RUPASINGHE

v.

ATTORNEY-GENERAL

SUPREME COURT.
WANASUNDERA, J., COLIN-THOMÉ, J., RANASINGHE, J., TAMBIAH, J.
AND L. H. DE ALWIS, J.
S.C. APPEAL 43/84–H.C. 624/B.
FEBRUARY 17, 18, 19, 1986 AND JUNE 30, 1986.

Bribery – Bribery Act ss. 8, 16, 18(c) – Right to silence – The Code of Criminal Procedure Act, section 110 – Evidence Ordinance, section 105 – Burden of proof that gratification was authorised by law on the terms of his employment.

The accused-appellant a public officer (Interpreter of a court) was held to have accepted a gratification of Rs. 50 from an accused person allegedly to save him from a prison sentence. The accused was indicted before the High Court on two counts under the Bribery Act. He was acquitted on count 1 but convicted on count 2.

The accused-appellant while giving his own account of the incident relied on three main defences:–

1. Violation of his right to silence by the police interrogators,
2. Failure to accept his exculpatory statement that the money was an advance for a translation job,
3. Failure to consider the two charges separately.

Held–

(1) Under section 110(1) of the Code of Criminal Procedure Act the police are invested with powers during the investigations of offences of examining orally any person supposed to be acquainted with the facts and circumstances of the case and the person interrogated is bound to answer truly all such questions relating to the case put to him except questions which have a tendency to expose him to a criminal charge or to a penalty or forfeiture. In Sri Lanka, unlike in England, the right to silence is restricted only to questions which would have a tendency to expose any person to a criminal charge or to a penalty or forfeiture. Further if the accused person does make an incriminating statement in answer to questions by the police that statement shall not be proved against him at the trial as section 25 of the Evidence Ordinance expressly forbids it subject to the proviso in section 27 of the Evidence Ordinance.

(2) The exculpatory dock statement that the payment of Rs. 50 was an advance fee for translating an appeal brief though admissible in evidence was belated and not made at the earliest opportunity and was rightly rejected.

(3) The acquittal of the accused-appellant on the first count of having accepted a gratification as an inducement or reward for interfering with the due administration of justice–is an offence under s. 16 of the Bribery Act–did not call for an independent review by the Court of Appeal of the facts relating to count 2 where the accused was being charged for accepting a gratification as a State Officer under s. 19 of the Bribery Act as amended by Act No. 40 of 1958. There was no offence if the payment was authorised by law or the terms of his employment but the burden of proving this was on the accused in view of the provisions of the new proviso to s. 19 of the Bribery Act brought in by the amendment. The accused had failed to discharge this burden.

Cases referred to:

(1) *R v. May–(1952) 36 Cr. App. R. 91, 93.*

(2) *R v. Prager–(1972) 56 Cr. App. R 151(1972) 1 All E.R. 1114.*

(3) *Hall v. Regina–(1971) I All E.R. 322.*

(4) *R v. Whitehead–(1929) I K B 99.*

(5) *R v. Keeling–(1942) 1 All E.R. 507.*

(6) *R v. Feigenbaum–(1919) I K B 431.*

(7) *R v. Ryan–(1966) 50 Cr. App. R. 144, 148.*

(8) *R v. Sullivan–(1966) 51 Cr.App. R. 102.*

(9) *R v. Gilbert–(1978) 66 Cr. App. R. 237.*

(10) *R v. Lewis–(1973) 57 Cr. App. R. 860.*

(11) *Nathen's Case–(1968) 52 Cr. App. R. 97.*

(12) *Van Cuylenberg v. Caffoor–(1933) 34 N.L.R. 433.*

(13) *Van Cuylenberg v. Sellamuttu–(1933) 35 N.L.R. 99.*

(14) *Deheragoda v. Alwis–(1913) 16 N.L.R. 233.*

(15) *Sugathadasa v. The Republic of Sri Lanka–(1977) N.L.R. 495.*

(16) *The Queen v. Kularatne–(1968) 71 N.L.R. 529, 557.*

(17) *Mohamed Auf v. The Queen–(1967) 69 N.L.R. 337, 343.*

APPEAL from a judgment of the Court of Appeal.

E. R. S. R. Coomaraswamy, P.C. with *Lakshman de Alwis, Rohan de Alwis* and *Ravi Algama* for accused-appellant.

Asoka de Z. Gunawardena, D. S. G. with *Nihara Rodrigo, S.C.* for Attorney-General.

Cur. adv. vult.

July 15, 1986.

COLIN-THOMÉ, J.

The accused-appellant was indicted under two counts as follows:–

1. That on or about the 2nd December, 1975 being an officer of the Homagama Magistrate's Court, to wit, Interpreter Mudaliyar, you did accept a gratification of Rs. 50 from Avis Singho as an inducement or reward for interfering with the due administration of justice in Magistrate's Court, Homagama, case No. 22928, an offence punishable under section 16 of the Bribery Act;

2. That at the same time and place aforesaid and in the course of the same transaction you being a state officer, to wit, Interpreter Mudaliyar, Magistrate's Court, Homagama, you did accept a gratification of Rs 50 from the said Avis Singho an offence punishable under section 19(*c*) of the Bribery Act as amended by section 8 of the Bribery (Amendment) Law No. 38 of 1974.

The High Court Judge found the accused-appellant guilty under both counts. He was sentenced to one year's rigorous imprisonment on each count, the sentences to run concurrently, and to a fine of Rs. 1,000 on each count, in default of payment of the fine to six weeks' rigorous imprisonment, and also to pay a penalty of Rs. 100.

The accused-appellant appealed to the Court of Appeal. The Court of Appeal allowed the appeal against the conviction and sentence on count 1 and dismissed the appeal against the conviction and sentence on count 2, subject to the penalty of Rs. 100 being reduced to Rs. 50.

Avis Singho and one other were charged for theft in the Magistrate's Court, Homagama, case No. 22929. On 11.11.1975 Avis Singho and his co-accused pleaded guilty to the charge. They were finger-printed and warned to appear in Court on 25.11.75 for sentence. Thereafter Avis Singho made representations to the

Supreme Court through his attorney-at-law alleging that he had been forced by the Judge and the Interpreter Mudaliyar to plead guilty. He could not appear before the Magistrate's Court on 25.11.75 and sentence was postponed for the 2nd December.

On 26.11.75 Avis Singho met the accused-appellant (hereinafter called the appellant) to obtain relief by way of a light sentence. He hoped that the appellant would not disclose to the Court that he had two previous convictions for theft. The appellant promised to obtain some relief and solicited a sum of Rs. 50. Avis Singho promised to meet the appellant on 2.12.75 the next calling date with the money.

On 27.11.75 Avis Singho made a complaint to the Bribery Commissioner's Department and it was decided to lay a trap for the appellant on 2.12.75.

Inspector V. Dharmapala who was in charge of the arrangements instructed Avis Singho to meet the appellant along with Police Constable Bissomenika who was to pose as his sister. He was also handed marked notes totalling Rs. 50 to be given to the appellant. Inspector Dharmapala instructed Avis Singho to discuss with the appellant about the money he had solicited and to inquire from him the nature of the relief he would be granted. Avis Singho was also instructed by Inspector Dharmapala to have this discussion with the appellant in the presence and hearing of Bissomenika.

When Avis Singho along with Bissomenika met the appellant on 2.12.75 he merely told the appellant "I have brought the money that I promised" and gave the money to the appellant. The appellant put the money in his pocket. Avis Singho failed to carry out two vital instructions given him by Inspector Dharmapala, namely, to inquire from the appellant the nature of the relief he would be granted and to discuss this matter in the hearing of Bissomenika.

At the trial Avis Singho insisted that he spoke to the appellant in a normal tone to be heard by Bissomenika. On this point he was contradicted by Bissomenika who stated that Avis Singho bent down and spoke to the appellant softly contrary to Inspector Dharmapala's instructions and she did not hear what he said. Avis Singho was also contradicted by his statement to the police where he admitted that he "bent down and told the suspect in a soft tone that he had brought the money he promised". He added "I thought that if I discuss about the bribe in a loud tone, that the suspect would suspect me and not accept the bribe from me. Hence I spoke to him softly".

Bissomenika stated that after the appellant accepted the marked notes she asked him "Sir, will my elder brother go to jail?" The appellant replied that he would save her brother with a fine without sending him to jail.

Inspector Dharmapala stated that on receiving a prearranged signal he entered the Courthouse and requested the appellant to hand over the *bribe* that he had accepted. The appellant got up from his seat took a purse from his right hand hip pocket, removed the marked notes from his purse and handed them to the Inspector. The case record was before the appellant on his table. Thereafter the appellant was charged, taken into custody and searched. He was taken to the residence of the Magistrate of Homagama and later brought to the Bribery Commissioner's Department where his statement was recorded.

The appellant made a dock statement. He stated that Avis Singho came to see him on 14.11.75 and requested him to translate into English an appeal brief and to type it in triplicate. He went through the copy of the appeal and told Avis Singho that it would take time and asked him to bring it later with an advance. On 2.12.75 Avis Singho met him with a female. He bent down and said in a soft tone "I brought the advance. Keep it, otherwise I might spend it". He accepted the money. The female asked him, "Sir, will my elder brother go to jail?" He replied "He will go to jail on today's case". Then it struck him that there was an earlier case, thereafter he told her "He will escape with a fine". He did not tell her he would save Avis Singho with a fine.

He was taken by Inspector Dharmapala to the residence of the Judge. He told the Judge "He (Avis Singho) paid off a grudge against Court".

He did not think it was proper for him to tell Inspector Dharmapala that the money was taken as fees for translation and that this amount of money was taken as an advance. He intended to place these facts before the Bribery Commissioner but unfortunately he was not taken before him.

C. Amerasekera, Office Assistant of the Ministry of Justice, called by the prosecution, stated that the appellant was Interpreter in the Magistrate's Court of Homagama in 1975. He was a State Officer. He was entitled to charge copying fees and translation fees but he had to issue a receipt on Form 172 for those fees. In this case the appellant had not issued a receipt to Avis Singho.

The main grounds of appeal from the judgment of the Court of Appeal were:–

(*a*) That there was a misjoinder of charges. Learned President's Counsel for the appellant abandoned this submission in the course of the argument of this appeal.

(*b*) That there was a material misdirection as to the right to silence of the appellant.

(*c*) That there was a misdirection on a vital point used against the appellant, to wit, the contents of the reply that the appellant gave to the question asked by Bissomenika, according to his dock statement.

(*d*) That there was a misdirection in acting on the findings of fact of the High Court Judge (who failed to separate the evidence relating to the two charges and to consider the two charges separately and whose judgment was set aside on Charge 1) in the review by the Court of Appeal of the evidence against the appellant on Charge 2, without an independent review.

Learned President's Counsel for the appellant submitted that as there was no express provision in our law dealing with the legality and propriety of comment by court on the right to silence exercised by an accused person during the police investigation we should have regard to the provisions of section 100 of the Evidence Ordinance and have recourse to the corresponding law of evidence for the time being obtaining in England.

The imugned portions of the judgment of the Court of Appeal which learned President's Counsel submitted violated the accused's "Right to silence" as laid down in a series of English decisions stated, inter alia, that:–

(*a*) "The accused stated that by his experience he thought it was not proper to tell the Inspector that he had accepted the money as an advance fee for translations, because he was connected with the raid. This conduct of the accused-appellant is strange. He is a senior, experienced officer of Court and being the Interpreter Mudaliyar of a Magistrate's Court, he would have known that it was important for him to tell his version, if the transaction was an innocent and lawful one, at the earliest opportunity to a person in authority. If he did not want to mention this to Inspector Dharmapala, he had every opportunity to do so to the District Judge, who remanded him, if he could have told the Judge as follows, "He paid off a grudge against Court", he could then surely have told him that he accepted Rs. 50 as an advance for the translation of the appeal into English."

(c) "Then, he had every opportunity of informing the Bribery Commissioner of his version, but he had not done so."

(d) "Though he stated that he wanted to tell his version of this transaction to a public officer superior to Inspector Dharmapala, he has taken no steps to do so."

(e) "It is very strange that it took him almost four and a half years after the incident, to divulge his version for the first time in Court."

The origin of the Judges' Rules in England for the guidance of police officers conducting investigations was in 1912. Since then these Rules have been amended from time to time. Judges' Rules which came into effect on January 27, 1964 (see Home Officer Circular No. 89/1978) are not rules of law. In *R v. May* (1) Lord Goddard observed:

"Judges' Rules are not rules of law but rules of practice drawn up for the guidance of police officers; and if a statement has been made in circumstances not in accordance with the Rules, in law that statement is not made inadmissible if it is a voluntary statement, although in its discretion the court can always refuse to admit it if the court thinks there has been a breach of the Rules."

In *R v. Prager* (2) the Court of Appeal reaffirmed that the essence of admissibility is that the statement was made voluntarily. This principle is expressly left untouched by the Rules. The "non-observance (of the Rules) may, and at times does, lead to the exclusion of an alleged confession; but ultimately all turns on the Judge's decision as to whether, breach or no breach, it has been shown to have been made voluntarily."

Rules II and III deal with the administering of a caution at different stages:

II. As soon as a police officer has evidence, which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence. The caution shall be in the following terms:

"You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."

III(*b*) purpose of preventing or minimising harm of loss to some prosecuted for an offence, he shall be cautioned in the following terms:

(The caution here is similar to the caution in Rule II).

III(*b*). It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loose to some other person or to the public or for clearing up an ambiguity in a previous answer or statement.

(The caution here is similar to the caution in Rule II).

In *Hall v. Regina* (3) a defendant was informed by a police officer, who did not caution him, of an allegation made by a third person against him. The defendant remained silent. The Privy Council observed (per Lord Diplock at Page 324) that:

"It is a clear and widely-known principle of the common law in Jamaica, as in England, that a person is entitled to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence. A fortiori, he is under no obligation to comment when he is informed that someone else has accused him of an offence. It may be that in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer, but in their Lordships view silence along on being informed by a police officer that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation."

The appeal was allowed and the appellant's conviction quashed. The Privy Council affirmed the principles laid down in *R v. Whitehead* (4) and in *R v. Keeling* (5) and disapproved of *R. v. Feigenbaum* (6).

In *R. v. Whitehead (supra)* it was held that the fact that the prisoner when charged and cautioned made no denial of the charge could not be corroboration.

In *R. v. Keeling (supra)* the appellant was convicted on a charge of having unlawful carnal knowledge of a girl of 8 years. Having regard to her age, the little girl was not sworn and according to the proviso to section 38 of the Children and Young Persons Act, 1933, it was essential as a matter of law that her evidence should be corroborated by some other material evidence implicating the appellant.

The Judge directed the jury that there was in fact the necessary corroboration to be found, if they thought proper to take that view, in the conduct of the appellant from first to last when the accusation in question was made against him.

The conduct referred to consisted of the appellant's answers at three stages in the proceedings preliminary to his trial. When he was cautioned that he was not bound to make any statement and told of the charge by the police officer who arrested him, he said, "I know what you mean, but not likely. She plays with the Sawbridge girl".

After the warrant had been read over to him, he said. "I have got you–nothing to say".

At the hearing before the committing magistrate, the appellant was cautioned in the manner provided by statute, thus:

> "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so but whatever you say will be taken down in writing and may be given in evidence upon your trial."

Having been cautioned by the magistrate, his answer was as follows:

> "I am not guilty. I am going to state nothing."

The trial judge drew the attention of the jury to the prisoner's conduct. Each of the three stages was mentioned by the trial judge and, in particular, he referred to the failure of the prisoner to make any further statement before the magistrates, and his failure to go into the witness-box at the trial.

It was held:

> "That some at least of the conduct to which the judge referred in his direction to the jury, and most obviously the conduct of the prisoner when addressed by the committing justices in not making any denial of the charge beyond saying that he was not guilty.

cannot in point of law be regarded as affording corroborative material for the jury. It is impossible to say whether that part, if any, of the statement which was admissible would have been sufficient to satisfy the jury. The judge told the jury that they could look at the prisoner's conduct from first to last in failing adequately to deny the charge as affording the necessary corroboration. In our opinion that conduct did not in point of law afford such material. Accordingly, the conviction cannot stand and must be quashed, and this appeal allowed."

On the other side of the dividing line is the case of *R. v. Feigenbaum (supra)*. The appellant was charged with having incited certain boys to steal fodder. Evidence was given for the prosecution by the boys and also by a police officer, who stated that he had called at the appellant's house, after the boys had been arrested for stealing fodder, and had told him that the boys giving their names, had informed the police that the appellant had sent them to steal the fodder, that they had stolen fodder for the appellant on other occasions, giving the dates and that the appellant had paid them specified sums for the stolen fodder. The appellant had made no reply to this statement. It was held that the jury had been rightly directed that they were entitled to consider whether the appellant's failure to reply was not in the circumstances some corroboration of the boys' evidence. (This decision was disapproved in *Hall v. Regina (supra)*).

In *R v. Ryan* (7) the Court of Criminal Appeal observed that –

"....it is wrong to say to a jury, 'Because the accused exercised what is undoubtedly his right, the privilege of remaining silent, you may draw an inference of guilt'; it is quite a different matter to say 'This accused, as he was entitled to do, has not advanced at any earlier stage the explanation that he has offered to you today; you, the jury, may take into account when you are assessing the weight that you think right to attribute to the explanation'".

In *R v. Sullivan* (8) the accused, who was convicted of smuggling watches from Switzerland, had refused to answer questions asked by the Customs Officers. During the course of his summing up the judge said to the jury:

"Of course, bear in mind that he was fully entitled to refuse to answer questions, he has an absolute right to do just that, and it is not to be held against him that he did that. But you might well think that if a man is innocent he would be anxious to answer questions. Now, members of the Jury, that is really what it amounts to."

The Court of Appeal said with reference to this (per Salmon, L.J. at 105):

> "It seems pretty plain that all the members of that jury, if they had any common sense at all, must have been saying to themselves precisely what the learned judge said to them. The appellant was not obliged to answer, but how odd, if he was innocent, that he should not have been anxious to tell the Customs Officers why he had been to Geneva, whether he had put the watches in the bag, and so on."

Then, after referring to the authorities, the judgment went on to say that sometimes comment on the accused's silence was unfair but that there was no unfairness in this case. It then continued:

> "The line dividing what may be said and what may not be said is a very fine one, and it is perhaps doubtful whether in a case like the present it would be even perceptible to the members of any ordinary jury."

The court held that they were compelled, in the existing state of the law, to hold that the judge's comment was a misdirection, but they dismissed the appeal under the proviso to section 4(1) of the Criminal Appeal Act 1907 (c. 23) on the ground that "no possible miscarriage of justice occurred".

In *R v. Gilbert* (9) the appellant was charged with the murder of one Taylor. At the trial for the first time, when admitting that he had stabbed his victim, he said he had done so, inter alia, in self defence. The trial judge read the appellant's statement to the police to the jury and remarked that the appellant was perfectly entitled to remain silent, but that he had made no mention of self-defence in it. However, the Court of Appeal, consisting of Lord Dilhorne, Lord Scarman and Jupp, J., held that as the law stands no comment is permissible that implies that the jury may draw an inference adverse to the accused from his exercise of his "right to silence", disapproving of the decision to the contrary in *R v. Ryan (supra)*. Inspite of the misdirection by the trial judge, the Court of Appeal held that, nevertheless, as no miscarriage of justice had actually occurred, the Court would, in its discretion, apply the proviso to section 2 (1) of the Criminal Appeal Act 1968, and dismissed the appeal.

The court indicated however, that the law is unsatisfactory and hinted that it was open to review in the House of Lords. If the House were to say that such comments were permissible, the Judges' Rules would have to be altered, particularly as to the wording of the caution.

In England under the Criminal Justice Act 1967, s. 11(1)–

> "On a trial on indictment the defendant shall not without the leave of court adduce evidence in support of an *alibi* unless, before the end of the prescribed period, he gives notice of particulars of the alibi."

The 'prescribed period' means the period of seven days from the end of the proceedings before the examining justices.

In *R v. Lewis* (10) the Court of Appeal held that a judge should not in his summing-up comment unfavourably on the fact that the defendant, after arrest and caution by the police, failed to say that he had an alibi, since under section 11(6) of the Criminal Justice Act 1967 the time at which notice of alibi must be given has been prescribed by the legislature. The court, however, held that despite the misdirection there was no miscarriage of justice and applied the proviso to section 2(1) of the Criminal Appeal Act 1968. The Court dismissed the appeal and the sentence was reduced.

The right to silence is a right against self-incrimination. This doctrine is an aspect of the rules of procedure and evidence which, in their application to criminal proceedings, are based on a compromise between the security of the community and the rights of the accused. A traditional feature of the "adversary" (as opposed to an 'inquisitorial') system of criminal jurisprudence is the privilege against self-incrimination. The origins of the doctrine against self-incrimination in the English Common Law are discernible in the pronouncement of the later Stuart Judges which echoed the revulsion of the community against the practice of the Court of Star Chamber of compelling persons brought before it to testify against themselves on oath. The use of the rack and other forms of torture to extort confessions or other incriminating statements from persons accused of crime contributed to this reaction. This privilege is also sacrosanct in the constitutional laws of the United States of America and finds expression in the Fifth Amendment to the American Constitution.

The condition of contemporary English law prompted far-reaching proposals by the Criminal Law Revision Committee in its Eleventh Report (June 1972). They made the following observations and recommendations:–

"28. We propose to restrict greatly the so-called 'right of silence' enjoyed by suspects when interrogated by the police or by anyone charged with the duty of investigating offences or charging offenders. By the right of silence in this connection we mean the rule that, if the suspect, when being interrogated omits to mention some fact which would *exculpate* him, but keeps this back till the trial, the court or jury may not infer that his evidence on this issue at the trial is untrue. Under our proposal, it will be permissible to draw this inference if the circumstances justify it. The suspect will have the 'right of silence' in the sense that it is *no offence* to refuse to answer questions or tell his story when interrogated; but if he chooses to exercise this right, he will risk having an adverse inference drawn against him at his trial.

30. In our opinion it is wrong that it should not be permissible for the jury or magistrates' court to draw whatever inferences are reasonable from the failure of the accused, when interrogated to mention a defence which he puts forward at his trial. To forbid it seems to us to be contrary to common sense and, without helping the innocent, to give an unnecessary advantage to the guilty. Hardened criminals often take advantage of the present rule to refuse to answer any questions at all, and this may greatly hamper the police and even bring their investigations to a halt. Therefore the abolition of the restriction would help justice."

The Report stated that Sir Norman Skelhorn (one of the members of the Committee) had argued for an amendment of the law for these reasons in his address "Crime and Punishment of Crime: Investigation of Offences and Trial of Accused Persons" delivered at the Commonwealth and Empire Law Conference in Sydney in 1965. The present restriction on judicial comment was also strongly criticized by Salmon, L.J., in giving the judgment of the Court of Appeal in *R. v. Sullivan (supra)*.

The Report added in paragraph thirty-one:–

"31. So far as we can see, there are only two possible arguments for preserving the present rule–

(i) Some lawyers seem to think that it is somehow wrong in principle that a criminal should be under any kind of pressure to reveal his case before his trial. The reason seems to be that it is thought to be repugnant–or, perhaps rather, 'unfair'–that a person should be obliged to choose between telling a lie and incriminating himself. Whatever the reason, this is a matter of opinion and we disagree. There seems to us nothing wrong in principle in allowing an adverse inference to be drawn against a person at his trial if he delays mentioning his defence till the trial and shows no good reason for the delay. As to the argument that it is 'unfair' to put pressure on a suspect in this way, what we said above about fairness in criminal trials generally applies. Bentham's famous comment (Treatise of Evidence, p. 241) on the rule that suspects could not be judicially interrogated seems to us to apply strongly to the 'right of silence' in the case under discussion. He wrote–

'If all criminals of every class had assembled, and framed a system after their own wishes, is not this rule the very first which they would have established for their security? Innocence never takes advantage of it. Innocence claims the right of speaking, as guilt invokes the privilege of silence.'

(ii) It has been argued that the suggested change would endanger the innocent because it would enable the police, when giving evidence, to *suppress* the fact that the accused did mention to them the story which he told in court. But we reject this argument for two reasons. First, we do not regard this possible danger as a good enough reason for leaving the law as it now is. Second, it is already permissible to draw an adverse inference from the fact that a suspect told a lie to the police or tried to run away; and (as mentioned above) even silence can be taken into account in assessing the value of the evidence given by the accused in court. In neither of these cases is it considered a fatal objection that the police might say falsely that the accused told the lie or that he failed to tell his story.

32. We propose that the law should be amended so that, if the accused has failed, when being interrogated by anyone charged with the duty of investigating offences or charging offenders, to mention a fact which he afterwards relies on at the committal proceedings or the trial, the court or jury may draw such inferences as appear proper in determining the question before them. The fact would have to be one which the accused could reasonably have been expected to mention at the time."

The Committee also recommended (in para. 40) that in any case where an adverse inference may properly be drawn from the accused's silence, it will be permissible to treat his silence as *corroboration* of the evidence against him for any purpose for which corroboration is material. Since the caution embodied in the Judges' Rules was inconsistent with this recommendation, it was proposed that the Judges' Rules should be abolished, to be replaced by administrative directions.

It would appear that many of the decisions of the Committee had not been unanimous and there have been differences of opinion and dissents from some of the members. There was also strong criticism of the recommendations from other quarters. We were shown a critique of the Report by Sir Brian MacKonna in the 1972 Criminal Law Review, 605, where most of the grounds for the recommendations have been critically examined and refuted. For the purpose of this case, I shall draw attention to one or two relevant observations made by Sir Brian.

Referring to the treatment of suspects by the Committee as falling into only two classes, the guilty and the wholly innocent, which is undoubtedly too simplistic, Sir Brian says at page 614–

"That useful paper 'The Jury at Work' suggests that most suspects are in some way implicated in the offence under investigation, either through their presence at the scene of the crime, or through their commission of the *actus reus,* the only question being about the state of their mind, intention, knowledge and the like, or, in cases of violence, self-defence. All these would have something to explain away, and they might not all feel confident of their ability, without legal assistance, to select and state all the facts on which their counsel might afterwards wish to rely in their defence. Questioning by the police will not always be limited to an inquiry about the facts to be relied on by the suspect in

his defence. It may take the form of an unfriendly cross-examination in the course of which even an innocent man might contradict himself or be induced to say something which he might afterwards wish to retract. It will be conducted in the absence of any friend or adviser of the suspect who might be able to support him if later he should wish to challenge the police account of the interview. I do not find it far-fetched to suppose that even an innocent man might wish to reserve his defence until his trial, or at least until he had an opportulity of being legally advised, and to postpone his cross-examination until he would be protected by an impartial judge."

The following observations by Sir Brian regarding the Committee's assumption that police investigations are always above board may also have some bearing on this matter. After referring to a statement by Winn, L.J., in *Nathan's case* (11), to the effect that the police can now be trusted and that they "behave with complete fairness towards those who come into their hands or from whom they are seeking information", Sir Brian states at page 617:

"The other view is expressed by three dissenting members of the Committee in paragraph 52 of the Report. They speak of the practice of questioning suspects in custody as being 'fraught with dangers'. They mention 'the danger of the use of bullying and even brutal methods by the police in order to obtain confessions' and continue–

'As with the use of violence, it is impossible to assess the extent to which the police at present commit perjury, but there is a widespread impression, not only among criminals, that in tough areas a police officer who is certain that he has got the right man will invent some oral admission (colloquially known as a 'verbal') to clinch the case'.

They cite this passage from the 1962 Report of the Royal Commission on the Police:

'There was a body of evidence, too substantial to disregard, which in effect accused the police of stooping to the use of undesirable means of obtaining statements and of occasionally giving perjured evidence in a court of law.'

They refer to the use of oppressive methods:

'It is demonstrated from time to time that even ordinary questioning can produce false confessions, but the risk is greatly increased if oppressive methods are used.'

They criticize the present methods of recording statements:

'One may not even be sure that the officer understood what the suspect said, or that the suspect understood the written statement when he read it through or had it read to him.... The possibilities of error are multiplied if, as often happens, the statement is not reduced to writing at the time and signed by the suspect'."

In 1982, Professor G. L. Peiris in an article in the journal LAWASIA entitled "An accused person's privilege against self-incrimination", made a comparative analysis of the English, New Zealand and South Asian Legal systems and brought the wealth of his learning and knowledge in dealing with this same question. In Part III of his article, he sums up the position with his mature observations:

"The predominant criticism of the privilege is that it seriously impedes law enforcement and is, therefore detrimental to the well-being of the community. It has been argued that the obstacles it imposes in regard to the determination of guilt may prove insuperable. The Supreme Court of Canada has observed:

'We have not yet arrived at the point that one accused of crime has so many and so high rights that the people have none. The administration of our law is not a game in which the cleverer and more astute is to win, but a serious proceeding by people in earnest to discover the actual facts for the sake of public safety.'"

The most trenchant denigration of the privilege has been made by Bentham who derisively declared that the privilege rested on two pivots—'the old woman's reason' and 'the fox-hunter's reason.' The essence of the first reason is the harshness of the consequences attending on self-incrimination. The second reason, according to Bentham, purports to introduce into the law a spurious notion of fairness.

In the Commonwealth as in the United States of America, there is a growing body of informed opinion that the privilege against self-incrimination confers on the accused too great a degree of protection at the expense of the community. It is submitted, however, that in the context of investigation of crime by the police in England, New Zealand and South Asian jurisdictions, legal recognition of the privilege is supportable cogently on several grounds:—

(*a*) But for the existence of the privilege, persons who are subjected to police interrogation may be confronted with overwhelming difficulties repugnant to accepted notions of equity and fair dealing. If a deponent were compelled to answer questions truthfully and to provide incriminating evidence against himself, the effectiveness of his defence in court may be greatly imperilled.

(*b*) The use of the fruits of self-incrimination has a demoralising effect, at least potentially, on the prosecution. A profound truth is reflected in Wigmore's assertion that 'Any system of administration which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer thereby. The inclination develops to rely mainly on such evidence and to be satisfied with an incomplete investigation of the other sources. This danger is all the more real in the setting of the South Asian legal systems. The Privy Council, dealing with considerations of policy which militate against the reception in evidence of incriminating statements made to police officers, has stated:

'Police authority itself, however carefully controlled, carries a menace to those brought suddenly under its shadow; and the law recognizes and provides against the danger of such persons making incriminating statements with the intention of placating authority.'

(*c*) Removal of the privilege is a potent disincentive to willigness on the part of persons to participate in an inquiry conducted by the police into the commission of an offence. The privilege may be seen as a means of securing for the police the fullest possible information for the successful conduct of the inquiry.

(*d*) Persons under interrogation by the police are often susceptible to direct coercion and to insidious pressure. The reminder by the Supreme Court of the United States that the police may accomplish their objectives 'not only with ropes and a rubber hose, not only by relay questioning persistently, insistently, subjugating a tired mind, but by subtler devices' is of particular relevance in South Asian countries where popular attitudes to police authority still contain a substantial element of diffidence and apprehension. Consequently, survival of the privilege has the beneficial result that inhibition is minimized, if not eliminated, and candour encouraged, so that the reliability of statements made to the police during an investigation is enhanced.

(*e*) Recognition of the privilege contributes to the preservation of a just equilibrium between the individual and the State in the sphere of detection and punishment of crime. One implication of the privilege is to require the Government 'in its contact with the individual to shoulder the entire load' and 'to leave the individual alone until good cause is shown for disturbing him.' This ensures that the resources of the State are not exploited in a manner intolerably oppressive to the individual.

(*f*) The privilege against self-incrimination provides a palliative against the enforcement of harsh law and the application of unjust procedures. This is responsible in large measure for the popularity which the privilege enjoys.

The Royal Commission on Criminal Procedure in England and Wales (1981) in its Report had adopted the traditional attitude to the scope of the privilege and declined to recommend any change of the existing law as to the consequence of silence during the investigative stage and at the trial. The Commission attached considerable weight to the argument that the right of silence formed a vital issue in the whole constitutional relationship in a free society between the individual and the State. The Commission no doubt took into account the criticism of the recommendations of the Criminal Law Revision Committee by professional and law organization.

The Police and Criminal Evidence Act 1984 gives a suspect in police custody a statutory right to have someone informed of his arrest and of his place of detention and the right to consult a solicitor privately if

he so requests. There are, however, some exceptions. There is a draft Code of Practice formulated by the Home Secretary in terms of the Act which recognise the right to silence. Paragraph 3 of the Code requires the officer authorising detention to notify the suspect of the above right and also of his right to consult the Code of Practice. Under paragraph 6, if the suspect is unable to nominate a solicitor, he must be advised of the availability of duty solicitors. It also states that–subject to certain exceptions–a suspect who asks for legal advice may not be interviewed until he has received such advice and that he can have his solicitor present when interviewed. The Code of Practice also continues the old caution rule although branches of the Code are rendered immune from criminal and civil proceedings. In all probability a court could in its discretion exclude evidence which had been unfairly obtained even in this regard.

We were also referred to an informative article by Professor Mong Hoong Yoo of the University of Singapore entitled "Diminishing the Right to Silence: the Singapore Experience" appearing in 1983 Criminal Law Review 89. This article tries to evaluate the Singaporean experience during the five-year period following the passing of the Criminal Procedure Code (Amendment) Act No. 10 of 1976. This amending Act embodied almost in toto and even the identical phraseology and language of the recommendations of the Criminal Law Revision Committee's Eleventh Report on Evidence (1972). Prior to that, the legal position both in Singapore and England appears to have been almost identical, except for the fact that jury trials did not obtain in Singapore. The article deals with "the right to silence" in its two aspects–out of court silence and in-court silence–which are dealt with separately by the writer. From an analysis of statistics, the writer concluded that accused persons rarely remained silent out of court even before the amendments and that the percentage of cases where the accused testified in court was slightly more in the pre-amendment period than in the post-amendment period. The writer concludes as follows at page 100:

> "The two studies described above indicate that the amendments have not materially assisted the Singapore police force and prosecuting officers in their combat against crime. The tentative results suggest that the practical value of the right to silence in court has hardly been effected by the amendment. Hence those who regard the right to silence as 'golden' can rest assured that the amendments have done little to tarnish its sheen."

In Sri Lanka the procedure regarding the investigation of offences by any police officer or inquirer is laid down in Chapter XI, Part V, of the Code of Criminal Procedure Act, No. 15 of 1979. This Act repealed Chapters II and IV of the Administration of Justice Law, No. 44 of 1973. Chapter II of the Administration of Justice Law, section 55 to 92, dealt with Criminal Procedure. Section 70(4) stated:

> S. 70(4). "It shall be the duty of a police officer before examining a person to inform him that he is bound to answer truly all questions relating to such case put to such person by him, except such questions as have a tendency to expose him to a criminal charge or to a penalty or forfeiture; and such person shall be bound to answer truly all questions relating to such case put to him by such officer other than the aforesaid questions."

Section 70 of the Administration of Justice Law has now been replaced by section 110 of the Code of Criminal Procedure Act, No. 15 of 1979, which deals with the examination of witnesses by any police officer or inquirer. Section 110(2) states as follows:

> S. 110(2). "Such person shall be bound to answer *truly* all questions relating to such case put to him by such officer or inquirer other than questions which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture."

Section 110(2) is almost identical with section 122(2) of the former Criminal Procedure Code (Cap. 16). The only change in the wording is that "or inquirer" has been introduced in s. 110(2) after the words "such (police) officer." Section 457(2) of the Code of Criminal Procedure Act, No. 15 of 1979, states:

> S. 457(2) "Any appeal, application, trial, inquiry or investigation *pending* in any court on the day immediately preceding the appointed date may be disposed of, continued, held, or made as the case may be as nearly as may be practical under the provisions of this Code."

In the instant case the alleged offences were committed on 2nd December, 1975. The trial commenced on 7.4.1980. The trial in this case was pending when the Code of Criminal Procedure Act, No. 15 of 1979 was certified on 8th March, 1979. Therefore the applicable law at this stage of the case is section 110(2) of the Code of Criminal Procedure Act, No. 15 of 1979.

In Sri Lanka, unlike in England, the right to silence is restricted only to questions which would have a tendency to expose any person to a criminal charge or to a penalty or forfeiture. This has been the law in Sri Lanka for a considerable period of time. Under section 110(1) the police are invested with powers during the investigations of offences of examining "orally any person supposed to be acquainted with the facts and circumstances of the case." In Sri Lanka, unlike in England, a reciprocal obligation is imposed on the person interrelated, in that such person is declared to be "bound to answer *truly* all questions relating to such case put to him by a police officer or inquirer other than questions which have a tendency to expose him, to a criminal charge or to a penalty or forfeiture.". In Sri Lanka the right to silence has been and is governed by statute and such questions are not determined by the English Common Law and the English decisions pertaining thereto.

The recognition of a general duty under our law to answer questions put by the police during the investigation of a crime represents a sharp contrast with English law which, as a rule, declines to impose an obligation to answer out-of-court questions of the police.

The refusal to answer a question which a public servant is legally authorised to ask constitutes an offence under section 177 of the Penal Code. In *Van Culenberg v. Caffoor* (12) the appellant was charged under section 177 of the Penal Code, that being legally bound under the provisions of section 122(2) of the Criminal Procedure Code to answer truly the questions put to him by a Police Officer, relating to an offence, he refused to answer them on the ground that they would have a tendency to expose him to a criminal charge. It was held that in order to entitle a person to the privilege of silence under such circumstances, the Court must see that there is a reasonable ground to apprehend danger to such person from his being compelled to answer. See also *Van Culenberg v. Sellamuttu* (13) and *Deheragoda v. Alwis* (14). The danger to be apprehended must be real and not imaginary.

The distinction between the law in Sri Lanka and the English Common Law relating to the right to silence may be summarised as follows:

(*a*) A person who is interrogated under section 110 of the Code of Criminal Procedure Act, No. 15 of 1979, is under statutory compulsion to answer all relevant questions other than those

which have an incriminating character. In Sri Lanka the right to silence does not extend to an exculpatory statement. According to the Oxford Dictionary an "exculpatory" statement is a statement which clears a person from a charge. English law recognizes no duty to answer questions put by the police.

(*b*) There is no provision in Sri Lanka like the Judges' Rules in England for the administrating of a caution to the accused while he is under interrogation by the police;

(*c*) Under section 110(3) a statement made by any person to a police officer in the course of any investigation may be used for the purpose of impeachment of his credibility and not for the purpose of corroborating his testimony in Court. In England a statement made by the accused to a police officer after he has been cautioned is admissible as substantive evidence against him.

There is a statutory immunity in our law given to a suspect to decline to answer any incriminating questions put by the police. However, if he does make an incriminating statement in answer to questions by the police that statement shall not be proved against him at his trial as section 25 of the Evidence Ordinance expressly forbids it subject to the proviso in section 27 of the Evidence Ordinance.

At the trial in this case the appellant made a dock statement. His defence was that the Rs. 50 given him by Avis Singho was an advance fee for translating his appeal brief into English. He was authorised by law to charge a fee for translations.

The defence if believed exculpated the appellant completely under the proviso to section 19(C) of the Bribery Act which states:

"... that it shall not be an offence for a State Officer to solicit or accept a gratification which he is authorised by the law or the terms of his employment to receive."

In his dock statement the appellant gave an explanation why he did not state to a person in authority at the earliest opportunity that the money was an advance fee for translating an appeal brief.

He stated that he thought it was not proper to state this to Inspector Dharmapala as he was an officer who was connected with the raid and because police officers try to establish a case somehow or other. The appellant did not state that he expressly invoked the right to silence on the ground that his answers would expose him to a criminal charge.

There is also no precise evidence whether a question was asked by Inspector Dharmapala which would have given the appellant the reasonable apprehension that by answering the question it would have a tendency to expose him to a criminal charge. However, giving the appellant the benefit of the doubt on this matter he has yet to explain why he did not tell the Judge at the earliest opportunity, when taken to his residence, that the money he accepted was an advance fee for translating an appeal brief. After all on his own testimony, if he had opportunity and the time to tell the Judge: "He (Avis Singho) paid off a grudge against court" he could quite easily and briefly have told the Judge that the money was for translation of a brief.

A statement from the dock constitutes substantive evidence despite the lack of oath or affirmation and the absence of cross examination which effects the value of the statement: *Sugathadasa v. The Rupublic of Sri Lanka* (15), *The Queen v. Kularatne* (16).

In order to assess the probative value of the dock statement in the instant case it was necessary for the Court of Appeal to examine the infirmities in that statement. In the exceptional circumstances of this case the Court of Appeal correctly took into account the failure of the appellant to mention the exculpatory statement in his defence at the earliest opportunity. The Court of Appeal correctly had not treated the appellant's silence at the investigative stage as corroboration of the evidence against him nor had it drawn an inference of guilt from his silence. The Court of Appeal had taken the appellant's silence into consideration in order to test the weight to be attached to his dock statement, which it was entitled to do in the circumstances of this case.

The accused under the Common Law systems has the assurance not merely that he is entitled to remain silent but that the exercise of this right will cause him no peril whatever. This consideration accounts largely for the hesitation shown by English Judges to permit any unfavourable inference from the silence of the accused at the time he

is charged. The law in Sri Lanka is not a creature of the English Common Law but has received statutory expression in section 110 of the Code of Criminal Procedure Act which casts a duty on a person to answer truly all questions put to him by a police officer investigating an offence, except questions which would expose him to a criminal charge. The refusal to answer such questions may form the basis of a charge under section 177 of the Penal Code. In exceptional circumstances a judge should not be inflexibly debarred from commenting on the fact that the defence has not been divulged on a previous occasion, but propriety of the comment depends on the nature of the information that is withheld. In the circumstances of this case I hold that the Court of Appeal was justified in commenting on the appellant's failure to state his defence at the earliest opportunity at the pre-trial stage, and that there was no material misdirection as to the right of silence of the appellant.

The next submission of learned President's Counsel was that the Court of Appeal had misdirected itself on a vital point regarding the contents of the reply by the appellant to the question by Bissomenika "Sir, will my elder brother go to jail?"

Learned President's Counsel submitted that since the evidence of Avis Singho had been totally rejected by the Court of Appeal on the first charge the evidence of Bissomenika as to what the appellant told her when she questioned him about her brother's case assumes great importance as it is the only independent item of evidence against the appellant.

The impugned passage in the judgment of the Court of Appeal reads:

> "Then a female who had come with the complainant asked him whether her elder brother would go to jail and he replied: 'He will go to jail in today's case. Then it struck me that there was an earlier case. Thereafter, I told her that I would save him with a fine'."

Learned President's Counsel submitted that this was a serious misstatement of fact as the appellant had said in his dock statement:

> "He will *escape* with a fine. I did not tell her that I would save him with a fine".

It should be noted, however, that the sentence following immediately after the impugned passage in the judgment in page 26 states:

"He said that he did not tell her that he would save her elder brother with a fine."

At page 23 of the judgment the dock statement of the appellant has been correctly quoted:

"Then I told her he will escape with a fine."

The evidence of Bissomenika has been accepted both by the High Court and the Court of Appeal. Bissomenika stated that when she asked the appellant:

"Sir, will my elder brother go to jail?" He replied: "he would save his brother with a fine without sending him to jail."

Taking into consideration all the circumstances connected with the conversation between Bissomenika and the appellant I hold that no prejudice was caused to the appellant.

The final submission of learned President's Counsel was that there was a misdirection by the Court of Appeal in acting on the findings of fact of the High Court Judge (who failed to separate the evidence relating to the two charges and to consider the two charges separately and whose judgement was not set aside on Charge 1) in the review by the Court of Appeal of the evidence against the appellant on Charge 2, without an independent review.

Section 19 of the original Bribery Act (Cap. 26) did not have subsection (*c*). It was introduced by section 13 of the Bribery (Amendment) Act No. 40 of 1958. The new amendment reads:

S. 19(*c*).

"Who, being a public servant, solicits or accepts any gratification, which he is not authorised by law or the terms of his employment to receive, shall be guilty of an offence etc."

In *Mohamed Auf v. The Queen* (17) it was held (per H. N. G. Fernando, C.J.) that where a public servant is charged under section 19(*c*) of the Bribery Act, with having accepted a gratification which he was not authorized by law or the terms of his employment to receive, the burden of proving that the gratification was unauthorized lies on the prosecution.

In consequence of this judgment section 19 of the Bribery Act was further amended by section 8 of the Bribery (Amendment) Law, No. 38 of 1974 as follows:–

(1) by the substitution, for paragraph (c) of that section, of the following paragraph:–

"(c) who, being a state officer, solicits or accepts any gratification,";

(2) by the substitution for the full stop at the end of the section, of a colon; and

(3) by the addition, at the end of that section, of the following proviso:–

"Provided, however, that it shall not be an offence for a state officer to solicit or accept any gratification which he is authorised by law or the terms of his employment to receive."

A "gratification" under section 90 of the principal enactment includes money. The relevant portion of section 105 of the Evidence Ordinance states:

S. 105.

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within.... any special exception or *proviso* contained in any other part of the (Penal) Code, or in any law defining the offence, is upon him, and the court shall presume the absence of such circumstances."

The effect of the new proviso to section 19 of the Bribery Act, is to shift the burden to the accused to prove that any gratification received by him was authorised by law or the terms of his employment.

The Court of Appeal in its judgment in the instant case has stated:

"In respect of Count 2, it was conceded by Learned Counsel for the accused-appellant that the prosecution has proved beyond reasonable doubt that the accused-appellant was a State Officer and that he had accepted a gratification of Rs. 50, and that the burden was on the accused-appellant to prove on a balance of probablity that he accepted this gratification which he was authorised by law or the terms of his employment to receive."

The Court of Appeal and the High Court Judge had carefully scrutinized the dock statement of the appellant which was the only evidence elicited by him at his trial. For the reasons stated in the separate judgments the version given in the dock statement was held to be false. I agree with this finding. The result was that the appellant had failed to discharge the burden placed on him by the proviso to section 19.

For the reasons stated in this judgment the appeal is dismissed. We affirm the conviction of the accused-appellant under Count 2 of the indictment by the Court of Appeal and we also affirm the sentence imposed on the accused-appellant by the Court of Appeal.

WANASUNDERA, J. – I agree.

RANASINGHE, J. – I agree.

TAMBIAH, J. – I agree.

L. H. DE ALWIS, J. – I agree.

Appeal dismissed.