions of the Human Rights Act.

26. Happily, it is not necessary to the decision in this case for this court to embark on the unenviable task of seeking to reconcile express and implied divergences of view between members of the House of Lords in the opinion in *Lee Kwong-kut* (this was a Privy Council case) and the judgments and speeches in *ex parte Kebilene*. Nor was that the task of the Secretary of State. His role was to decide whether the applicant's return to Hong Kong would be wrong, unjust or oppressive; ours is to decide whether the reasons he gave for concluding that it would not can be impeached.

27. As all the speeches in the House of Lords in *ex parte Kebilene* made clear in a non-extradition context, issues affecting fairness of trial are, usually, best decided at the trial itself. In our judgment that principle generally applies also in an extradition context, unless there are special circumstances, such as a real risk of denial of a fair trial at the

hands of the requesting state. In the present case, therefore, the Secretary of State was right to point out that he is not a trier of fact and to stress the importance of local factors. He had proper regard, when considering the fairness of the presumption, to its rebuttable nature and to the fact that the applicant was not deprived of all means of defending himself. He was entitled to conclude that the European authorities do not preclude extradition in the present case and that the HKSAR courts will properly consider the English authorities in relation to the presumption of innocence. His conclusion that there is no real risk of any denial in Hong Kong of Article 6 rights cannot be faulted.

28. Accordingly this application fails.

In Wali v Federation of Pakistan (above p.XX), the Supreme Court of Pakistan considered the issue whether section 14(d) of the NAB Ordinance violated the presumption of innocence in that it placed the burden of proof on the accused in respect of an offence under section 9(a)(vi) and (vii) of the Ordinance.

Section 14(d) states:

Where a person is accused of an offence under section 9(a) (vi) and (vii), the burden of proof that he used his authority, or issued any directive, or authorised the issuance of any policy or statutory rule or order (SRO), or made any grant or allowed any concession, in the public interest, fairly, justly, and for the advancement of the purpose of the, enactment under which the authority was used, directive or policy or rule or order was issued or grant was made or concession was allowed shall lie on him, and, in the absence of such proof the accused shall be guilty, of the offence, and his conviction shall not be invalid by, the reason that it is based solely on such presumption;

[Provided that the Prosecution shall first make out a reasonable case against the accused charged under clause (vi) or clause (vii) of subsection (a) of section 9]
{Note: The words in square brackets were added by an amendment Act of 2001 as a result of the Supreme Court judgment in Wali}

Section 9(a) provides:

A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices: ...

(vi) [if he] misuses his authority so as to gain any benefit or favour for himself or any other person, or to render or attempt to do so or wilfully fails to exercise his authority to prevent the grant, or rendition of any undue benefit or favour which he could have prevented by exercising his authority;

(vii) if he has issued any directive, policy, or any SRO (Statutory Regulatory Order) or any other order which grants or enables any [undue] concession or

benefit in any taxation matter or law or otherwise so as to benefit himself or any relative or associate or a benamidar [or any other person]

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[See above, p.XX]

BURDEN OF PROOF

224. Under section 14(d) of the impugned Ordinance, the burden of proof has been placed on the person accused of an offence under section 9 (a) (vi) and (vii). Placing of burden of proof on an accused is not an unfamiliar concept in legal parlance. There [are] a large number of Statutes wherein the burden of proof has been placed on the accused....

Where the burden of proof is placed or presumptions are raised by a law on a class of persons that it creates, then as long as such presumptions are raised or the burden of proof is placed uniformly in respect of persons to whom such a law applies, there is no violation of the equality clause/s of the Constitution. Laws raising presumptions against and placing onus of proof upon an accused have repeatedly been challenged in various jurisdictions and it has consistently been the view of Courts that subject to their uniform application and there being a rational connection between the facts presumed and the facts proved, such laws are valid. It would be advantageous to refer to the case-law on the question of placing of burden of proof on the accused and presumption against him in regard to a particular offence provided in a special enactment. In *State of Madras v. A. Vaidyanatha Iyer* (PLD 1958 SC (Ind.) 264), it was observed:

Therefore where it is proved that a gratification has been accepted, then the presumption shall at once arise under the section. It introduces an exception to the general rule as to the burden of proof in criminal cases and shifts the onus on to the accused. It may here be mentioned that the Legislature has chosen to use the words “shall presume” and not “may presume” the former a presumption of law and latter of fact. Both these phrases have been defined in the Indian Evidence Act, no doubt for the purpose of that Act, but section 4 of the Prevention of Corruption Act is *in pari materia* with the Evidence Act because it deals with a branch of law of evidence e.g., presumptions, and therefore should have the same meaning; “shall presume” has been defined in the Evidence Act as follows: “Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved”.

It is a presumption of law and therefore it is obligatory on the Court to raise this presumption in every case brought under section 4 of the Prevention of Corruption Act because unlike the case of presumption of fact, presumption of law constitute a branch of jurisprudence. While giving the finding quoted above the learned Judge seems to have disregarded the special rule of burden of proof under section 4 and therefore his approach in this case has been on erroneous lines.

In *Muhammad Siddique v The State* (1977 SCMR 503), the following view was taken:

6. The learned counsel for the petitioner argued before us that the approach of the Courts below was erroneous, inasmuch as they had discussed the case from the angle whether the defence plea was true or not, whereas the correct approach should have been that the prosecution had established its case. We do not find much force in this submission. It is an admitted fact that the tainted money was recovered from the petitioner. Thereafter the onus shifted upon him to explain how he had received it. Consequently, the Courts below were justified in closely analysing the defence plea advanced by the petitioner;

7. It was next contended that the High Court had misread the evidence while holding Ghulam Rasul to be an independent witness. He referred us to certain statements made in Court to show that Ghulam Rasul was the cousin brother of the complainant. Since the conviction was based on the evidence of the complainant coupled with that of Ghulam Rasul, who was erroneously considered to be an independent witness, it (conviction) stood vitiated.

8. It is true that Ghulam Rasul P.W. was a relation of the complainant, but we are of the opinion that in the circumstances of the case the conviction is not liable to be set aside merely on account of the above misreading of evidence. The petitioner was caught red-handed with the tainted money and, thereafter, the onus on the prosecution was very light to establish his guilt. The remaining evidence on the record was sufficient to discharge the said burden.

9. In *Ikramuddin v. The State* (PLD 1958 Kar. 21), Bachal, J., in respect of a similar matter under the Anti-corruption Act, opined that "the presumption against the accused under section 4 of the Act is not to be drawn until the explanation offered by the accused is considered and found unsatisfactory. Where the accused offers a reasonable explanation which is acceptable and which raises a doubt as to the truth of the prosecution case, the presumption cannot be drawn. But if the Court feels justified in drawing a presumption against the accused after due consideration of the explanation, then the burden is on the accused to displace the presumption of criminal misconduct.

10. Their Lordships of the Supreme Court in *Mir Ahmed v. The State* (PLD 1962 SC 489) held: where there is a question of correct treatment of a plea in defence which is of a factual nature and is supported by evidence and circumstances, the decision must not be taken in relation to the accused's special pleading, but must rest on examination of the entire evidence, and if thereafter the Court is of the opinion that there is a reasonable possibility that the defence put forward by the accused might be true, this opinion reacts upon the whole case, and the accused is entitled to the benefit of such doubt, on the ground that the prosecution has not proved its case beyond reasonable doubt.

Reliance can also be placed on *Ghulam Muhammad v. The State* (1980 P.Cr.L.J. 1039) wherein it was observed:

10. I have carefully considered the above legal proposition. Section 4(1) of the Prevention of Corruption Act, 1947 embodies a special rule of evidence which is contrary to the well recognised legal principle, that in a criminal case the onus to prove the guilt of the accused is always on the prosecution because the accused is presumed to be innocent. This departure from the well settled legal principle

was necessitated by the fact that in corruption cases it was found extremely difficult for the prosecution to prove that the money or valuable thing accepted or obtained by a public servant was by way of illegal gratification because no explicit reliance could be placed on the uncorroborated statement of the bribe giver in that behalf as his position was that of an accomplice. So in order to overcome the above difficulty section 4(1) of the Prevention of Corruption Act, 1947 was enacted. Now in view of the aforementioned statutory provisions it is no longer necessary for the prosecution to prove that the money or other valuable thing accepted or obtained by a public servant was received for doing or showing an undue favour in return for the said money or the valuable thing. I am in respectful agreement with the interpretation of the provisions of section 4(1) of the Prevention of Corruption Act, 1947 as made in *Muhammad Saleem*. In *Muhammad Siddique v. The State* (1977 SCMR 503) the Supreme Court has also held that once the tainted money is recovered from the accused the onus to explain how he received it shifts upon him. Thus the prosecution case is not affected adversely merely because the statement of Muhammad Siddique is not corroborated by any evidence that the appellant had demanded illegal gratification from him and that the money paid to him which later on was recovered from him was by way of illegal gratification. The question of the appellant's guilt is to be determined on the explanation given by him with regard to the money received by him from *Muhammad Siddique*.

Reference may also be made to *Badshah Hussain v. The State* (1991 PCr.LJ 2299), wherein it was held:

Presumption: Burden to dispel presumption on accused; Once it was proved to the satisfaction of the court that tainted money recovered from accused had passed on to accused, the burden would be on accused to displace presumption arising under section 4 of the Act of commission of offence, which would be discharged if the accused person established his case by a preponderance of probability. [p.2303]C

In *Abdul Razak Rathore v. The State* (PLD 1992 Karachi 39), it was observed:

10. The presumption in section 4 of the Prevention of Corruption Act, 1947 arises only upon proof that the accused person has accepted any amount as illegal gratification. In the case of *Sultan Ali v. The State* reported in PLD 1971 Kar. 78, a learned Single Judge of this Court observed that it would be an outrage on common sense and reason to infer that under section 4 of the Prevention of Corruption Act, 1947, the presumption has itself been displaced and that the offence of bribery must be held to be established the moment the money is passed into the possession of the accused without further proof that it was accepted as an illegal gratification. When the law raises a presumption against the accused and calls upon him to prove the contrary, it is well-settled that the contrary can be said to be proved if the accused succeeds in establishing that the act attributed to him is capable of an interpretation other than that suggested by the prosecution. The proof of the contrary need not necessarily be by

evidence, oral or documentary; but it may be furnished by the statement of the accused himself or by the circumstances of the case.

11. In *Kazi Nizamuddin v. The State* reported in PLD 1979 Karachi 294, a learned Single Judge of this Court examined the provisions of section 4 of the Prevention of Corruption Act, 1947, and observed as follows:

It is true that section 4 of the Prevention of Corruption Act, 1947 provides for presumption in favour of prosecution when the tainted money has been passed into the hands of the accused and the burden would be upon him to prove that it was not accepted by him as illegal gratification but this would require consideration of two important points. Firstly that whether the money in question was tainted as alleged by the prosecution and secondly what is the standard of proof required from the accused when per statutory requirements presumption operates against him. On the first point, it has been argued before me that in the instant case when the complainant is not supporting the prosecution allegation that the marked notes were meant to be delivered as illegal gratification and both the complainant and the appellant in the instant case unanimously state that money was given and returned for some other purpose, which has nothing to do with the allegation of bribe, the money which was passed to the appellant during the raid was not tainted at all. On the second point, it has been argued before me that in the instant case when presumption operates against the appellant under section 4 of the said Act, the burden of proof which falls upon the appellant is not greater but lesser than the general standard of burden of proof on the prosecution which makes it imperative upon the prosecution to prove guilt of accused beyond any reasonable doubt. In this context it is further contended before me that in such a case when law raises a presumption against the accused and calls upon him to prove the contrary, it is well-settled that contrary can be said to be proved if the accused succeeded in establishing that the act attributed to him is capable of interpretation other than that suggested by the prosecution. The proof of the contrary need not necessarily be by evidence, oral or documentary, but it may be furnished by the statement of the accused or by the circumstances of the case.

Also see *Shabbir Ahmed v. The State* (PLD 1996 Karachi 537), wherein it was observed:

In my view the presumption imposed in section 4 of the Prevention of Corruption Act is not un rebuttable which can be rebutted by the statement of accused or by the circumstances of the case. The burden is still on the prosecution to prove beyond reasonable doubt that the tainted money was passed on to the accused and the same was recovered from his personal search.

6. Mr. Shahadat Awan, Advocate for appellant has argued that admittedly the raiding party has not seen passing of tainted money nor have heard conversation between the complainant and the appellant according to the learned counsel for the appellant this creates doubts in the prosecution case and the impugned conviction is not sustainable....

7. The Superior Courts have never sustained a conviction in an anti-corruption case where the Magistrate was not able to hear the conversation between the complainant and the accused nor in a case where the Magistrate was not able to see passing of tainted money from the complainant to the accused. In the instant case, it is an admitted fact that P.W.2 was sitting in the house of the complainant and came out after the revived signal from the concerned Mashir. By that time the conversation between the complainant and the appellant was concluded and the “tainted” money had already passed. Therefore, in my considered view this is not sufficient piece of evidence to sustain the conviction ordered by the learned trial Court.

8. In the case of *Bashir v. The State* PCr.LJ 670, the Magistrate who was supervising the trap as well as the other raiding party did not state at trial about passing of money nor heard conversation between the complainant and the accused. Benefit of doubt was extended and the accused was acquitted. In the case of *Arshad Mirza v. The State* PLD 1988 Lahore 640, the transaction regarding payment of illegal gratification was neither seen nor the conversation between the complainant and accused was heard by the raiding party and, therefore, the conviction was set aside. In the case of *Muhammad Akhtar Siddiqui v. The State* 1994 MLD 2029 a learned Single Judge of Lahore High Court Mr. Raja Afrasiyab Khan, J. (as his lordship then was) allowed the appeal and set aside the conviction order after considering the cases of *Muhammad Tahir v. The State* 1992 PCr.LJ 490, *Nazir Ahmad v. The State* 1988 PCr.LJ 775 and *Tariq Mahmood v. The State* 1985 PCr.LJ 1105. Following is the relevant portion of the said reported case:

“The prosecution had to prove that the members of the raiding party not only saw the payment of the tainted money to the accused but also overheard the conversation between the bribe-giver and the bribe receiver. In my view, the prosecution evidence does not inspire confidence in these circumstances. It is, therefore, not at all worth credence”.

9. After exclusion of the evidence of P.W.2 and P.W.4 the only evidence remains in the field is of Mashir Nazarat Ali who is the same person to whom Begum Alfaraz was married with. In his cross-examination he has admitted that the complainant had informed him regarding his harassment by the appellant. He has also admitted that he was not able to hear the conversation between the complainant and the accused. He has simply witnessed passing of tainted money. Therefore, his evidence is also of no worth to sustain a conviction. On the question of solitary evidence of the complainant, Mr. Shahadat Awan, Advocate for the appellant has cited an unreported case of *Inayat Masih v. The State* Criminal Appeal No. 9 of 1993 where a learned Single Judge of this Court after referring to the cases of *Muhammad Ramzan v. The State* 1990 P Cr.LJ 633, *Noor Ahmad v. The State* 1991 P Cr.LJ 1015 and *Malik Zafar v. The State* 1989 MLD 4215 held that it would not be safe dispensation of justice to base conviction on the evidence of such interested witness. Appeal was allowed and the conviction was set aside.

In *State of West Bengal v. The Attorney General for India, Intervener* (AIR 1963 SC 255), it was held:

(11) This is a deliberate departure from the ordinary principle of criminal jurisprudence, under which the burden of proving the guilt of the accused in criminal proceedings lies all the way on the prosecution. Under the provision of this sub-section the burden on the prosecution to prove the guilt of the accused must be held to be discharged if certain facts as mentioned therein are proved; and then the burden shifts to the accused and the accused has to prove that in spite of the assets being disproportionate to his known sources of income, he is not guilty of the offence. There can be no doubt that the language of such a special provision must be strictly construed. If the words are capable of two constructions, one of which is more favourable to the accused than the other, the Court will be justified in accepting the one which is more favourable to the accused. There can be no justification however for adding any words to make provision of law less stringent than the legislature has made it.

225. It will be instructive to refer to the Lima Declaration made at the conclusion of 8th International Anti Corruption Conference in Lima (Peru) in September, 1997, referred to by Ch. Mushtaq Ahmed Khan in his written submissions, wherein following steps have been enumerated, which may make both prevention and prosecution more effective:

30. Countries should improve the effectiveness of their laws dealing with corruption to the maximum extent possible consistent with their constitutions and international human rights norms including:

- Abolishing any requirement to prove that an official who received an illegal gift actually give favours in return;
- Providing a system for the declaration of assets by persons holding public positions of trust (and their families) and placing on them the obligation to justify increases out of line with legitimate sources of income;
- Introducing the periodic or random monitoring of the assets and lifestyles of significant decision makers in the public sector (and their families and associates), where appropriate by an independent agency;
- Laws which effectively empower the freezing, seizure and confiscation of the illicitly acquired wealth of officials found guilty of corruption wherever it may be and by whomsoever it may be held;
- Providing appropriate protection for witnesses (and their families) and protecting whistle blowers;
- Providing a system for the recording of gifts received by officials; ensuring that officials at all levels cannot hide behind immunities but are fully subject to corruption laws; and
- Debarring convicted criminals from standing for political office and appointment to positions of public rest.

226. Article 121 of the Qanun-e-Shahadat Order, also places the burden of proof on the accused, which reads as under:

121. Burden of proving that case of accused comes within exceptions: When a person is accused of any offence the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Pakistan Penal Code (Act XLV of 1860), or within any special exception or

proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

A bare perusal of the above provision would show that the onus to prove innocence may be shifted on to the accused, where existence of certain circumstances bringing his case within the ambit of general or special exceptions contained in the Pakistan Penal Code, is necessary to be proved for getting an acquittal, absence of which shall be presumed by the Court. We are, therefore, not inclined to hold that where a person is accused of an offence and the burden of proving innocence is shifted on to him having regard to the peculiar circumstances mentioned in any provision of law, the same can be derogatory to ordinary dispensation of criminal justice or violative of Articles 4 and 25 of the Constitution. The same view was correctly taken by a Full Bench of the Lahore High Court in the case of *Liaqat Parvez Khan v. Government of the Punjab through Home Secretary* (PLD 1992 Lahore 517).

227. It is well settled that matters relating to remedy, mode of trial, the manner of taking evidence and forms of actions are all matters relating to procedure. It is also well settled principle of interpretation of statutes that only a matter of procedure would be retrospective. However, if in this process any existing rights are affected on the basis of a statute the same would not operate retrospectively unless the legislature had either by express enactment or necessary intendment given the legislation retrospective effect. Viewed from whatever angle the placing of burden of proof on the accused, in the facts and circumstances of this case in juxtaposition with section 14(d) of the Ordinance falls within the realm of procedural law. Thus visualized, the plea raised on behalf of the petitioners that the ratio of *Nabi Ahmed (supra)* is applicable to all situations in the realm of substantive law, cannot stand a detailed scrutiny thereof. Even the assertion that *Nabi Ahmed (supra)* was followed in *Bhai Khan (supra)* by a learned Single Judge of the Lahore High Court, Lahore and therefore, it should be considered as applicable to the facts and circumstances of the present lis as well, also falls in the same category. Clearly, the cases of *Nabi Ahmed* and *Bhai Khan (supra)* are distinguishable and confined to the facts and circumstances of those cases.

228. The Accountability Courts have been established to deal exclusively with corruption and corrupt practices and hold accountable those accused of such practices and matters ancillary thereto so that cases can be decided speedily as also to guard against delays in investigation and to forestall the acts of the suspects who have been able to abuse the process of law by stalling investigations at initial stages through litigation of sorts. As to the validity of Section 14(d), that if a holder of public office or any other person has issued any directive, policy or SRO (Statutory Regulatory Order) or any other order which grants or enables any undue concession or benefit in any taxation matter or law or otherwise so as to benefit himself or any relative or associate or a benamidar or any other person is concerned, suffice it to say that there may be cases where the accusation cannot be supported by direct evidence and is a matter of inference of corrupt motive for the decision with nothing to prove directly any illegal gain to the decision maker. To protect decision making level officers and the officers conducting inquiry/investigation from any threats, appropriate measures must be taken

to relieve them of the anxiety from the likelihood of harassment for taking honest decisions.

229. Viewed in the above context, although shifting of burden of proof on an accused in terms of section 9(a)(vi)(vii) read with section 14(d) may not be bad in law in its present form, but would certainly be counter productive in relation to the principle of good governance. If decision-making level officials responsible for issuing orders, SROs etc. are not protected for performing their official acts in good faith, the public servants and all such officers at the level of decision-making would be reluctant to take decisions and/or avoid or prolong the same on one pretext or another which would ultimately lead to paralysis of State machinery. Such a course cannot be countenanced by this Court.

230. Be that as it may, the prosecution has to establish the preliminary facts whereafter the onus shifts and the defence is called upon to disprove the presumption. This is also the consistent stand taken by Mr. Abid Hasan Minto as well as the learned Attorney General who adopted his arguments. This interpretation appears to be reasonable in the context of the background of the NAB Ordinance and the rationale of promulgating the same notwithstanding the phraseology used therein. We are also of the view that the above provisions do not constitute a bill of attainder, which actually means that by legislative action an accused is held guilty and punishable. For safer dispensation of justice and in the interest of good governance, efficiency in the administrative and organizational set up, we deem it necessary to issue the following directions for effective operation of Section 14(d):

1. The prosecution shall first make out a reasonable case against the accused charged under Section 9 (a)(vi) & (vii) of the NAB Ordinance.
2. In case the prosecution succeeds in making out a reasonable case to the satisfaction of the Accountability Court, the prosecution would be deemed to have discharged the prima facie burden of proof and then the burden of proof shall shift to the accused to rebut the presumption of guilt.

Easing the Burden of Proof

The following views from an article entitled "Legal Provisions to Facilitate the Gathering of Evidence in Corruption Cases: Easing the Burden of Proof" by Nihal Jayawickrama, Jeremy Pope and Oliver Stolpe provides another view on the issue of the burden of proof in corruption cases.

The expression "reverse onus" is perhaps unfortunate and inaccurate. Its continuing use invariably leads to controversy. To "ease" the burden of proof ought not to be regarded as "shifting" the burden to the accused person. The focus should be on what the Judicial Committee of the Privy Council has described as the doctrine of "implicit flexibility" [*Attorney-General v Hui Kin-Hong*, Court of Appeal of Hong Kong, 3 April 1995]. To "ease" the burden of proof

should be viewed as drawing the right balance between the rights of the accused person and the interests of the community in situations where, without eroding the rights, common sense dictates that an explanation be sought from an official in possession of disproportionate wealth.

Efforts to ease the burden of proof in corruption cases have been criticized for a lack of rationality or proportionality or both. It has been argued that the interest of society in combating corruption should not outweigh an individual's fundamental rights. However, the rationale for the offence of "illicit enrichment" and authority for the confiscation of "unexplained wealth" is, on the one hand, deterrence and, on the other, the positive effect that punishing offenders would have on restoring confidence in the rule of law. The theory of deterrence, which is founded upon the assumption that man is a *homo economicus* whose decisions are the outcome of a careful weighing of advantages and disadvantages, has been rejected so often that it can almost be discarded. Research reveals that the probability of apprehension, prosecution and conviction is seldom considered by an offender. Corruption and extortion, its twin, differ from many other offences in that they are motivated less by revenge, hate or even the inability to eke out a living through lawful means than by excessive greed. Confiscation, if designed as an effective measure, is likely to have an impact at the initial stage of demanding and accepting a bribe. Moreover, empirical evidence suggests that society regards prompt and effective punishment as one (and possibly the most important) element of a credible anti-corruption strategy.

Despite having emerged as a controversial issue at the early stages of the negotiation of a draft convention against corruption, easing the evidential burden of proof in respect of corruption offences appears to be both necessary and desirable in order to deter potential offenders as well as to facilitate the investigation and successful prosecution of such offences. It is likely to alter the equation of "risk versus reward" that lies at the heart of many calculations when it comes to deciding whether or not to engage in corruption. If successful detection and prosecution are rendered more likely, and a loss of the rewards more probable, then it follows that individuals will be less tempted to engage in misconduct. The challenge, therefore, is not simply to reverse the burden of proof, but to identify the situations where, in the face of strong circumstantial evidence, a person ought to be called upon to explain that which only he or she knows, namely, how he or she came to be in possession of wealth grossly disproportionate to his or her known legitimate income.

[*Forum on Crime and Society*, vol 2(1) 2002, 24 at 29-31]

SENTENCING

In Rajendran s/o Kurusamy & Ors v Public Prosecutor (below) it was said:

Where the consideration of sentences is concerned, a general body of case law has evolved over the years giving guidance to the principles to be applied. Such principles include taking into account the facts of the offence, antecedents of the accused, mitigation, taking into consideration other offences, general thresholds and benchmarks of sentencing, the seriousness of the offence, the deterrent principle and protection to the public. It is useful to have regard to similar cases for a prevailing idea as to the kind of sentences appropriate in the present case.

However, whilst the general principles of sentencing apply to corruption cases just as to any others, the courts have recognised that corruption offences merit special consideration.

In this section, a variety of views are included. The case of S v Ngunovandu, which is of particular note in that it involves an attempt to bribe a judge, provides an illustration of the factual basis upon which a court might proceed in dealing with a corruption case. The other cases are noted in order to provide some assistance on sentencing.

S v NGUNOVANDU

High Court of Namibia

Steyn J

June 17-21 1996

Cases referred to in the judgment

Miller v Minister of Pensions [1947] 2 All ER 372

R v Patel 1944 AD 511

R v Solomon 1954 (2) SA 502 (T);

S v Deal Enterprises (Pty) Ltd and Others 1978 (3) SA 302 (W)

S v Glegg 1973 (1) SA 34 (A)

S v Makhunga 1964 (3) SA 513 (C)

S v Narker 1975 (1) SA 583 (A)

S v Van der Westhuizen 1974 (4) SA 61 (C)

For the State: C Miller

For the accused: G D Roux

STEYN J

This case concerns an attempt allegedly made by the accused to bribe a judge of the High Court of Namibia, Judge Pio Marapi Teek.

The main charge against the accused reads as follows:

In that during the period 23 November, 1994 to 4 January, 1995 and at or near Windhoek in the district of Windhoek the said accused did wrongfully and corruptly offer to Pio Marapi Teek, a judge of the High Court of Namibia and as such a public official, payment of N\$50 000 in cash as a fee, gift or reward with the intent to induce or to attempt to induce the B said Pio Marapi Teek J to acquit or not to convict Franciscus Feris, an accused charged in the High Court of Namibia with the theft of diamonds in contravention of s 30 of Proc 17 of 1939, alternatively with being in possession of diamonds in contravention of s 28(c) of Proc 17 of 1939.

There is an alternative charge of attempting to defeat the ends of justice. In the event it is unnecessary to deal with this alternative charge. The accused, represented by counsel, pleaded not guilty both to the main charge and the alternative charge.

The principal witness for the State was Judge Teek. He testified that he presided at the criminal trial of one Feris. This accused, that is Feris, appeared before him on a charge of the theft of diamonds from Consolidated Diamond Mines in contravention of section 30 of Proc 17 of 1939; alternatively with being in possession of diamonds in contravention of section 28(c) of Proc 17 of 1939. This case was set down for hearing on 25 and 26 October 1994. The accused person, the said Feris, pleaded not guilty. The hearing proceeded on those two days but was not completed and was postponed by the presiding officer until 8 December for hearing on that and the following day, the 9th.

Judge Teek testified that he had an appointment with his priest in the early morning of 23 November, 1994. He said that he was on his way to keep this appointment at the Roman Catholic Cathedral. This took him through the Old Mutual Arcade where he was accosted by a person. Although this person was unknown to him at the time he identifies the individual as the accused. The latter indicated to him that he wished to speak to him. The complainant says that he told the accused to make an appointment to see him in his chambers. On the morning of the following Monday, 28 November 1994 the accused came to the complainant's office and had a meeting with him. It is necessary, in order to relate the events sequentially, to interpose at this stage the evidence of the complainant's registrar, Ms Cronjé.

Her evidence was that in late November or early December the accused came to her office. He introduced himself by name and said that he had an appointment to meet with the complainant. The witness says she had difficulty with the

spelling and pronunciation of the accused's name. She asked him to spell it or write it on a piece of paper and went in to inform the complainant of the fact that the accused was there to see him. I should add that Ms Cronjé stated that this was the second occasion on the same day that the accused had been in her office. On the first occasion Judge Teek had not been present and she had requested the accused to return later. A meeting took place between the accused and the complainant. According to the latter it became clear during the course of the discussion that the accused wished to discuss the case in which the said Feris was charged with the offence aforementioned. Whilst the complainant could not relate verbatim the details of this conversation he says that it became clear to him that the accused was laying the ground work for offering him an inducement to acquit the said Feris. The complainant gained this impression, he says, as a result of certain remarks made by the accused. These related to statements made by the accused that Mr Feris was in great distress as a result of the prosecution; that he stood to lose everything he had if he were convicted and that he was a man of considerable means.

The complainant said that he decided to intervene at this stage and was intent on terminating the conversation. He was about to attend a judges' meeting and he informed the accused of this fact and urged him to leave the matter at that. Especially, he says, that he told the accused, if he had understood him correctly, it was a matter which he did not wish to have pursued. The accused, according to the witness, reacted by saying that there was some misunderstanding which he was anxious to clarify. The complainant's testimony is that he informed the accused that should he wish to do so, he should contact him at his home. The complainant's telephone was connected to a recording machine and he said that he was of the view that should the accused, despite the complainant's discouragement, assist in importuning him, he would be able to record any conversation in which this was done.

The case against the said Feris proceeded on 8 and 9 December and was adjourned until 6 January, 1995 for judgment. On 13 December, 1994 the complainant received a telephone call. He says he recognised the accused's voice. He immediately switched on the recording mechanism, thereby committing to tape the conversation that ensued. The complainant's transcription of the tape and his version of the conversation as transcribed was handed in as Exhibit B and reads as follows:

'Teek (T): Hallo, who is speaking?

Ngunovandu (Ng): Ngunovandu.

T: Anything else?

Ng: Nothing, we are trying. So that we go and rest during the holidays/vacations.

T: Are you going somewhere?

Ng: I am trying to go elsewhere (2x).

T: Going out of Windhoek?

Ng: Yes, out of Windhoek.

T: Man, I say, I don't actually know you. What is your first name?

Ng: Daniël Ngunovandu.

T: Daniël. O yes! We have never met before in fact.

Ng: In fact we met, even at home we were together, when I tried . . . then were (great) good men. We sat together at home.

T: Aha!

Ng: ...

T: Man, listen. When you came to me on Monday. The Monday when you came to my office. I didn't. . . . You remember I was on my way, I was on a way to the meeting. So, I didn't quite catch what you were trying to tell me. Because if it is what I think was happening. We really leave it at that. It is quite dangerous. Ja, I mean, I don't know, really. I didn't catch exactly catch what you were trying to say. But if I think it is what it was. Then we at best leave it at that. We pretend it never happened.

Ng: No. The big problem. I say. Where is it?

T: It is quite dangerous to play that sort of thing. Me being. I don't quite know what you had in mind. You know. So, it is very safe for me, as well as for you if we leave it exactly at that point of departure. Rather than going deeper into it.

Ng: Yes but, when I tried to put the thing clearly, I put it that the person is someone I know, the person Fanie concerning that case. To me it is so confidential. There was no third person or any person who might know those things of story. I rather told you there is something like this and that. The person has problems as a person. He's got everything, he has to do. He is trying to take away that thing. At least he is trying to. . . .

T: You are referring to the case of Feris?

Ng: That is correct, yes.

T: I think, really. It is very dangerous.

Ng: Boet, really the dangerous. You have to believe in me. I know precisely I don't think there will be any problem whatsoever. And I am hundred per cent sure.

T: What I mean is it can be dangerous to you. You know that you might get into hot water if it is what I think you are trying to say.

Ng: That's what, I fear. That's why I say we at best leave it just at that.'

There are the following significant facts recorded in the transcription.

- (1) The caller identifies himself as Daniël Ngunovandu.
- (2) The complainant refers to the fact that a meeting had taken place on 'the Monday you came to my office'.
- (3) There is a specific reference to the Feris case.
- (4) The matter under discussion is thrice referred to as being dangerous or very dangerous.
- (5) The caller is trying to 'go out of Windhoek and rest' during the holidays.

It is appropriate to record at this stage that two concessions have been made concerning the recording of this conversation - one concession was made by the State and the other on behalf of the accused. I record the latter concession first:

Whilst, according to the defence, it was clear that there were some inaccuracies in the transcription, these were irrelevant. It was accordingly conceded that Exhibit B could be relied on as a correct transcription of the conversation recorded on tape.

The State on the other hand conceded that it could not contend that the contents of the conversation attributable to the caller amounted to the offer of a bribe.

It fell short of actually offering the judge a consideration in return for acquitting the accused in the Feris case. However, the matter does not end there. On 4 January, 1995, two days before the judgment was due to be delivered in the Feris trial, the complainant received another telephone call. Recognising the voice of the accused he again connected the recording machine in order to tape the conversation. He says that he did so because he recognised the voice of the accused.

This transcription, Exhibit C, which is similarly admitted as a correct reflection of what appears on the tape reads as follows:

'Ng: Mr Teek!

T: Yes (Part in between accidentally erased).

Ng: You do not have confidence, or something which might or that you see that there might be . . . consequences or problems in fact there and there I myself have the belief I am not at the stage of telling you something which might leak or come are or the other problem.

T: What actually did you want? I didn't follow everything.

Ng: You see Mr Teek, I talked to that person. Just to give you a short briefing on that, that is Feris whose case is on the 6th. We came to the point that he has got something or money, you see.

T: Yes.

Ng: He does not want to be in the problem he finds himself in. So I thought I will try to tell you. Because of your honesty or honest work in the process as a judge. You must not be involved in those kinds of things.

T: The money he has what does he want to do with it? What does he want to do with the money?

Ng: He wanted to give it to you.

T: To do what with it?

Ng: He wanted it in that manner. You see. But you see that there was a problem.

T: He will give me money to do what with the money?

Ng: You throw out the case.

T: My goodness. That's quite serious. Were you sent by him or by some other persons?

Ng: No, there is nothing else. It is his own. He thought like that. As a person I know.

T: This amounts to trying to bribe a judge. That's quite a serious matter.

Ng: Yes. If you see it is not going to work out . . . I don't think there be the one or

other mistake. But if you think there will be any problem then we have to drop the whole thing.

T: But I cannot drop it. If it reached where it is now. Cannot drop it. I cannot. Because as a judge I can no longer be seized with that matter and then I have to report the matter.

Ng: Report the matter where?

T: To the relevant authorities. Because I have to give reasons why I am withdrawing from the case. Because I cannot carry on with the case. That is why I said at the beginning that whatever you had in mind, its better if it is left unsaid. You see. This might have disastrous consequences and repercussions for both of us - the judge, accused and yourself who approached me.

Ng: . . . then we drop the whole thing.

T: I can't because whether I accepted the offer or I did not accept the offer, you know, the repercussions are serious. Anything can happen. So I cannot leave the matter there. It is impossible you know. My whole integrity and dignity of the Court is at stake here.

Ng: I do understand, you see.

T: Such a thing must not be tolerated where judges can be approached and cases be dismissed and certain offers be made. We cannot allow that. It's impossible.

Ng: I understand the whole matter but as a person who works for the truth and the way it should be, I say. There might be repercussions or problems. But I think really there would not be the one or other problem.

T: No, no. In today's world I cannot trust my own shadow. How on earth can I trust someone else, especially in a position like this?

Ng: . . . I think that from my side, there is not third party or someone who might know.

T: I think we rather drop the whole matter here and I will take up the necessary steps because really come what may I cannot carry on with the case. You see. I can no longer carry on with the case. Because this I have to live with my conscience and a skeleton in my wardrobe. Something I am not prepared to do....

Ng: I understand very well. . . .

T: I think let's leave it at here before we go any further. Alright bye, bye.'

(That was on 4 January, 1995 at ten past seven.)

I highlight a few of the most significant aspects of the conversation. In contrast to the previous conversation an offer is now made to make a payment of an unspecified amount to the complainant 'to throw out the case' against the said Feris bearing in mind that this case was due to be disposed of on 6 January, 1995, two days later. It is also clear from the transcription of the conversation that having ascertained the true nature of the caller's intention, the complainant emphatically rejects the offer of a bribe but he also informs the caller that he will be reporting the matter to the relevant authorities. He informs the caller that the latter's request 'to drop the whole thing' cannot be acceded to because 'my whole integrity and the dignity of the Court is at stake here'.

The recording of the conversation also reflects that the complainant added very specifically that it was his view 'that such a thing must not be tolerated where judges can be approached and cases be dismissed and certain offers be made. We cannot allow that. It is impossible.'

The recording reflects that the complainant concludes the conversation by saying the following: 'I cannot possibly by virtue of my profession and the oath I have taken, leave the matter there.'

According to the witness he now decides that he needs to involve the wisdom of his Judge-President in the matter. The latter was on leave at the time and was only returning on 1 February. He therefore adjourned the Feris matter once again. When the Judge-President returns he reports to him and to his colleagues the events that had occurred and he does so at a judges' meeting. At this meeting the decision is taken that he should report the matter to the appropriate authorities and this was duly done. Subsequently the complainant recuses himself from the hearing of the Feris matter.

Before dealing with cross-examination and the evidence of the defence there are two other matters I need to refer to. The first is that it was not disputed that certain matter was accidentally erased from the first recording and probably also from the second. There were also certain parts of the conversation that were indistinct and therefore not recorded. Secondly, both in his statement and in his evidence-in-chief the complainant averred that a sum of R50 000 or Namibian dollars was offered to him by the accused. During the course of that portion of the evidence he said that this part of the conversation was part of what was accidentally erased.

In cross-examination it appeared that whilst the complainant did not know the accused, the latter in the discussion in the judge's chambers did raise the fact of a family connection and that the families and more particularly the accused's father and one of his brothers knew the complainant.

The question of the quantum of the bribe was raised in cross-examination and it would appear that the complainant was unclear how and when this figure had been mentioned by the accused.

Defence counsel also elicited the fact from the complainant that, some time subsequent to the matter having been reported, an approach was made by a stranger to the witness and certain threats were made to him because he was pursuing the complaint. It is common cause that he did not report this incident to the authorities.

In cross-examination it was put to him, that is the complainant, that the accused would deny ever having attempted to bribe him; that he, that is the accused, was

not in the complainant's office on the day in question and that he had not telephoned him as alleged as he was on vacation on the dates concerned. This was at the family's communal home in the Herero Reserve at Omatjetje at a place called Ovehoetua.

This was then also the evidence of the accused in his defence. It appears that he has worked as a consultant for a prominent insurance company whose head office in Namibia is in Windhoek in the Old Mutual Arcade. His occupation is that of an insurance salesman. According to him his only contact with the complainant was during the period July to September, 1994. It was during this period that he visited him in his office on a single occasion. He did so with the objective of selling an insurance policy to the complainant. He admits that he was on this occasion received by Ms Cronjé and that he introduced himself as Daniël Ngunovandu. However, he denies having told her that he had an appointment to see the complainant. In substantiation of the purpose of the visit he said that the reason he went there was that as a black judge the complainant was part of his, that is of the accused's, target market and that he seized the opportunity to sell an insurance policy to him. His evidence is that, in the event, he was taken to the judge, introduced himself and according to him told the complainant that he would like to sell him an insurance policy. However, as things turned out it would appear that he tried to sell him Unit Trusts. According to the accused the complainant's response was that he had enough policies. The accused, according to him, then tried to secure the complainant's portfolio of insurance policies, but the latter declined to give it to him.

According to the accused it became apparent that the complainant did not want to listen further. The accused terminated the conversation and left the judge's chambers.

The accused denied that he and the complainant ever discussed family matters. He denied that he had ever raised the Feris trial in which the judge was presiding at this meeting or at any other time. He denies that any conversation of the kind described by the complainant ever took place.

Concerning the telephone conversations, as I have indicated, his evidence was that it was impossible for him to have done so as he was at Omatjetje in the Ovehoetua Reserve. All his family, his parents and his brothers were together to celebrate the birthdays of his father and one of his brothers on 15 and 16 December. The nearest telephone to where they were was some thirty kilometres away. He specifically denied ever making the calls concerned or that the voice recorded on the tape is his.

Some attempt was made to corroborate this version by calling his brother, Philip, to testify that during the whole of the period from 11 December until 8 January he had the accused constantly under observation and that it would have been impossible for him to have gone anywhere and to have made these telephone

calls without his knowing about it. The accused says specifically that he does not know Mr Feris and says that he was never asked by the latter to approach the complainant at all or in connection with the case the judge was hearing and in which Feris was involved. In cross-examination the accused gave a somewhat unconvincing explanation as to how he came fortuitously and without an appointment to visit the judge in his chambers. He sought to establish that it was only during the period July to September that such a meeting could have occurred. What the product was that he actually offered his prospective client was also not particularly clear. Whilst he conceded the possibility that he may have bumped into the judge in the Old Mutual Arcade, he denied ever having had the conversation described by the complainant or that he had sought an appointment with him. More specifically he denied ever having been in the judge's chambers on 28 November or ever having spoken to him on the telephone. He could not furnish any explanation as to why the complainant should falsely implicate him or how a person pretending to be him, could have telephoned the judge to discuss the case with him over the phone having impersonated him successfully at the meeting in the judge's chambers on 23 November 1994.

Before dealing with the question of the guilt or the innocence of the accused I should record my impressions of the witnesses who testified. The complainant's evidence was not free of contradiction. However, these contradictions were in my view of the kind one would have expected of any witness who was called upon to testify after a lapse of some eighteen months when these incidents took place. However, a much more serious attack on the witness' credibility was directed by the accused's counsel. This attack had its origin in the delay between the alleged offering of a bribe and reporting it to the authorities. Counsel was constrained to describe the judge's conduct as 'startling and contrary to what would be proper for an officer of the Court'.

This submission requires serious examination. It would be superficial and unfair to say that because the first incident occurred on 28 November 1994 and that the matter was only reported on or about 1 February that there was a delay of two months between the making of the offer of the bribe and the first report of such an offer. I say this because it is common cause that on an acceptance of the complainant's evidence, no unequivocal offer was actually made by the accused prior to the telephone conversation on 4 January 1995. On the two previous occasions the complainant succeeded in preventing the commission of any offence by his conduct in silencing the prospective offeror before the offer could be made. Indeed it was, as I have said, only on 4 January 1995 that a clear and unequivocal offer to pay the complainant money to acquit Mr Feris was made. Four weeks elapsed between the making of this offer and the report to the Judge-President. However, there are several matters that have to be borne in mind in this respect.

1. The person who approached the complainant was a fellow tribesman and

according to him, that is the complainant, someone whose family he knew. It is therefore in my view understandable that he was initially reluctant to respond too aggressively and proactively as someone else in his position may well have done.

2. Moreover his initial conduct was in accordance with his character as I was able to assess it during a fairly lengthy and detailed cross-examination. He appeared to me not to be someone who would by virtue of character have reacted in an aggressive or confrontational manner when the matter was first broached.

3. It is noteworthy and in my view of fundamental importance that when the bribe is made on 4 January, the complainant's reaction is not only to reject it emphatically, but also to inform the person making the offer that he is going to report the fact to the relevant authorities.

4. Fourthly, I record that I do not find it unreasonable that the complainant awaited the return of his Judge-President and all his colleagues before sharing with them this incident and seeking their collective wisdom. In this respect it must be borne in mind that the complainant found himself in a most invidious position. He knew that he could perforce be exposed to the glare of unpleasant publicity; that he would as a judicial officer be obliged to testify in the very Court in which he presides and that he could well, as in the event he was, be subjected to challenging cross-examination and even criticism. It is my view that no fair or any legitimate criticism can be attributed to the conduct of Judge Teek in respect of the manner in which he dealt with the approaches allegedly made by the accused to him.

Insofar as the credibility of the witnesses is concerned I record that the complainant was a truthful witness; he is corroborated in material respects by his registrar, Ms Cronjé who was a patently truthful and honest witness. The relevant incidents in respect of which she corroborates him are in regard to the approximate date of the visit of the accused and his meeting with the complainant; the identity of the person concerned, not only that it was the accused but that he identified himself by name and that he said that he had an appointment to see the judge. The latter statement tends to lend credence to the evidence of the complainant that he was accosted by the accused on 23 November and that the prospect of a meeting pursuant to an appointment was mooted.

The fact that the evidence tendered by the State is credible is not the equivalent of proof beyond reasonable doubt. If the version deposed to by the accused can reasonably possibly be true he is entitled to be acquitted.

Accordingly the question the Court has to ask itself is can his version reasonably possibly be true? The accused's evidence was certainly not given in a convincing manner. However, to reject it out of hand because of demeanour would, in my opinion, not be justified. Credibility findings based on the demeanour of the witness who testifies in a language requiring translation must be made with the

greatest caution. So much of what may appear to be circumlocution can be ascribed to the vagaries of the language and the idiom of the original version.

However, I do record that the accused did tend to be evasive and responded to questions in a manner which was less than frank. However, I do not find that this fact on its own entitles the Court to reject his evidence. The probabilities of the two competing versions do however require evaluation.

The evidence of the complainant as corroborated by Ms Cronjé concerning the circumstances of the first meeting are certainly consistent and in my opinion much more likely. The date of the meeting, fixed by the judge with reference to a meeting he had diarised with his priest and which is confirmed by Ms Cronjé is certainly far more acceptable than that of the speculative identification of date by the accused.

Counsel for the accused, quite rightly in my view, was unable to argue that the incident which took place in the judge's chambers on 28 November was a fabrication. It follows that the trial of the said Feris, in view of the date as determined, was under way and that someone sought to bring influence to bear on the presiding officer and therefore that the meeting did indeed take place at the end of November as testified by the witnesses.

The next question is: Who was the visitor? We know beyond doubt that it was someone who called himself Daniël Ngunovandu. We know this because this is the name that Ms Cronjé wrote down because she had difficulty in spelling and pronouncing it. We also know that the visitor introduced himself to the complainant by the same name. There can be no reason to doubt the complainant's evidence that the family relationship was discussed and more particularly the relationship with Daniël's father and one of his brothers. We also know that the complainant was certainly of the view that the man he saw on the Monday, the 28th, was the same man who had accosted him in the Old Mutual Arcade a few days previously, that is on 23 November. To seriously suggest that in these circumstances the two witnesses who identified the accused as the person who was there and conducted the conversation with the complainant, was an imposter impersonating the accused, borders on the preposterous. I have no doubt that the person who was in the judge's chambers on 28 November, 1994 was the accused. I am satisfied that there can be no doubt that in the course of that meeting the Feris trial was referred to by the accused and that the complainant's evidence in this regard must be accepted. Should further corroboration for these findings be required it is to be found in the undisputed contents of the telephone conversation of 13 December as reflected in Exhibit B. Once again credulity is stretched beyond legitimate limits to suggest with any conviction that someone impersonating the accused and giving his name, pursues the ground work laid on the occasion of the visit to the Court house on 28 November. I am accordingly equally certain that the person who made the call on 13 December was the accused. It is true that the record of the conversation

taped by the complainant on 4 January 1995 does not reflect the name of the caller. However, I find it inconceivable that it could have been anyone other than the accused. Not only does the complainant identify the voice as that of the accused to whom he has spoken on three previous occasions - granted once only briefly, but extensively on two other occasions - but it is highly improbable and in my opinion pure speculation to suggest as a reasonable possibility that a new interlocutor is used to pursue the efforts initiated on the two previous occasions.

In coming to this conclusion I have adopted the approach advanced by Mr Justice Nicholas which is recorded in *Fiat Justitia, Essays in Memory of Oliver D Schreiner*, published in 1982 in an article under the title 'The Two Cardinal Rules of Logic in *R v Blom*'. The relevant passage is cited in Hoffmann *The South African Law of Evidence* 4th ed. at 592 and it reads as follows:

In a criminal case the ultimate proposition to be proved, the *factum probandum*, is the guilt of the accused. Where the case is one depending on circumstantial evidence, the *factum probandum* is established as a matter of inference from the proved facts, the *facta probantia*. But a *factum probans* may itself be a proposition to be proved by way of inference from other facts.

In considering whether the *factum probandum* has been established in a criminal case depending upon circumstantial evidence, the trier of fact must decide two questions: whether the inference of guilt can on the proved facts logically be drawn; and whether guilt has been proved beyond a reasonable doubt. The latter requirement does not necessarily mean that "every factor bearing on the question of guilt must be treated as if it were a separate issue to which the test of reasonable doubt must be distinctly applied". But the question remains whether the second rule in *Blom* applies to the drawing of intermediate inferences. It is submitted that it does apply.'

I should add that it might have been necessary to weigh the evidence in this respect concerning whether the last call was made by the accused or someone else, even more anxiously, if the evidence of the accused had been to admit making the first telephone call and to have said that he had then desisted and did not make the second call and that someone else must have taken up the cudgels on behalf of Mr Feris. But we now know that he, in his evidence, denies ever having made any call at all. Hence it would in my judgment be pure speculation to consider that a new interlocutor intervened.

Of course anything in life is possible and extraordinary events do occur. However, the criminal justice system and the administration of criminal justice would be in serious jeopardy if absolute certainty were to be the required criterion for a conviction.

Denning J, as he then was, in the judgment in *Miller v Minister of Pensions* [1947] 2 All ER 372 at 373 in a well-known passage, says the following:

'Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that will suffice.'

A similar dictum is to be found in a judgment of the South African Court of Appeal in the decision in *S v Glegg* 1973 (1) SA 34 (A). An excerpt from the English headnote reads as follows:

'The phrase "reasonable doubt" in the phrase "proof beyond reasonable doubt" cannot be precisely defined but it can well be said that it is a doubt which exists because of probabilities or possibilities which can be regarded as reasonable on the ground of generally accepted human knowledge and experience. Proof beyond reasonable doubt cannot be put on the same level as proof beyond the slightest doubt, because the onus of adducing proof as high as that would in practice lead to defeating the ends of criminal justice.'

In these circumstances I have come to the conclusion that the State has proved the case against the accused beyond reasonable doubt. It is also common cause that the making of an offer to bribe is the commission of the crime of bribery and there is ample evidence to support this. It is reported in our South African Law of Criminal Procedure, the revised 2nd ed at 223 and more particularly in a decision of the Court of Appeal in *R v Patel* 1944 AD 511.

I would add that I have carefully evaluated the evidence and the full and detailed submissions of the accused's counsel and I reaffirm that and that the State has proved the guilt of the accused beyond reasonable doubt and I find him guilty as charged on the main charge of bribery.

The Court has to determine what an appropriate sentence is for the accused. In assessing this, it has to reconcile the often competing interests of the accused and of the community. It has to evaluate the gravity of the offence and ensure that the sanction it imposes speaks of an abhorrence of the crime but is not so harsh as to unfairly penalise and destroy the offender.

Insofar as the accused is concerned his counsel has referred to a number of mitigating circumstances. First, and perhaps most importantly, the accused at the age of 35 is a first offender. The Court must give considerable weight to this

consideration.

It must be assumed in his favour that he has led a law-abiding life, unblemished by criminal conduct. He has a large family dependent upon him. He will lose his employment and the extra-curial consequences of his conviction and sentence will bear heavily on him and on his dependents. By virtue of his physical setbacks, prison life will probably punish him more harshly than most. As far as the crime is concerned, counsel submitted that it is unlikely that he will ever repeat his offence. Incarceration in itself will by virtue of his position in his community tend to deter him as an individual from becoming a recidivist. His counsel has in fact urged that all these circumstances are so weighty that it should move the Court to avoid the imposition of imprisonment. Mr Miller for the State has pointed to certain aggravating features. The accused, he says, persisted in his attempts to bribe the Judge. Despite the latter's attempts on two occasions to 'warn the accused off', the latter was undeterred and over a period of weeks eventually succeeded in communicating an unequivocal monetary inducement to Judge Teek. Mr Miller also submitted that it aggravated the accused's conduct that his target was a Judge of this Court; a high office which certainly should be regarded as beyond the contemplation of any criminal as a suitable candidate to importune. It was, he said, an attempt to corrupt the administration of justice at the highest level. Counsel also pointed to the fact that the accused has not advanced any mitigating circumstances concerning how it happened that he came to be involved in the attempt to secure the corrupt acquittal of the accused in the Feris trial. In all the circumstances the aggravating features significantly outweighed the personal factors referred to by his counsel. He urged the Court to impose a sentence of imprisonment on the accused and stressed the deterrent aspect of this form of punishment in all the circumstances. The crime of bribery has long been regarded as morally repugnant and was visited with criminal sanction as early as 59 BC. The authors of the standard work on South African Criminal Law and Procedure (revised 2nd ed) D vol II at 214 record that:

'In the late (Roman) republic a series of enactments of which the most important was the *lex Julia revel* of Julius Caesar, punished officials who accepted any consideration in return for action or inaction by them in an official capacity.'

Certainly in South African law it has undoubtedly always been regarded as a serious offence and there are numerous decisions in the Courts of that country that articulate this view. See in this regard *R v Solomon* 1954 (2) SA 502 (T); *S v Makhunga* 1964 (3) SA 513 (C); *S v Van der Westhuizen* 1974 (4) SA 61 (C) and *S v Deal Enterprises (Pty) Ltd and Others* 1978 (3) SA 302 (W). In *S v Narker* 1975 (1) SA 583 (A) at 586A the South African Judge of Appeal, Mr Justice Holmes coined the ringing phrase that:

'Bribery is a corrupt and ugly offence, striking cancerously at the roots of justice. . . .'

There is in my view no reason why this approach to this offence should not also apply in full measure in this jurisdiction. In a country, newly independent and attempting to build afresh a cohesive and efficient administration, branding corruption as evil and unacceptable is particularly imperative. Should the community gain the impression that its officials can be subverted from serving the public interest by illicit monetary inducements, respect for such administration will soon disappear. The quality of the public service will rapidly deteriorate and the State body corporate will at best barely survive.

Whilst the importance of sentencing as a mechanism for controlling crime can easily be overstated, especially by those who prioritise retribution as an element of punishment, there can in my view be no doubt that the deterrent impact of punishment is particularly relevant when it comes to determining a sentence for premeditated offences. This approach is clearly appropriate when a Court is seized with punishing an offender for crimes of dishonesty. Whilst each case must depend on its own circumstances, sentences of imprisonment for aggravated crimes of dishonesty must always be seriously considered as particularly appropriate for offenders who, prompted by greed, commit grave offences of dishonesty.

Mr Roux for the accused has rightly stressed the fact that efficient policing is a most powerful force in combating crime. I agree. Bribery is difficult to police, difficult to detect and difficult to prosecute successfully. That does not mean that the offender who is caught must be treated less than is fair and just. But it does mean that the judicial officer weighing the interests of the offender and striking a balance with the interest of society, must give proper weight to the deterrent impact of the sentence he passes.

I have carefully evaluated the personal circumstances of the accused. I have had particular regard to the extra-curial consequences which a sentence of imprisonment will have on him and on his family. In view however of the gravity of the offence and the circumstances in which it was committed I have no doubt that a sentence of imprisonment is appropriate. I have given due weight to the legitimacy of the contention that for this accused - a first offender - going to jail is in itself a highly destructive experience. However, having regard to his persistence, the brazenness of his conduct and the high office he targeted, I have concluded that a substantial period of imprisonment should be imposed. The sentence the Court passes must send a clear message to the Namibian community of the abhorrence with which the Court views the conduct of the accused.

The sentence of the Court is: seven years' imprisonment of which three years is suspended for five years on condition that the accused is not during the period of

suspension convicted of a crime of dishonesty which is so serious as to merit the imposition of an unsuspended sentence of imprisonment without the option of a fine.

RAJENDRAN s/o KURUSAMY & ORS v PUBLIC PROSECUTOR

High Court of Singapore (1998)

Yong Pung How CJ

The three accused had been convicted on two charges of a conspiracy to fix the results of two football matches in Singapore. The first accused, B1, was alleged to have offered money on two occasions to one M, a footballer with Woodlands Wellington, to rig the results of two football matches. M thereafter sought the help of the third accused, B3, another footballer of Woodlands Wellington, who agreed to help M lose the two football matches. Both M and B3 were subsequently paid for their 'assistance' when the desired results were achieved. The second accused, B2, was B1's employee and he was alleged to have assisted B1 in passing some money to M on the first charge and contacting M on behalf of B1 on the second charge.

The prosecution's case rested on a few statements, some made by B2 and the rest made by M, which formed the essence of the charge against the three accused. After two voir dires, the trial judge admitted the statements having found that they were made voluntarily without any threat, inducement or promise. In addition, the defence of the three accused was rejected. Accordingly, the three accused were convicted and sentenced. B2 and B3 received fines and monetary penalties for their roles in the conspiracy while B1, a well-known 'bookie' within football circles in Singapore, received a fine and a term of six months imprisonment.

The Public Prosecutor appealed against the sentences imposed on all three accused on the basis that they were manifestly inadequate.

Held, dismissing the Public Prosecutor's appeal of sentence against B2, but enhancing the sentences imposed on B1 and B3:

1. Where the consideration of sentences was concerned, a general body of case law has evolved over the years giving guidance to the principles to be applied. Such principles included taking into account the facts of the offence, antecedents of the accused, mitigation, taking into consideration other offences, general thresholds and benchmarks of sentencing, the seriousness of the offence, the deterrent principle and protection to the public. It was useful to have regard to similar cases for a prevailing idea as to the kind of sentences appropriate in the present case.

2. The sentence given to B2 by the trial judge was adequate. He was the least culpable of the three accused, and was a mere conduit between B1 and M. His involvement in the match-fixing charges was of no great significance. He simply acted as he was told. It would have been a gross injustice to equate his sentences to those of B1 and B3. His previous antecedents had also been given careful consideration by the trial judge.

3. Although B3 was not the mastermind of the conspiracy, it was he who allowed B1's plan to be executed properly. The wider public interest justified a severe sentence being given. B3's original sentence did not reflect the severity of the offences which he committed. He was the captain of the team who, knowing he had to set a good example to his team mates and the public at large, nevertheless colluded with M to lose those matches. Therefore, taking into account the profile of B3 as a player and captain of his team, his sentence was enhanced to include two months imprisonment on each charge, both to run consecutively.

4. With regard to the sentence of B1, the court found that he was the most guilty of the three accused, having masterminded and planned the whole conspiracy of match-fixing for his own benefit. Further, he had on many occasions been found guilty of match-fixing. It was clear that B1 was a person who, though punished on many other instances, had not learnt his lessons and mended his ways. On the contrary, the offences committed became more severe, as the amounts for match-fixing became larger.

The court found it necessary to send out a strong message to those who intended to involve themselves in such illegal activities. Accordingly his sentence was enhanced to one of twelve months' imprisonment for the first charge and one of six months for the second charge, both to run consecutively.

S v DAVIDS

Cape Provincial Division (South Africa), 1998

Comrie J and Prisman AJ

The appellant was a warder at a prison. He was convicted, *inter alia*, contravening section 1(1)(b) of the Corruption Act 94 of 1992 (receipt of or agreement to receive a bribe) in that he had agreed to accept a bribe from a prisoner in exchange for assisting a prisoner to escape. He was sentenced to three years' imprisonment.

On appeal it was argued that corruption in the public service was rife. In recent times there had been a veritable epidemic of escapes from prisons and police cells. Some of those escapes must have been the outcome of corruption, as was the escape in the present case. It was in the interests of the community that persons sentenced to substantial terms of imprisonment should serve their sentences. The community relied upon the officers of the Department of Correctional Supervision to fulfil that task. Those officers had to be under no illusion: a corrupt dereliction of duty, resulting in an escape, would be dealt with firmly by the Courts. Deterrence played an important role in the sentence to be imposed *in casu*.

For this reason, and in the light of other relevant factors, the appropriate sentence to be imposed in respect of the conviction on the charge of assisting a prisoner to escape, was two years' imprisonment.

S v MOGOTSI

Witwatersrand Local Division (South Africa)(1998)

Cloete J and Serobe AJ

The appellant was a 30-year-old first offender who was employed as a traffic officer. He had been convicted in a magistrate's court of contravening section 11(6) of the Corruption Act 94 of 1992.

The appellant had stopped a motorist for a traffic offence and began writing out a summons but then accepted R100 from the motorist and had written the words 'cancelled' between two lines across the top entry of the summons which was then handed to the motorist. The appellant then changed the motorist's registration number and address details on the other copies of the summons in order to cover his tracks and ensure that the motorist could not be traced either through his address or the registration number of his vehicle.

In the magistrate's court the appellant was sentenced to four years' imprisonment, of which two years were suspended for two years.

On appeal against the sentence, the Court emphasised that the appellant had abused his position of trust for personal financial gain: his conduct was calculated to undermine public trust in government officials and he had subsequently set about covering his tracks. The Court noted that corruption was still on the increase and in the light of all the circumstances imprisonment was the only suitable sentence in the present matter. Although the sentence was somewhat higher than the Court itself would have imposed, it did not induce a

sense of shock and in the absence of a misdirection the Court could not interfere on appeal.

THE QUEEN v LAI KIN-KEUNG

Court of Appeal of Hong Kong (1996)

Yang, CJ, Power, V-P and Mortimer, JA

The appellant pleaded guilty in the District Court to two counts of conspiracy, one to accept and the other to offer bribes, contrary to section 4 of the Prevention of Bribery Ordinance. He was sentenced to concurrent terms of five years imprisonment and appealed.

The appellant was a senior inspector in the Royal Hong Kong Police Force. His main duty was to assist in planning operations against illegal gambling, dangerous drugs and vice activities. Twenty four vice establishments were involved in the offences and at least one other police officer was corrupted. The appellant played a pivotal role and bribes of at least \$600,000 and loans of \$700,000 were involved.

A starting point of 7 years imprisonment was taken and discounted to five years for the pleas and other mitigation, concurrent terms being imposed because the offences were interwoven.

At the time of sentence the appellant had offered to assist the police but had only provided statements. Only this limited assistance was taken into account. Considerable assistance was provided after sentence. It was submitted credit could be given for that and that the sentence reduced as he was a "supergrass".

Held:

1. In situations such as this, the overall sentence imposed will be considered in the light of the new circumstances advanced. However the sentence will be disturbed only if having taken into account all those circumstances it is either wrong in principle or manifestly excessive.
2. The sentence must be considered in the light of settled sentencing policy that a plea normally attracts a discount of approximately one third.
3. The various guidelines and sentencing policies had been appropriately balanced and applied and the overall sentence was proper. Had the case been brought in the proper court the sentence would have been regarded as lenient.
4. The appellant had given great and largely successful assistance in the prosecution of others. It was unnecessary to resolve whether he was within the

supergrass category. There was no guideline that every supergrass must receive a two third reduction in sentence and it was for the appropriate tribunal to assess the assistance given and the risks faced.

Appeal allowed, the concurrent sentences of five years imprisonment reduced to concurrent sentences of four years imprisonment.

THE QUEEN v CHAN KOON-KWOK

(Court of Appeal of Hong Kong (1990))

Kempster, Hunter and Macdougall, JJ.A.

This was an application by the Attorney General for the review of a sentence imposed in the District Court on a man convicted on four charges of soliciting an advantage as an agent, contrary to section 9(1)(a) of the Prevention of Bribery Ordinance (Cap 201). The district judge had ordered sentences of 9 months imprisonment, concurrent, suspended for 2 years, on each of the four convictions.

The Attorney General argued that the sentences were manifestly inadequate, even though the offender had a clear record and his employment prospects had been adversely affected.

Held:

1. The suspension of a term of imprisonment is not appropriate in corruption cases. (referring to *Attorney General v. Ki Hon and Another* (1988) 2 HKLR 220 and *R. v. Turner* (1989) 2 HKLR 123)

2. The sentences imposed here were wrong in principle and manifestly inadequate. 18 months immediate imprisonment was appropriate on each the four convictions, to be served concurrently.

R v GODDEN-SMITH

See page 100 above

ATTORNEY GENERAL v CARLYLE

Court of Appeal of Hong Kong (1976)

Briggs, CJ, Huggins & Pickering, JJ. A

The respondent, a senior police officer, had over a period of less than two years spent more than what he earned by a difference of \$66,341. On being charged with maintaining a standard of living above that which was commensurate with his official emoluments under section 10(l) of the Prevention of Bribery Ordinance, he pleaded guilty and was convicted.

In mitigation of sentence, although the respondent did not say anything, two of his superior officers spoke on his behalf. They gave evidence as to his good character, his distinguished record and high standard of work. In considering sentence, the magistrate not only took account of the lapse of time since the commission of the offence and the strong character evidence but also took the view on the admitted facts that the respondent received advantages which did not relate to his duties. He regarded the case as an exceptional one and sentenced the respondent to 12 months' imprisonment suspended for 2 years and a fine of \$25,000.

The Attorney General applied for a review of the sentence on the ground that the sentence of 12 months' imprisonment was manifestly inadequate and its suspension was wrong in principle.

Held:

1. The court would be slow to interfere with the inadequacy of a sentence and would do so only when a sentence of the lower court was very clearly wrong having regard not only to the whole of the circumstances of the offence but also to those of the offender.

2. Following a conviction for an offence under section 4(2) or section 10 of the Prevention of Bribery Ordinance the norm should be an immediate custodial sentence but that was a norm and not an invariable. There could be no rule-of-thumb in sentencing. There was the possibility of imposing a sentence in an exceptional case, less severe than that of immediate imprisonment.

3. In the absence of any evidence as to the acceptance of bribes by the respondent, it was proper for the magistrate to have taken the view that the respondent received advantages which did not relate to his duties. Having taken account of the various matters before him the magistrate was justified in regarding the case as an exceptional one.

Application dismissed.
