CRI/T/111/99
IN THE HIGH COURT OF LESOTHO

Rex
vs

MASUPHA EPHRAIM SOLE	First Accused
JACOBUS MICHIEL DU PLOOY	Second Accused
MARGARET BAM	Eleventh Accused
LAHMEYER INTERNATIONAL GmbH	Fourteenth Accused
ACRES INTERNATIONAL LIMITED	Fifteenth Accused

For the Director of Public Prosecutions: Mr GH Penzhorn, S.C., Mr H.H.T. Woker
For the First Accused: Mr E. H. Phoofolo
For the Second Accused: Mr G. Farber, S.C., Mr J. Nel
For the Eleventh Accused: Mr K. Sello
For the Fourteenth Accused: Mr A.H. Trikamjee
For the Fifteenth Accused: Mr S. Alkema

Before the Hon. Mr Acting Justice B.P. Cullinan on 2nd October, 4th December, 2000, 15th and 30th January, 6th and 26th February, 6th and 13th March 2001.

ORDER

2

Cases referred to:
(1) R v Sacks and Another 1943 AD 413;
(2) The State v Benson Aaron (1893) Hertzog 125;
(3) R v Chorle 1945 AD 487;
(4) R v Patel 1944 AD 511;
(5) R v Libala 1958 (2) PH H265 (E);
(6) S v Jack 1963 (1) PH H86 (E);
(7) S v Makhunga 1964 (3) SA 513 (C);
(8) S v Ganie 1967 (4) SA 203 (N);
(9) S v Lavenstein 1919 TPD 348;
(10) R v Swemmer 1917 TPD 455;
(11) S v Van der Westhuizen 1974 (4) SA 61 (C);
(12) R v Levy and Others 1929 AD 312;
(13) S v Gouws 1975(1) SA 1 (A);
(14) R v Kutboodien 1930 CPD 191;
(15) R v Visser 1935 TPD 296;
(16) R v Ingham 1958 (2) SA 37 (C).

3

As indicated in a ruling delivered on 26th February, the indictment, in its present original form, inter alia contains sixteen counts of bribery, that is Counts 1 to 16 inclusive. The first accused is charged under all of those counts. The 14th accused is charged under Counts 7 and 8 thereof. Both accused have raised objection to the indictment. Suffice it for the moment to

say that objection is made on the basis that the particulars of the offence of bribery pleaded in the relevant counts are insufficient.

It proves necessary to consider what constitutes the common law offence of bribery. The Roman-Dutch law in the matter is based on two Placaaten of the States-General of the United Netherlands of 1st July 1651 and 10th December 1715. In the Appellate Division case of R v Sacks and Another (1) Tindall JA (Watermeyer ACJ and Centlivres JA concurring) accepted that the first Placaat, promulgated before 1652, the date of the settlement of the Dutch East India Company at the Cape of Good Hope, was part of the Roman-Dutch law in South Africa. As to whether the later Placaat formed part of such law, Tindall JA at p422 observed that "counsel on both sides assumed that it does" and that Sir John Wessels (History of the Roman-Dutch Law, p357) had stated that in any event,

> "the common law of the province of Holland was accepted as the common law of the settlement of the Cape of Good Hope, that all ordinances, therefore, of the States-General which were not of purely local application were recognised as law at the Cape of Good Hope and that of the ordinances passed either by the States-General or by the States of Holland, those which were enacted for the Dutch Republic and its dependencies or for the province of Holland undoubtedly applied to the Cape as well.... The Placaat of 1715 was passed by the States-General and it is obviously one of general and not merely local application. It will be noted that it makes special mention of the Dutch East India Company. However, it is unnecessary to decide whether this Placaat became part of the law of the Dutch dependency at the Cape of Good Hope, for even if it did not the Placaat of 1st July, 1651, which is quoted in Benson Aaron's case [2], having been promulgated before 1652, was part of the law

> at the Cape of Good Hope and this Placaat is, for all purposes material to the question at present under consideration, to the same effect as the Placaat of 1715. And the latter Placaat did not repeal that of 1651 which is quoted in an authoritative book as late as Moorman's [Misdaden] (ed. of 1764)".

A translation of the preamble to the Placaat of 1651 is to be found at pp 130/131 of the report of The State v Benson Aaron (2), decided in 1893 by a Full Bench of the Supreme Court of the South African Republic in the Transvaal. The terms of the Preamble are extremely wide indeed. Nonetheless, in the Appellate Division case of R v Chorle decided in 1945, Schreiner JA (Watermeyer CJ, Tindall and Greenberg JJA and Davis AJA concurring) observed at p492 that

> "[i]t may not be possible to affirm that no conduct that cannot be brought within the language of the Placaats amounts to bribery; but on the other hand it can be affirmed that whatever acts the Placaats penalise are, in the absence of abrogation by disuse or modification by subsequent legislation, crimes to-day and punishable as bribery."

The learned authors Hunt and Milton in their work South African Criminal Law and Procedure (Common Law Crimes) Vol II, Revised 2 Ed (1982) (2 Ed by Professor Milton) (Reprint 1992) observe at p217 that

> "... the trilogy of leading Appellate Division decisions on the subject of bribery - R v Sacks [1], R v Patel [4] and R v Chorle [3] - were largely determined by the contents of the Placaats. However, it is submitted that although the Placaats thus form the basis of common-law bribery in our law, they should on the one hand not be restrictively construed in the fashion of a modern penal statute, nor, on the other, regarded as a complete statement on the subject of common-law bribery. For instance, it is submitted that it is bribery to solicit official action with a promise of consideration not only to the official or his relatives (as stated in the Placaats) but to anyone else as well. And the accused must (in accordance with the general principles governing all common-law crimes) both act unlawfully and have mens rea. "

As early as 1919 the following definition of common- law bribery had appeared in the First Edition of Gardiner and Lansdown, South African Criminal Law and Procedure at p735:

"It is a crime at common law for any person to offer or give to an official of the State,

5

or for any such official to receive from any person, any unauthorised consideration in respect of such official doing, or abstaining from or having done or abstained from, any act in the exercise of his official functions ."(Italics added)

That definition was accepted by Feetham JA (Watermeyer CJ, Tindall JA, Centlivres JA and Davis AJA concurring) in R v Patel (4) at p521 "as a sufficient working definition". Apropos that comment, in R v Chorle (3) Schreiner JA observed at pp492/493:

> "It should, I think, be remarked that the statement in Gardiner and Lansdown is not couched precisely in the form of a definition. In the case of bribery the learned authors use a distinct form of words which is not used by them in the case of any other crime. "It is a crime at common law for any person to offer, etc." It may be said that it was intended in this summary of the scope of bribery to give effect to the view that since the crime derived from several old enactments the statement might not be exhaustive and that while persons who do the acts mentioned in the summary are guilty of the crime of bribery others may also be guilty of the crime although their acts do not fall within the terms."

In particular, speaking of the concluding phrase of the Gardiner and Lansdown definition, "in the exercise of his official functions", the learned Judge of Appeal had
this to say at p496:

> "I can find nothing corresponding to these words in the Placaats. On the contrary, they refer to "dispositien op eenigerhande saaken", i.e., dispositions in regard to any kind of matter. It may be that some limitation must be read into this wide language. It may, for instance, be necessary to read it as applying only to matters relating to some aspect of the administration of the State's affairs. But I can see no reasonable necessity for limiting the operation of the Placaats to cases in which the official's assistance is sought in a matter covered by his official functions, however widely this expression is interpreted"

and further on at p496

> "But the corrupt intent of the offeror would be the same whether the act fell within the sphere of the official's functions or not and so would be the corruptive effect on the official if he accepted the present. For he is a servant of the State and not of a single department of the State. The law of bribery is designed to protect the State against those who by gifts tempt its officials to use their opportunities as such to

further private interests in State affairs and there is no reason why the law, which in its original form was wide enough to secure that protection, should, by restrictive interpretation, be cut down to something less than is necessary to achieve its object."
and further on at p497,

> "The language of the Placaats refers to gifts made in respect of past favours as well as offers made in anticipation of favours to come."

Hunt and Milton op. cit. observe at p219:

> "Following upon Chorle's case [3], later editors of Gardiner and Lansdown (see 6 ed(1957) 1150) substituted for the words 'in the exercise of his official functions 'the words 'in his official capacity', and it was this form of the definition which met with approval in the cases of Libala [5], Jack [6], Makhunga [7] and Ganie [8] (above). However, with respect, the word 'his' can still be read to suggest that the official must be acting within the scope of his official duties. For this reason the phrase has been rendered 'in an official capacity' in the definition adumbrated in the text." (Italics added)

Hunt & Milton op. cit. then frame two definitions, that is, to cover the actions of the briber and those of the bribee (referred to by Professor Snyman, in his work Criminal Law 2 Ed (1989) at p361, as "active" bribery and "passive" bribery respectively). The following definitions in Hunt & Milton op. cit. may be found at pp219 and 227:

> "Bribery (as a briber) consists in unlawfully and intentionally offering to or agreeing with a state official to give any consideration in return for action or inaction by him in an official capacity".

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

Thus the following essential elements or ingredients of the offence are common to both briber and bribee:

> (a) Unlawfully
> (b) Intentionally
> (c) A State official
> (d) (i) Offering or agreeing to give any consideration
> (ii) Agreeing to take any consideration
>
> (e) In return for action or inaction by the bribee in an official capacity.

Based on such ingredients, the following specimen indictments are to be found at pp231/232 of Hunt & Milton op. cit.:

> "(1) Charge against the Briber THAT X is guilty of the crime of Bribery IN THAT upon or about.....at....., in the district of ..... the said X did unlawfully, intentionally and corruptly offer to Y, a duly appointed member of the Liquor Licensing Board for the said district constituted in terms of the Liquor Act, No.87 of 1977 as amended, and as such being a State official, the sum of R500 as a reward in consideration for the exercise by the said Y at the meeting of the said Board to be held at....., on....., of his vote in favour of the said Board's giving its conditional authority for the grant to one Z of an hotel liquor licence in respect of new premises to be erected at....., for which conditional authority an application by the said Z was pending before the said Board at the aforesaid interim meeting.
>
> (2) Charge against the Bribee THAT Y is guilty of the crime of Bribery IN THAT upon or about....., at....., in the district of ....., the said Y, who was at all material times a constable in the South African Police, and as such a State official, did unlawfully, intentionally and corruptly accept from X the sum of R50 as a consideration for declining to arrest and detain the said X on an allegation of theft committed by the said X on ....., at ....., in the presence of the said Y."

The indictment before the Court, in its present original form, because of the original number of accused and number of counts involved, is necessarily a lengthy document. It is divided into four parts thus:

a) Particulars of Accused
b) Crown's Summary of Substantial Facts

C Preamble to the Charges
D The Charges

It is evident that the "Crown's Summary of Substantial Facts" consists of facts, facts indeed which descend to evidence in places. That is the first accused's position in the matter: he in effect has filed another application saying that such facts have no place in an indictment and should be struck out. But that is the subject of a separate application, which can be deferred for the moment.

Some parts of the Preamble might well be described as descending to evidence, but in any event, it does contain the following averments:

1) The accused was at the relevant time a civil servant in the employ of the Government "and as such a State or public official"
2) Retaining such status, he was seconded to the Lesotho Highland Development Authority ("LHDA") as Chief Executive thereof.
3) The LHDA is a statutory body entrusted with the implementation of the Lesotho Highlands Water Project ("LHWP" or "the Project"),

which Project was the product of a treaty between the Governments of the Kingdom of Lesotho and the Republic of South Africa.

4) The accused was responsible for the execution of the policy of the LHDA and the transaction of the day to day business. As such "he was in a position to make or influence decisions improperly benefitting contractors".
5) Particular accused were contractors/consultants, involved, on a contractual basis with LHDA, in the Project. The other accused were "intermediaries" in the matter of payments made by the contractor/consultant accused to the first

accused (a matter of evidence).

6) Arising out of their contractual relationship with LHDA, the contractor/consultant accused benefitted from contracts performed by them, payment by LHDA therefor "being made or initiated or authorised in Lesotho".
7) The payments made to the first accused by the other accused "were made in respect of action or inaction by Accused 1 in his official capacity" as described above and "were intended to influence Accused 1 in such capacity and /or were intended to be utilised by the intermediaries (as referred to...) for this purpose"
8) "At all times material to the individual bribery charges referred in part D below the individual Accused referred to in each such charge, when they performed or were involved in the act or acts referred to in each charge, they did so wrongfully, intentionally and corruptly and with a common purpose."

I pause at this stage to deal with three ancillary aspects. I have italicized the word "improperly" above in the paragraph I have numbered (4). The dicta of Mason J (Curlewis and Gregorowski JJ concurring) in R v Lavenstein (9), a case of statutory bribery, at pp352/353 are in point:

> "It is maintained that the Crown must show that the particular act which the official was desired to do was an act which it would have been wrong of him to do in his official capacity. To illustrate: If a bribe is given in connection with a contract, then the Crown must show that that contact ought not to have been accepted by the Government for whom the official acts. That is, in substance, the contention. The result of that contention is that you can always bribe an official to do his duty and it is no offence. If you can show that the contract is a good contract, that it was a contract that the Government ought to have accepted, more favourable than the other tenders submitted, then the briber can escape.....

But to my mind, that is not the meaning of the Act at all. Duties of officials are of two kinds, imperative or discretionary. As a rule bribes are not offered in connection with imperative duties of officials, a duty which the law directs an official specifically, to do, and as to which he has no discretion. The greater number of cases

> are those in which an official has a discretion. If the official has a discretion, what the law requires of an official is to exercise that discretion with sole regard to the public interest. This is his duty. That is the act he has to do. When once he exercises his discretion with regard to the private interests of any individual, he is doing an act in conflict with his duty, and that, to my mind, is the only reasonable interpretation of the words of the statute. That was the interpretation put upon it in Swemmer 's case [10]; because why do people bribe? They bribe an official not to exercise his discretion with sole regard to the public interest; they bribe him in order that he shall exercise his discretion with regard to their interest, and that is bribing a person with the object of inducing him to do an act in conflict with his duty. The language of the section to which I have referred seems to me to corroborate that construction, and, as a matter of fact, any other construction will have the extraordinary and ridiculous results I have mentioned, viz.: that you can bribe officials to any extent as long as you can show that the actual thing they did was in the public interest, regardless of what their motives may have been and of what they may have done in order to arrive at their action." (Italics added)

Those dicta were adopted in R v Patel (4) by Feetham JA at p522. What the bribee may be asked to do may actually be in accordance with his duty, yet it is bribery to "bribe an official to do his duty." And as Baker J observed in the case of S v van der Westhuizen (11) at p63,

> "it is a crime for an official to accept money in return for doing his duty. As has been said it is immaterial that the solicited action is in the public interest: it is contrary to the public interest to secure a public benefit by bribery (R v Lavenstein [9] at p353)."

As I see it, therefore, there is no need for the Crown to allege that any of the contractor/consultant accused "improperly" benefitted from any action or inaction by the accused, that is, in the sense that the award of any contract etc. was not fully deserving. Secondly, there is no need, as Hunt and Milton indicate, for the Crown to allege that any action or inaction by the accused was "in his official capacity"; it is sufficient if it was in an official capacity. Thirdly, it is necessary for the Crown to allege that the accused acted unlawfully and intentionally. It would not be unlawful for a person to offer or agree to take a bribe if he was e.g. acting as an agent

provocateur, as in the case of R v Sacks (1) at p427 and R v Patel (4) at pl4. The Crown have used the word "wrongfully": I do not see that that word necessarily connotes that a matter is legally rather than morally wrong. It is not necessarily therefore synonymous with "unlawfully", which aspect, I consider, must be averred by the Crown. As to the word "corruptly", I do not see that it adds to the requirement of "unlawfully and intentionally". I observe, however, that the latter word appeared in the charge in Levy (12) at p317, in Sacks (1) at p418, Van der Westhuizen (11) at p61, Makhunga (7) at p513 and S v Gouws (13) at p7: it also appears in both specimen indictments in Hunt and Milton. In the circumstances it seems that the time-honoured formula is, "unlawfully, intentionally and corruptly."

Those are, as I have observed, ancillary points. There are three other points, which are by no means ancillary. It proves necessary to set out at least one count in the indictment. I reproduce Count 7 which involves the first and fourteenth accused:

"Count 7: - Bribery

> Accused 1 and 14 are guilty of the crime of bribery in that over the period April 1992 to April 1997 Accused 14 paid/transferred DM261 747.64 and SAR184 774.20 into a Swiss Bank account held by Zalisiwonga Mini Bam (now deceased) who thereafter paid/transferred the said sum, or part thereof, to Accused 1 which payment/transfer was made to Accused 1 in circumstances as described in the Preamble and more particularly in paragraph 41 above."

Paragraph 41, contained in the Preamble, reads thus

"41. The payments referred to in paragraphs 39 and 40 above were made in respect of action or inaction by Accused 1 in an official capacity as described in paragraphs 29 and 30 above and /or were intended to influence Accused 1 in such capacity and or were intended to be utilised by the intermediaries as referred to in paragraph 39 above for this purpose."

As will be seen from Count 7 above, which coincides in format with the other

other bribery counts, there is no mention of any place where it is alleged the offence was committed, as indicated by section 127 of the Criminal Procedure and Evidence Act, 1981, that is, other than an averment of a payment into a bank in Switzerland. Paragraphs 22, 31 and 40 allege that the accused operated bank accounts in Switzerland, and that the contractor/consultant accused either paid the amounts concerned direct into such accounts or alternatively paid the intermediaries, who in turn paid the amounts into the accused's Swiss bank accounts. In brief, it is alleged that corrupt payments took place in Switzerland. That of course raises the issue of the Court's jurisdiction. Apart from the first accused's heads of argument concerning the issue of the place involved, I have heard no submissions in the matter. The aspect of the place of commission of the crime is inevitably linked with the issue of jurisdiction. As indicated in the ruling of 26th February (at p11), the first accused intends to raise the issue of jurisdiction. I would prefer, therefore, to defer consideration of the aspect of the place involved in the commission of the alleged offences, until the issue of jurisdiction is argued.

As indicated earlier, the offence of the briber and the bribee are similar in all respects, except that one offers or agrees to give and the other agrees to receive. It is not necessary to prove that consideration changed hands, that e.g. the bribe money was paid and accepted. As for the briber, the crime is complete when he makes the offer (or agrees to give consideration) to the bribee (per Gardiner JP in R v Kutboodien (14) at ppl92/193). As for the bribee, his offence is complete when he agrees to take the consideration. I would respectfully agree with the suggestion by Hunt and Milton op. cit. at p229 that where receipt by the bribee precedes agreement on his part, that nonetheless the offence is committed at the latter stage, that is, upon

agreement.

Now in the present case the Crown in each count of bribery does not allege a corrupt agreement per se: it alleges a corrupt payment, presumably as indicating such agreement and constituting execution of consideration by the briber. But what of the bribee? While the allegation of payment to the bribee grounds the briber's participation in the corrupt agreement, where is the allegation that the bribee agreed to take any consideration, or alternatively that he actually took or received such consideration?

In brief, the sixteen counts of bribery allege an offence by the briber (and intermediaries) but not, in my view, by the bribee. The Preamble recites the purpose of the alleged payments, that is, that they "were made in respect of action or inaction by Accused 1 in his official capacity".... and / or were intended to influence Accused 1 in such capacity and / or were intended to be utilised by the intermediaries.....for this purpose." While the allegations as to the duration of payments contained in Count 7 and the other bribery counts, if subsequently grounded in evidence, may or may not give rise to certain inferences, the Court at this stage is concerned with pleadings and not evidence, much less inferences to be drawn therefrom. In brief, if the Crown wish to charge the first accused with bribery, having alleged corrupt payments, they must also allege that the first accused unlawfully intentionally and corruptly received such payments.

The first and fourteenth accused also object to the indictment on the ground, which they consider fatal to the indictment, that no particulars of any action or

inaction by the first accused have been supplied by the Crown. There is the averment of "action or inaction" contained in paragraph 41 in the Preamble which I have largely reproduced above. In the "Crown's Summary of Substantial Facts" the penultimate paragraph thereof, paragraph 27 reads thus:

"27 From these facts, as well as other evidence that will be led in respect of individual counts, the Court will be asked to draw the inescapable conclusion that the payment of these monies to Accused 1 by the other Accused were intended and constituted bribe money relating to Accused 1's employment with the LHDA in the context of the LHWP."

The first and fourteenth accused submit that the Court is there being asked to 'speculate". But of course if an inference is "inescapable" (connoting surely a degree of certainty above the standard of reasonable doubt) then there can be no question of speculation. But the real objection to paragraph 27 and, to most of the Crown's Summary of Substantial Facts, is that it reads more like an opening address: it is somewhat early in the day to speak, in an indictment, of inferences to be drawn. If it is borne in mind that the indictment is but a pleading, stating the Crown's case, that is, no more nor no less than the five essential ingredients of the offence of bribery, with necessary particulars, the contents of section B of the indictment may not entirely survive examination. I would prefer to leave the initial task of excision to the Crown. Thereafter the Court's intervention may not be necessary.

As for the lack of particulars as to action or inaction by the first accused, quite obviously it is incumbent upon the Crown to allege (and ultimately to prove) the five essential ingredients detailed earlier. In this respect the crime of bribery by briber and bribee, is complete upon

agreement. (R v Kutboodien (14) at pp 192/193, R v Visser (15) per de Wet J at pp298/299 and R v Ingham (16) per Rosenow AJ at p48B). It

15

is not necessary that the consideration should be paid and accepted. The action or inaction sought may actually be in accordance with the bribee's duty; nonetheless, of course, it is bribery, as earlier said, "to bribe an official to do his duty" (R v Lavenstein (9) at p352, R v Patel (4) at p522, S v Van der Westhuizen (11) at p63 E). It is immaterial that the solicited action or inaction is in the public interest (R v Lavenstein (9) at p353). Indeed it is also immaterial (to the briber) that the briber's goal is not achieved (R v Sacks (1) per Tindall JA at p427 and R v Kutboodien (14) per Gardiner JP at p297 and de Wet J at p298).

As to whether or not it is incumbent upon the Crown to nonetheless supply particulars of the proposed action or inaction by the first accused, I observe that in the case of R v Levy (12) the accused partners were convicted before Gardiner JP under two counts of bribery. The particulars in each count read thus:

> ".....the said accused as partners aforesaid did on behalf of the firm and at Cape Town in the district of the Cape on the several dates set out in column 2 of the Schedule 'A' attached hereto, wrongfully, unlawfully and corruptly make to the officers mentioned in Column 3 of the said schedule 'A' the unauthorised payments of money set out in Column 4, opposite their respective names, in consideration of such officers in their office and in relation thereto, purchasing or having purchased, influencing or having influenced the purchase from the said firm during the period 1st November, 1921, to the 31st December, 1924, of goods for the Store, the actual dates of the purchases and the class of goods in respect of which each payment was made being to the prosecutor unknown: and thus the accused did commit the crime of bribery"
>
> "the said accused as partners aforesaid, did on behalf of the firm and at Cape Town in the district of the Cape, and on or about the several dates set out in Column 2 of the Schedule 'B' attached, wrongfully, unlawfully and corruptly give to the said Ernest Byrne the unauthorised payments of money set out respectively in Column 3 of the said Schedule 'B' for doing or having done in his office of storekeeper, acts tending to the advantage of the firm in respect of the sale by the firm of goods to the store; and thus the accused did commit the crime of bribery."

16

No objection was raised in the court below or in the Appellate Division to such particulars. It may be said that the relevant period was stated and the corrupt payments were itemised in a schedule, and again the nature of the action or inaction was stated, that is the general influencing of purchases from the firm. In the case of the second count, the specified action or inaction is that of "acts tending to the advantage of the firm in respect of the sale by the firm of goods to the Store". As I see it, a parallel may be drawn with the present case. The relevant period is stated. The relevant payments could well have been itemised in a schedule, but nonetheless the total payment over the period is alleged. Again, the general nature of the action or inaction by the accused, while it is no more than suggested in the Crown's Summary

of Substantial Facts and again the Preamble (para. 35), is stated thus in the further particulars supplied to the 14th accused:

> "The Crown's case as it appears from the Indictment and the other evidential material to be placed before the Court is that the payments which were made by the Accused 14 to Accused 1 were made in circumstances where Accused 1 was in a position as Chief Executive to influence or involve himself in the evaluation or award of contracts, variation orders or contractors claims, or to make decision unduly beneficial to Accused 14, or to use his opportunities as Chief Executive to otherwise further the private interests of Accused 14."

For my part, I would prefer a more definitive statement that the various payments were made in return for the first accused exercising his influence in an official capacity to the benefit of the particular accused.

The charge sheet in Levy (12) indicates that it is not mandatory upon the Crown to specify each and every transaction, that is, each and every action or inaction by the first accused. That observation is reinforced by the dicta of Mason J (Curlewis and Gregorowski JJ concurring) in R v Lavenstein (9). In that case, as earlier said, the

accused was charged with a statutory form of bribery. The judgment of Mason J reads at p350:

> "The charge in the magistrate's court was that the accused contravened that section of the law, in that he did wrongfully and unlawfully, either directly or indirectly, make a gift of £45 to an official or person in the service of the Government of the Union of South Africa, one Humphrey Neville Lloyd, an inspector of the South African Police, with the object of inducing him to, perform or leave unperformed an act in his official capacity in conflict with his duty.
>
> The objection taken in the magistrate's court was framed in a very general way, but it was amplified in the notice of appeal and may be summarised as followed: It is objected that the indictment is bad, because it alleges no specific act which the official was desired to do in conflict with his duty."

and at p353

> "But the more important objection is that the business or transaction which brought the official and the accused together are not alleged in the indictment.
>
> There can be no doubt that in many cases it would be impossible to allege that, because in many cases the bribe may be given not with respect to any known transaction, but with respect to future transactions which may come upon the scene. But where the Crown does know what the business transaction is which brings the accused and the official into relationship and in respect to which the bribe generally is offered, I think the indictment should allege that transaction."(Italics added)

As I observed earlier, it is immaterial (as far as the briber is concerned) that his goal is not achieved. Hunt & Milton observe (at p226, n.146) that "indeed in few reported common-law

bribery cases has [the briber's] goal been achieved; R v Levy (12) is one of the few." There is good reason for that of course. Where the bribee does not accede to the corrupt offer, or indeed where he acts as an agent provocateur in the matter (see R v Sacks (1) at p427) there is every likelihood that the matter will be reported to the police and a prosecution initiated. Where the bribee accepts or even solicits a corrupt offer, the bribery is wrapped in a cloak of secrecy, which may or may not ultimately be removed. Those it seems were the facts of R v Levy (12),

18

where the accused were committed for trial apparently in June 1928 (see p329) in respect of offences alleged to have been committed over a period stretching from 1921 to 1924.

In the present case the Crown alleged in effect that bribery took place over a period, taking all sixteen counts into reckoning, stretching from February 1991 to January 1998. The Crown then states that it is unable to particularise the alleged action or inaction by the first accused in respect of which the various payments were made. Apart from the facts of Levy (12) and the dicta of Mason J in Lavenstein (9), there is further support for the Crown's position to be found in an encyclopaedic work entitled, "American Jurisprudence", 2 Ed, 1997, (Lawyers Cooperative Publishing), Vol 12 in the section on Bribery at para 14 on pp601/602:

"Effect of unattainability or nonattainment of purpose

Under a statute making the crime of bribery complete upon the formation of an agreement or understanding, it is immaterial whether anything is actually done in furtherance of the agreement. Thus, it is not necessary that the bribe be paid or that the purpose of the bribe be achieved, and no actual violation of the bribee's duty is necessary to sustain a conviction. The offense under the general federal bribery statute, for example, is consummated, even though the object of the bribe was not attained or could not be attained. Thus, the prosecution need not show any of the legislative acts for which the defendant allegedly accepted bribes, since the mere acceptance of a bribe is a violation of the provision. Also, it is not necessary for the government to establish that the defendant who is charged with bribing a government agent actually benefited in any way from the actions taken by the agent." (Italics added)

The references there are to a statutory form of bribery, but it will be seen that the comments in the extract (apart from the italicized words) coincide with the Roman-Dutch common law in the matter. As for the italicized words above, they take the matter further than the dicta of Mason J, inasmuch as they indicate that the

19

prosecution need not prove any action or inaction: Mason J went no further than saying that where the Crown is aware of the specific action or inaction by the bribee, it should be pleaded; where such is not known to the Crown, it cannot, nor is it obliged to plead such aspect.

With those dicta I respectfully agree. Accordingly I rule that the Crown is not obliged to plead any specific alleged action or inaction in an official capacity by the first accused, which is unknown to the Crown.

DELIVERED THIS 13th DAY OF MARCH, 2001.

B.P. CULLINAN
ACTING JUDGE

Attorneys for:
The 1st Accused : E. H. Phoofolo & Co, Maseru
2nd Accused : Willem Syssert, Bloemfontein
11th Accused: Mohaleroe Sello & Co, Maseru.
14th Accused: Naledi Chambers Inc., Maseru.
15th Accused: M. T. Matsau & Co, Maseru.