C. OF A. (CRI) 5 OF 2002
CRI/T/111/91

IN THE APPEAL COURT OF LESOTHO

In the matter between:

EPHRAIM MASUPHA SOLE Appellant

and

THE CROWN Respondent

JUDGMENT

Criminal law - bribery - jurisdiction - no evidence that agreements to accept bribes were concluded in Lesotho - what constitutes harmful effects.

State official -appellant chief executive of statutory body - seconded from civil service - whether a state official as required by common law crime of bribery.

Criminal Procedure and Evidence (Amendment) Act,2001 amending sections 245 to 248 of Criminal Procedure and Evidence Act, 1981 - retrospective operation and constitutionality.

Reopening of defence case - whether trial court's refusal to permit appellant to reopen was irregular or improper.

No direct evidence of agreement to bribe or of intention of bribers to pay appellant - payments made to appellant by intermediaries - admissibility of portions of criminal record - appellant failing to give evidence - convictions based on inference - whether correctly drawn.

Sentence - appellant unrepresented during evidence and addressing court in mitigation - whether sentencing procedure unfair - refusal of postponement to enable appellant to consult with and possibly call criminologist - first raised by appellant in reply - whether any misdirections.

2, 3 and14th April, 2003

Held at Maseru

CORAM

Smalberger JA
Gauntlett JA
Melunsky JA

The Full Court:

INTRODUCTION

[1] The appellant was indicted in the High Court on 3 December 1999 together with eighteen other accused on charges of bribery, fraud and perjury. Objections to the indictment resulted in the Crown, on 1 June 2001, preferring a fresh indictment against the appellant only, in which he was charged with 16 counts of bribery and two of fraud. Pursuant thereto he appeared before Cullinan AJ (formerly CJ) on 11 June 2001. He pleaded not guilty to all counts. At the conclusion of a protracted trial, the appellant was convicted on 11 of the bribery counts, involving the receipt of millions of Maloti, and on both fraud counts. He was sentenced to an effective period of 18 years imprisonment. He now appeals against his convictions and sentence.

[2] At the commencement and during the course of his trial the appellant raised a number of legal issues which were the subject of separate rulings and judgments by the learned trial judge. The appellant also appeals against some of those adverse to him. They will be considered and dealt with at an appropriate stage in this judgment.

[3] The criminal trial arose out of the Lesotho Water Highlands Project ("the LHWP" or "the project") , one of the biggest and most ambitious dam projects in the world, which entailed *inter alia* the construction of the Katse Dam in a remote and inaccessible part of the highlands of Lesotho. Initially the project involved the building of the essential infrastructure, such as access roads and accommodation facilities. One of the main aims of the project was the delivery of water to the Republic of South Africa, which necessitated the construction of a delivery tunnel. Another object was the generation of electricity and this entailed the construction of a hydropower complex and a transfer tunnel from Katse to Muela where the complex was to be built. All of this required substantial funding, most of which came from outside agencies such as the World Bank, the European Commission and the African Development Bank.

[4] The implementation, supervision and maintenance of the LHWP was entrusted to the Lesotho Highlands Development Authority ("the LHDA"), a statutory body created by the Lesotho Highlands Development Order 23 of 1986, pursuant to and in terms of a treaty between the governments of Lesotho and the Republic of South Africa. The LHDA was governed by a board of directors but the day to day running of its affairs was in the hands of its chief executive officer. Another body, the Joint Permanent Technical Commission ("the JPTC"), subsequently known as the Lesotho Highlands Water Commission, which was composed of representatives from both Lesotho and South Africa, acted in an advisory capacity to the LHDA and also monitored the progress of the project.

[5] The appellant is a qualified civil engineer. He was appointed to the public service in August 1972. He had progressed to the position of Senior Engineer, Water Affairs, when, on 1 November 1986, he was seconded to the LHDA as its first chief executive. He served in this capacity until his

suspension in October 1994. He was eventually dismissed from this post in November 1995. Subsequently the LHDA instituted civil proceedings against the appellant in the High Court, claiming damages arising from his alleged wrongful conduct while chief executive. Judgment was given in favour of the LHDA in October 1999 and an appeal by the appellant to this court was dismissed in April 2001.

[6] Before considering the evidence, it is appropriate to make some general observations relating to the bribery counts. The alleged bribers were firms, partnerships or joint venturers who were awarded substantial contracts by the LHDA in relation to the project, either as contractors, for the performance of construction work, or as consultants, for the design and/or supervision of the construction. In order to carry out specific aspects of the project some of the firms joined with others to form partnerships or consortia. None of the contractors or consultants gave evidence at the trial although, as appears below, the appellant applied unsuccessfully to reopen his case in order to lead their evidence.

[7] The essential averments in respect of each bribery count were:

(1) An offer by a contractor or consultant to the appellant to use his opportunities or powers as chief executive to further the private interests of the contractor or consultant concerned;

(2) Acceptance of the offer;

(3) Payment of specific amounts by the contractor or consultant to the appellant pursuant to the agreement so reached.

[8] The Crown alleged that it was unable to furnish particularity concerning the agreements on which it relied, nor, save in two or three instances, did it specify what benefits or advantages accrued or were to accrue to the contractor or consultant. Indeed there was

no direct evidence of any agreement between the contractors or consultants and the appellant or of the manner in which the appellant was to use his powers or opportunities to further the formers' interests. Furthermore, and apart from one payment by Dumez (Nigeria) Ltd ("Dumez Nigeria") allegedly on behalf of Dumez International ("Dumez"), no money was paid by the contractors or consultants directly to the appellant. The Crown relied on payments made by the contractors or consultants to certain third persons (referred to as "intermediaries" in the court *a quo*) who, in turn, so it is alleged, paid over a percentage of their receipts to the appellant.

[9] From the aforegoing it is apparent that the Crown case was based largely on inferences which it drew from the facts and the essential question that arises in relation to the merits of the appeal is whether the inference of the appellant's guilt was properly drawn. In this regard it is important to note that most of the material facts are not in dispute. The trial judge accepted the material evidence led by the Crown and his factual findings are largely unchallenged on appeal. Moreover the appellant did not give evidence and did not call any witnesses to testify on his behalf.

[10] In the absence of any substantial factual dispute there is no need for us to name the particular witnesses from whom the facts were established. It is sufficient to say that the records from the South African and Lesotho banks, relevant to this enquiry, were produced by representatives of the banking institutions concerned; that the documents relating to Swiss bank accounts were supported by affidavits under the authority of Mrs Cova (an examining magistrate of Zurich); and that Mr. Roux, a director of PricewaterhouseCoopers, Forensic Services (Pty) Ltd., relying on the banking records, traced the flow of money from contractors and consultants to intermediaries and from intermediaries to the appellant. All of the aforesaid evidence was unchallenged, save that counsel for the appellant disputed the admissibility of certain aspects of Mr. Roux's evidence which were said to amount to opinion evidence. In the result the trial judge, perhaps overcautiously, did not have regard to Mr. Roux's opinions, but took into account his evidence to the extent that the witness placed the facts before him "in manageable form". In addition to the banking and accounting evidence, he also had regard to the testimony of Messrs Putsoane, Mochebelele and Rafoneke and Mrs

Mathibeli, Makoko and Callaway, among others.

[11] Before proceeding to consider certain background circumstances relevant to the merits, the various counts on which the appellant was convicted and the inference to be drawn from the established facts, it would be appropriate to deal first with certain other issues which arose at different stages during the trial.

Jurisdiction: bribery

[12] A significant part of the oral argument of the appellant's counsel as regards conviction on the bribery counts related to jurisdiction. A special plea to jurisdiction had been raised before the trial court in terms of section 162 (2) (e) of the Criminal Procedure and Evidence Act, 1981 ("the Code"). On 10 May 1991 the trial court held that it had jurisdiction to try the bribery counts, giving its reasons for the ruling in a 124 - page judgment handed down a week later.

[13] The trial judge's approach to the issue was this. The objection to jurisdiction related (in the absence of a statement of agreed facts, or any evidence at that stage) to the basis disclosed by the indictment. The latter stated that the location of the place of the commission of the alleged offence of bribery was unknown to the Crown. In the circumstances the matter had to be approached on the basis that the alleged agreements relating to each of the bribery counts were made outside Lesotho.

[14] Before us the question is less abstract. The objection is not one confined to the indictment; it is that, the trial having now concluded, there is no evidence which establishes that any of the agreements pertaining to the bribery counts were concluded in Lesotho. The appellant's case in

summary is that the crime of bribery is complete once the agreement between briber and bribee is struck; it requires nothing more. That being so, since no evidence shows that the corrupt agreements which the Crown contends (for the reasons analysed below, in dealing with the bribery counts) were concluded between the appellant and contractors to the LHDA, were in fact struck in Lesotho, the trial court had no jurisdiction to convict the appellant of bribery.

[15] Since this issue goes to jurisdiction, we deal with it at the outset, and in advance of the detailed consideration of the individual counts which follows.

We approach it on the premise that these counts are established by the Crown, but without the Crown proving that the corrupt agreements were concluded in Lesotho.

[16] The separate judgment of the court in relation to this issue ranged far and wide: as regards different legal systems, different periods of legal history, and disparate offences. These extend from actions of debt for penalties under old English statutes against usury, to deaths at sea from blows struck on shore, to cheques forged in one country and uttered in another, to bigamy. Before us, however, counsel for both the appellant and the Crown adopted a narrower approach, focusing solely on the crime of bribery. While common jurisdictional principles permeate the field of criminal law, this approach is to be preferred.

[17] The inquiry becomes yet narrower given the acceptance by the appellant's counsel of the correctness of the decision of the Supreme Court of Zimbabwe in **S v Mharapara** 1986 (1) SA 556 (ZSC) (and - **sub nom Mharapara v The State** (1986) LRC (Const) 235). The judgment written for the court by **Gubbay JA** (as he then was) was indeed extensively quoted

by the trial judge. While it deals with a theft offence, this reasoning (at 563-4) appears to us compelling, and of equal application to bribery in Lesotho:

> **"With regard to the law of Zimbabwe, I can see no justification for a rigid adherence to the principle that, with the exception of treason, only those common law crimes perpetrated within our borders are punishable. That principle is becoming decreasingly appropriate to the facts of international life. The facility of communication and of movement from country to country is no longer restricted or difficult. Both may be undertaken expeditiously and at short notice. Past is the era when almost invariably the preparation and completion of a crime and the presence of the criminal would coincide in one place, with that place being the one most harmed by its commission. The inevitable consequence of the development of society along sophisticated lines and the growth of technology have led crimes to become more and more complex and their capacity for harming victims even greater. They are no longer as simple in nature or as limited in their effect as they used to be. Thus a strict interpretation of the principle of territoriality could create injustice where the constituent elements of the crime occur in more than one State or where the *locus commissi* is fortuitous so far as the harm flowing from a crime is concerned. Any reluctance to liberalise the principle and adopt Anglo-American thinking could well result in the *negation of the object of criminal law* in protecting the public and punishing the wrongdoer. A more flexible and realistic approach *based on the place of impact, or of intended impact, of the crime must be favoured*.**
>
> **Accordingly, I am satisfied that, although all the constituent elements of the theft occurred in Belgium, in particular the obtaining of the money there, the State is nonetheless entitled to proceed upon the present indictment and adduce evidence at the trial, if such is available, to establish the fact that *the harmful effect of the appellant's crime was felt by the Zimbabwe Government within this country*."** (Italics added)

As the trial judge observed, the Supreme Court of Canada (in **Libman v R** (1985) 21 DLR (4th) 174; (1986) LRC (Crim) 86) has adopted a similar approach. While it may remain true that "[t]he primary basis of criminal jurisdiction is territorial",

> **"As well, along with other types of protective measures, States**

> **increasingly exercise jurisdiction over criminal behaviour in other States that has harmful consequences within their own territory or jurisdiction....” (Per La Forest J at 90).**

[18] Is this approach incapable of application to bribery in a case like the present because the *actus reus* is complete upon conclusion of the corrupt agreement, so that its implementation, or other consequences, in Lesotho constitute no part of the offence? The analogous problem in **Mharapara** was that a theft was committed in Brussels, but with harmful consequences which ensued within Zimbabwe. Similarly in **Attorney-General v Yeung Sun-Shun and Another** (1987) HKLR 987; (1987) LRC (Crim) 94; (1989) LRC (Crim) 1 (HK CA)) - also considered by the trial judge - the Hong Kong courts had to deal with a conspiracy concluded in Macau relating to illicit imports of ivory from Macau to Hong Kong. The court concluded:

> **“In our view, the Hong Kong courts have, and should assume, jurisdiction to try those who are charged with a conspiracy formed out of the jurisdiction if any act has been committed within the jurisdiction in furtherance of the agreement.”**

[19] We consider that the trial judge was correct in adopting a similar approach as regards the crime of bribery where acts in furtherance of the offence - already itself committed when the corrupt agreement between briber and bribee is struck - take place, or harmful effects of the offence occur, within Lesotho.

[20] It is now necessary to consider whether either postulate was established on the evidence.

[21] The Crown argued that the second postulate was sufficiently established by the harmful consequence immediately inflicted upon the integrity of public administration in Lesotho by the conclusion of the corrupt agreements. We agree. The development scheme administered by the

LHDA is, as we have already indicated, of great importance to Lesotho, and indeed, to the Southern African Development Community. It involves Lesotho's international relations and is central to its economic future. Its success and integrity matter vitally to this country. Corrupt agreements by its chief executive with its international contractors, if established, would be a cancer at its heart. Since it is not a requirement for the *actus reus* of bribery that loss be suffered, it is not in our view necessary to consider whether, in addition to harm of this kind, specific harmful effects arose in relation to each count for the State of Lesotho.

[22] For these reasons we conclude that the trial judge was correct to conclude that jurisdiction existed to try the appellant in Lesotho on the bribery counts.

Was the appellant a state official at all material times?

[23] The common-law crime of bribery can only be committed by or in respect of state officials. According to the definition in **Milton South African Criminal Law and Procedure Vol.II (Common Law Crimes)** (revised 2 Ed (1982)) (reprint 1992) at 227

> **"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."**

[24] In terms of section 154 (1) of the Constitution of Lesotho, 1993, "public office" means any office of emolument in the public service, and "public officer" means a person holding or acting in any public office. "Public service" is the service of the King in respect of the government of Lesotho. The term "state official" is not confined to public officers (**R v Sacks and Another** 1943 AD 413 at 423). While all public officers qualify as state

officials, the converse is not true. The concept of a state official is of wider import and extends beyond the confines of the public service to someone who derives his authority from the public sector and performs his duties or functions in the public interest (**R v Whitaker** [1914] 3 KB 1283 (CA) at 1286; **S v Mzizi and Another** 1990 (1) SACR 503 (N) at 506/7; **S v Mukwezva** 1993 (1) SACR 694 (ZS) at 697). Whether a person occupying a certain office is a state official in that sense is often difficult to decide and may ultimately depend upon the facts of a particular case.

[25] As previously mentioned, the appellant was a member of the public service before his secondment to the LHDA in November 1986 and returned to the public service after his suspension as chief executive of the LHDA in October 1994. That much is common cause. What is in issue is whether he remained a member of the public service, and hence a public officer, during the period of his secondment when the alleged bribery offences were committed. In this regard the trial judge concluded:

> **"he was in fact a public officer holding the post of chief executive of the LHDA. He was, however, first and foremost, a public officer, and so remained until he eventually resigned from public service with effect from 22 December, 1998. He was then at all relevant times a state official, for the purposes of the common law offence of bribery."**

While it was not strictly necessary for him to do so, the trial judge went on to consider whether the appellant, in his capacity as chief executive of the LHDA, was also a state official for such purposes. He held that he was. Both these findings are challenged on appeal.

[26] Appellant's counsel contended that in terms of the indictment the Crown only set out to prove that the appellant was a state official on the narrow basis that he remained a public officer during the period of his secondment

to the LHDA. The trial judge was therefore not entitled to hold that he was a state official by virtue of his capacity as chief executive of the LHDA. We disagree. On a proper reading of the preamble to the indictment the Crown clearly set out to establish not only that the appellant was a state official because he remained a public officer while seconded to the LHDA, but also because considerations governing the establishment of the LHDA, and the exercise of its authority and functions, rendered its chief executive a state official. In any event, the question whether the appellant in his capacity as chief executive of the LHDA was a state official is ultimately a matter of law which the trial judge was not precluded from determining on the indisputable and common cause facts pertaining thereto. It was therefore open to the trial judge to find that the appellant was a state official on either basis or, as he chose to do, on both.

[27] The argument of the appellant's counsel that the appellant ceased to be a public officer on his secondment to the LHDA was premised on such secondment severing his connection to the public service. That is a false premise for it disregards the true meaning and import of secondment as well as the express terms of the appellant's secondment. In this respect the Concise Oxford Dictionary (9 Ed) defines the verb "second" as

> **"transfer (official) temporarily to other employment or to another position"**

and in **National University of Lesotho v Moeketsi** (1995) 1995-1996 LLR-LB 100 (CA) at 102/3 it was said (per **Kotze JA)**:

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

We agree with the trial judge that the use of the word "resumes" indicates that the court was of the view that during the period of secondment the main contract of employment was in a state of suspension. The terminology used is not compatible with the notion of severance.

[28] This conclusion is reinforced by the terms of the letter addressed by the acting Principal Secretary in the Ministry of the Public Service to the appellant informing him of his secondment, to which we were referred by the Crown's counsel without challenge**.** It provides, *inter alia:*

> "**Your secondment appointment may be terminated by the Government at any time after informing Lesotho Highlands without any reason being assigned and, in the event of such termination, you will revert to your substantive or similarly graded post and enjoy the salary and seniority you would have held had you not been seconded.**
>
> **Please note that your period of secondment, [will] not [constitute] a break in your pensionable service, for purposes of computing your terminal (sic) benefits."**

[29] Mrs Makoko, the Director of Employee Relations in the Ministry of Public Service, confirmed in her evidence that the appellant's salary rights were preserved during his secondment so that on his return he became entitled to the incremental increases he would have obtained but for his secondment. While she further testified that his pension rights did not accumulate during secondment it is very likely that she was mistaken in that regard as her evidence is not only contrary to the second quoted paragraph in the appellant's letter of secondment but, as pointed out by the trial judge, is also at variance with regulation 15 (1) of the Pensions Regulations, 1964 which reads:

> "**Except as otherwise provided in these regulations, only continuous public service shall be taken into account as qualifying service or**

as pensionable service:

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

Neither the terms of the letter of secondment nor the provisions of regulation 15 (1) were drawn to Mrs Makoko's attention when she gave evidence.

[30] Despite misgivings about Mrs Makoko's evidence in this latter respect, the trial judge proceeded on the assumption that her evidence was correct. At the very least, even if they did not accumulate, the appellant's pension rights were preserved during his secondment and resumed on his return to the public service, which is in keeping with suspension rather than severance.

[31] In the result the trial judge's finding that the appellant's "substantive post was that of public officer, (at a grade of no less than Senior Engineer), whilst he temporarily held the post of chief executive of the LHDA," leading to the conclusion-quoted in para [25] above - that he was at all material times a public officer- cannot in our view be faulted.

[32] Although not strictly required we proceed to consider whether the appellant, in his capacity as chief executive, even without ties to the public service, still qualified as a state official. The trial judge, with commendable diligence, did a detailed and thorough analysis of all relevant authorities, legislative and administrative provisions and related considerations bearing on the question. No purpose would be served in traversing the same ground in the same detail. We shall confine ourselves to what we consider to be the more salient features.

[33] The appellant's appointment as chief executive of the LHDA, and his terms and conditions of service, were governed by the Lesotho Highlands Authority Order 23 of 1986 ("the Order"). The enactment of the Order was a direct consequence of the treaty between the governments of Lesotho and South Africa, the purpose of which was to provide for the establishment, implementation, operation and maintenance of the LHWP to the mutual benefit of both countries, but more particularly, Lesotho. The treaty itself made provision for the appointment of a chief executive and the delineation of his functions. The project was ultimately to be controlled by the government of Lesotho through the relevant Minister - the Minister responsible for Water, Energy and Mining. In terms of section 38 (1) (a) of the Order the exercise by the LHDA of any of its functions was "deemed to be for public purposes within the meaning of the Land Act, 1979." The Order as a whole clearly indicated that the LHWP was to be for the public benefit. The Minister's authority ranged from the appointment and dismissal of members of the board of the LHDA, having his own Principal Secretary as chairman of the board, to the power to appoint and dismiss the chief executive. Furthermore, the Minister exercised overriding supervisory administrative and financial control over the LHDA. It is also true to say, as found by the trial judge, that the source of the chief executive's emoluments was at least in part public funds.

[34] Consequently the trial judge went on to hold that the LHDA "in the constitution of its board, in the overall control of the Minister, was effectively a government body controlled by government. It was also partly funded by government. The accused was appointed by no less than the Minister ..." He concluded:

"**In brief, it is difficult to imagine a post of a greater public character**

> **than that of the chief executive. Clearly the accused was, in effect, employed by government and derived his authority from the public sector. On a consideration of all the above authorities I consider that his employment would meet the test set in any of those cases. I wish to emphasise, that even were it not the case that the accused was also a seconded public officer, I am satisfied that, in any event, for the purposes of the common law offence of bribery, he was a state official at the relevant time**."

[35] It has not been shown that in his overall assessment of the relevant authorities and material considerations in relation to this aspect the trial judge misdirected himself in any respect, or that he came to a wrong conclusion in law. In our view he correctly held that the appellant, while chief executive of the LHDA, was a state official and thus capable of being bribed.

Sections 245 to 248 of the Code

[36] The next issue relates to the applicability and constitutionality of sections 245 to 248 of the Code as amended by the Criminal Procedure and Evidence (Amendment) Act 2001 which came into operation on 8 March 2001. On 7 December 1999 the appellant and 18 other accused were arraigned in the High Court on an indictment alleging some 19 counts, including 16 of bribery. In terms of section 119 of the Code, as soon as the indictment in any criminal case has been lodged with the Registrar of the High Court, such case shall be deemed to be pending in that court. At the latest, the case against the appellant was pending as from 7 December 1999. After a number of interlocutory applications the appellant was ultimately left as the sole accused under a fresh indictment charging him, in the main, with the same offences charged under the original indictment. He pleaded to the fresh indictment on 11 June 2001 and his trial proper commenced on that date. It is a moot point whether the proceedings against the appellant only commenced when the fresh indictment was

lodged, which probably occurred after the amended sections 245 to 248 came into operation. However, the Crown has consistently adopted the attitude that the proceedings against the appellant commenced when the first indictment was lodged, and were pending when the amended sections became operative. The trial judge approached the matter on that basis, and we shall do likewise.

[37] Two main submissions were advanced on behalf of the appellant. The first was that the amended provisions could not be applied retrospectively to criminal proceedings which had already commenced. The second was that they were unconstitutional to the extent that they denied the appellant a fair hearing in breach of section 12 (1) of the Constitution.

[38] The first submission is without any merit. In law a distinction is drawn between substantive law which defines rights, duties and obligations, and rules of procedure which govern or regulate the general conduct of litigation. As a guiding principle "every alteration in procedure applies to every case subsequently tried, no matter when such case began ..." **(Curtis v Johannesburg Municipality** 1906 TS 308 at 311) provided it does not impact upon existing substantive rights and obligations (**Minister of Public Works v Haffejee NO 1996 (3) SA 745 (A) at 753 B-C).**

It was correctly conceded by the appellant's counsel that sections 245 to 248 in their original form were purely procedural in nature. The changes brought about by the amendments to sections 245 to 248 did not affect or alter their intrinsic procedural nature or impact upon any existing substantive rights or obligations. An accused has no vested rights in purely procedural provisions. In keeping with the general principle enunciated above the amended provisions applied to the appellant's trial from the date of their enactment.

[39] With regard to the second submission, the appellant's counsel contended that the amended provisions, as he put it, "had changed the rules of the game" thereby denying the appellant a fair hearing. As pointed out by the trial judge in another of his commendably thorough judgments, the amendments bring the Code, as far as the matters dealt with are concerned, in line with similar legislative provisions in other countries, including South Africa, where they have been in operation for many years. They were clearly designed to better regulate the conduct of criminal proceedings by facilitating proof in relation to matters of a relatively formal, non-contentious nature. We do not propose to embark upon a comparison of sections 245 to 248 in their original and amended forms. This was done by the trial judge. A review of their relative provisions show that the amendments have not imposed new obligations on an accused or interfered with substantive rights. They facilitate the discharge of the burden of proof resting on the Crown but their application does not result in prejudice (in the legal sense) or lead to an unfair trial as the legitimate rights of an accused person to challenge disputed matters are appropriately catered for and protected.

[40] To the extent that the amended provisions incorporate presumptions which favour the Crown by giving entries in the accounting records, and related documentation, of banks both in Lesotho and countries outside the status of prima facie proof, courts recognise "the pressing social need for the effective prosecution of crime, and that in some cases the prosecution may require reasonable presumptions to assist it in its task" (**S v Zuma and Others** 1995 (1) SACR 568 (CC) at 591 para [41]). Here the prima facie proof provisions relate to matters which would generally be considered of a formal, non-contentions nature, proof of which would normally not be considered to operate unfairly against an accused person. Nor can the

mere fact that the evidence is tendered in the form of an affidavit render the trial proceedings unfair (cf **S v Van Der Sandt** 1997 (2) SACR 116 (W) at 132). An accused is not denied the right to challenge the evidence constituting prima facie proof. He may request that oral evidence be heard. The fact that it lies within the discretion of the presiding judicial officer whether or not to grant such request does not lead to unfairness; one assumes the proper exercise of such discretion.

[41] In our view the trial judge correctly concluded that the amending provisions did not impinge upon the fairness of the trial, were not unconstitutional, and were applicable to the conduct of the trial.

Application to reopen

[42] Before proceeding to deal with the appeal against the merits, there remains to be considered the appeal against the trial judge's refusal to allow the reopening of the defence case.

[43] The Crown closed its case on 8 November 2001. The appellant's counsel immediately indicated that he was closing the defence case. The trial judge observed that he had not yet ruled on whether there was a case to meet (which strictly speaking he was not required to do in the absence of an application for discharge). He then proceeded to rule that there was a case to answer whereupon the defence case was formally closed. Dates were set for the delivery of the Crown's and the defence's heads of argument, being 16 and 26 November respectively, with argument to be heard on 29 and 30 November. On 16 November the Crown's heads were duly delivered; and on 21 November the application to reopen the defence case was filed on the appellant's behalf.

[44] The appellant annexed to his founding affidavit some 37 letters and communications that had passed between the chief executive of the LHDA and various erstwhile contractor/consultant accused during the latter half of 1999. The correspondence comprised, in general, requests for explanations regarding alleged payments to the appellant and replies of an exculpatory nature from such erstwhile accused. What the appellant sought was an order to subpoena a witness to produce such documents in evidence as well as to subpoena certain consultants/contractors to give evidence before the court or on commission. The application was based on the alleged non-disclosure of the relevant documentation by the Crown and, consequently, the appellants alleged lack of knowledge of exculpatory material indicative of his innocence and relevant to his defence. In a comprehensive judgment which traversed all relevant material the trial judge concluded that the application had not been brought in good faith and accordingly dismissed it.

[45] A court has a general discretion to allow a party who has closed his case to lead evidence at any time up to judgment (**Hoffman and Zeffert The South African Law of Evidence, (4ed 1988) at 476**). In exercising such discretion the court will have regard, inter alia, to the reasons advanced for the failure to call such evidence; the materiality thereof; whether due diligence was exercised; and the question of prejudice (cf **Oosthuizen vs Stanley** 1938 AD 322 at 333; **Hladhla v President Insurance Co. Ltd** 1965 (1) SA 614 (A) at 622). A further consideration is the timing of the explanation. In the present instance this occurred some days after the appellant had received the Crown's heads of argument. That raises the spectre of the special danger that "there is always the possibility, such as human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty" (**S v De Jager** 1965 (2) SA 612 (A) at 613) or, far that matter, might seek to avoid or delay its consequences (see also in this regard the references to **Wigmore** in

Hladhla's case at 621).

[46] In response to the appellant's application the Crown called Deputy Commissioner Matsoso as a witness. He testified that, some months prior to the commencement of the trial proper in June 2001, he had furnished the appellant with a bundle of documents, a copy of which he identified in evidence. It transpired that the bundle contained copies of all but four of the copied documents attached to the appellant's founding affidavit. The trial judge accepted Deputy Commissioner Matsoso's evidence after subjecting it to careful scrutiny and evaluation in the light of other relevant documentation. He further concluded that the appellant must have acquired access to the remaining four documents during the course of his trial through his connections with the LHDA. The trial judge therefore rejected any suggestion that the appellant only became aware of the documentation in question after his case had been closed. The appellant's counsel was unable to point to any misdirection by the trial judge in his evaluation of the evidence and the conclusion he reached in that regard.

[47] Arising from such finding it was inevitable that the trial judge would hold, as he did, that on the papers before him the appellant had for same time been aware of the probable general defence of his erstwhile co-accused, implicit in which was a denial of their complicity in, or knowledge of, any alleged bribery of the appellant. Their previous association as co-accused, the interaction of their legal representatives (which included a joint meeting of counsel representing them held on 2 May 2000) and disclosures made by or on behalf of certain of the former co-accused at preliminary court hearings would all have contributed to such awareness. Prospective defence witnesses were notionally available, identifiable and contactable before the appellant's case was closed. In this respect the trial judge observed:

> **"From the moment of their notional availability, I cannot but imagine that the accused, duly advised, considered whether or not he should call particular individuals as witnesses, and whether, in view of impending trials, and the privilege against self-incrimination, the individuals might wish to give evidence."**

[48] Although the circumstances in which the appellant ultimately came to close his case allowed occasion for reflection, he at no time sought to call any witnesses, not did he seek any opportunity, by way of postponement or otherwise, to do so. No acceptable reason or explanation exists for his failure to do so. The appellant has never suggested that his case was closed contrary to his instructions.

[49] In the circumstances there was every justification for the trial judge exercising his discretion against the appellant and refusing the application to lead further evidence. The exercise of a discretion by a judicial officer in the performance of his judicial functions can only be interfered with on certain well-known limited grounds (**Ex parte Neethling and Others** 1951 (4) SA 331 (A) at 335 D-F). No ground that would justify interference has been shown to exist. In respect of this ground of appeal, too, the appellant must fail.

The Merits

[50] The process of awarding contracts for the LHDP frequently commenced with what was called the "pre-qualification" procedure - a request to potential contractors or consultants to submit tenders for a particular aspect of the project. Most funding agencies usually insisted on a pre-qualification list and the chief executive also had the right to require it. An evaluation committee, some of whose members were appointed by the chief executive, usually assisted by outside consultants, then considered the

tenders and nominated a preferred tenderer to the chief executive. He, if satisfied with the preferred tenderer, recommended the contractor or consultant to the JPTC and thereafter to the LHDA board which made the final decision. In an appropriate case the chief executive apparently had the right to request the evaluation committee to reconsider its nomination. After the LHDA's approval of a tenderer, a negotiating committee (usually consisting of the same persons as the evaluation committee), entered into negotiations with the contractor or consultant in order to resolve any uncertainties or qualifications contained in the tender. If these were disposed of satisfactorily, an agreement, known as a memorandum of understanding ("MOU") was concluded between the LHDA and the tenderer. A letter of acceptance or a contract would signify formal approval.

[51] By October 1986, at the time of the appellant's appointment to the LHDA, the design work on the project was under way. One of the first consultants to become involved in the project was Acres International Limited ("Acres"), a Canadian company. From the beginning of 1987 Acres supplied key personnel to the technical division of the LHDA, initially pursuant to contract 19, and, on the expiry thereof, under contract 65, which was signed in February 1991. The posts occupied by Acres's employees on the LHDA included the technical manager, chief engineers and chief design engineers. They were concerned with running the technical and engineering side of the LHDA, the supervision of the work of other consultants, the provision of assistance in the preparation of tender documents and the evaluation of tenders. The contracts between Acres and the LHDA were clearly lucrative and although no precise figures are available, the LHDA paid Acres at least M15 million and 22 million Canadian dollars ("CAD") between September 1991 and June 1999, according to the trial judge's rough estimate.

[52] When contract 19 came to an end only Acres was invited to submit a proposal for a subsequent contract. It was in this way that contract 65, termed a sole-sourced contract, came into operation. It continued in force until 31 October 1999. During the currency of this contract there was considerable dissatisfaction among Lesotho engineers within the LHDA. This arose out of the following circumstances. It was due to a shortage of suitably qualified and skilled engineers in Lesotho that Acres obtained the contracts in the first place. It was obliged to train local technicians to enable them to occupy important positions within the LHDA. This, according to the complaints, they failed to do. The appellant conceded as much at a meeting called by the local engineers during February 1994. More importantly the engineers objected to the fact that the appellant had promoted Acres's personnel without justification, while overlooking the claims of local engineers for advancement. These complaints were confirmed by Mr. Putsoane, an engineer, in his evidence, but despite the absence of a denial by the defence, the evidence falls short of establishing beyond reasonable doubt that the appellant had indeed favoured Acres, although it may be noted that the remuneration due to Acres depended, *inter alia,* on the number of their employees engaged by the LHDA.

[53] In 1988 certain contractors were invited to tender for the construction of the northern access road to Katse Dam (contract 104). Sixteen tenderers pre-qualified. Dumez was not one of them but the appellant, on the advice of Acres, recommended the inclusion of Dumez. The recommendation was accepted and Dumez was included. After the receipt of tenders, Dumez was recommended and appointed as the preferred tenderer for the contract at a contract price of M54 million. The MOU was signed and work commenced early in 1989. Dumez made substantial claims for extra payments as the work progressed and a dispute arose concerning the

amount to which it was entitled. In June 1991 the appellant, a Mr. Schutte (the consulting engineer) and Dumez's representatives met in Paris. (The fact that the appellant was in Paris at all, while in Europe for the ostensible purpose of attending a conference in Vienna, was the subject of one of the fraud counts). Dumez alleged that the appellant had settled its claims at the Paris meeting. This was denied by the LHDA. The dispute proceeded to arbitration. Dumez again raised the issue of the Paris agreement. Eventually, and during 1994, the arbitration was settled by a payment of M90 million to Dumez. On behalf of the respondent it was submitted that these facts established that the appellant had benefited Dumez by agreeing to a substantial settlement of Dumez's disputed claims when he had no authority from the LHDA to do so. This, it was argued, was further proof of the appellant's involvement in a corrupt scheme with Dumez. The short answer to this submission is that there was no evidence of an agreement between Dumez and the appellant at the Paris meeting. It is true that the appellant gave no explanation for his unauthorised visit to Paris. But Dumez did not give evidence about the alleged settlement and the appellant made no admission in that regard. It follows that there is no merit in the Crown's submissions on this aspect. It also follows that the trial judge erred in holding that the appellant had acted in an unauthorised manner in relation to contract 104.

[54] A French firm known as Spie Batignolles ("Spie") was also involved in the LHWP. It was awarded the contract for the construction of the Katse village in August 1989. It was also the successful tenderer for carrying out civil works and the erection of buildings for power supplies, sub-stations and border crossing facilities. All of these contracts were commenced during March 1990. Spie, moreover, was the leading partner (or a substantial participant) in two partnerships or joint ventures, known as LHPC and MHPC respectively. Both partnerships consisted of the same

firms, save that a firm known as LTA, while not a member of LHPC, was a participant in MHPC. In 1990 LHPC was designated as the preferred tenderer for building the transfer tunnel from Katse to Muela (at a contract price of M822 million) and delivery tunnel from Muela to South Africa (at a contract price of M422 million). MHPC was awarded very substantial contracts for the Muela Power Station civil works, steel lining and gates (contract 129 A) in December 1994 and for the Muela Dam infrastructure and operations building (contract 129 B) earlier during that year.

[55] Questions concerning alleged irregularities in respect of contracts 129 A and 129 B were raised in the court *a quo* and in this court. These contracts, relating to hydropower aspects, did not involve the JPTC at that time. When the tenders were read out for contract 129 A, the lowest tenderer was a firm known as Skanska. MHPC's tender contained a modification which was not read out when tenders were opened. The effect of the modification was to reduce the tender price of MHPC. The upshot was that while the contract was eventually awarded to MHPC, the funding agency, the African Development Bank, withdrew its sponsorship for the contract and the LHDA was obliged to resort to commercial loans to finance it. With regard to contract 129 B, although MHPC was designated as the preferred tenderer, a serious dispute was encountered when the negotiating committee met with the firm in accordance with the normal practice. MHPC required the escalation clause to be applied before, instead of after, the deduction of advance payments, the effect of which would be to increase the contract price. The negotiating committee refused to accede to this. One of the significant reasons for the committee's decision was that, if agreed to, it would unfairly prejudice the unsuccessful tenderers who had tendered on the basis that escalation would be applied only after the advance payments were deducted. MHPC indicated that it would "bypass" the negotiating committee. This is

precisely what happened. The MOU was signed by a Mr. Ramollo and the letter of acceptance by the appellant. Both contained the requirement of the tenderer. The appellant clearly knew of the disputed issue and obviously had decided to benefit the tenderer. As a result of his decision, the funding agency, the European Commission, refused to provide sponsorship to the extent to which the contract price had been increased and the LHDA (or the Government) was obliged to find funding elsewhere.

[56] The largest contract, for the construction of the Katse Dam, was awarded to a consortium known as the Highlands Water Venture ("HWV"). The tender documents were issued in October 1989, HWV was identified as the preferred tenderer during 1990 and the contract was signed in 1991 at a contract price of over M1245 million. The dam was completed during 1998 at a cost substantially in excess of the contract price.

[57] Sogreah, Cegelec and Coyne et Bellier ("Coyne") were three other overseas firms involved in the project. Sogreah's involvement commenced as early as 1986. It was concerned, together with Sir Alexander Gibb and Partners ("Gibb") in the hydropower design, with Gibb and Coyne in the water transfer design and, together with Coyne, it was in charge of the supervision of the construction of the Katse Dam and the transfer tunnel. The construction of a power supply system and what was called the "Maseru Ring" was an integral part of the LHWP. This contract was awarded to Cegelec which executed the work from December 1989 to September 1991.

[58] Lahmeyer Internation Gmb H ("Lahmeyer") was also concerned in the LHWP at an early stage in connection with a feasibility study for certain aspects of the project. Subsequently and in partnership with Mott MacDonald - the Lahmeyer MacDonald consortium ("LMC") - it entered

into a joint venture with other participants. The joint venture was known as the Lesotho Highlands Tunnel Partnership ("LHTP"). As a partner in LHTP Lahmeyer had a substantial interest in the supervision of two contracts, *viz.* the construction of the delivery tunnel in Lesotho (contract 46) and the construction of the Muela hydropower project (contract 51). Tenders for these contracts were submitted in May 1990 and May 1991 respectively and the contracts were signed in February 1991 (contract 46) and February 1992 (contract 51). Both contracts ran for a number of years.

Lahmeyer, as a partner in LHTP, was also involved in a later phase of the project which related to the construction of the Mohale tunnel. Tenders for two consultancy contracts relating to the tunnel were called for in 1994. The contracts were awarded to LHTP in 1995 and 1997.

[59] We have already observed that Gibb was concerned in a number of joint ventures in the project. Indeed, Gibb's interest commenced as early as October 1986 when it pre-qualified as a consultant for the hydropower design. All in all it was involved in fourteen consultancy contracts over a period of eleven years.

[60] So much for the contractors and consultants. We turn now to consider two other aspects - the appellant's banking accounts and the significance of the intermediaries. On 1 March 1988 the appellant opened a bank account at the Union Bank of Switzerland ("UBS") Zurich. The account consisted of US Dollar ("USD") and British Sterling ("GBP") sub-accounts into which a Mr. Max Cohen paid the opening deposits of USD 2500 and GBP 2500 respectively. Cohen was a director of two Panamanian registered companies, Universal Development Corporation (Panama) ("UDC") and Electro Power Corporation (Panama) ("EPC") both of which played pivotal roles as intermediaries. Cohen was residing in the Lesotho Sun Hotel,

Maseru as early as October 1984 and he remained there on a semi-permanent basis for a few years. Neither UDC nor EPC had any direct interest in the LHDP but, as will be shown when we deal with the individual counts, they conducted banking accounts in Switzerland into which they received money from contractors or consultants and from which they paid the appellant.

[61] Apart from his accounts at UBS, the appellant held an account at Banque Multi Commerciale ("BMC") in Geneva in a French Franc ("FFR") currency, which he opened on 11 October 1989. He also operated an account at Union Bancaire Privee ("UBP"), Geneva, with two sub-accounts in FFR and South African Rands ("R") and further accounts (or possibly sub-accounts) at UBS. In addition, and during the period relevant to the charges, he held cheque and 32 day notice accounts at the Standard Bank, Ladybrand and a 32 day notice account at the Standard Bank, Bloemfontein, apart from various accounts in Maseru. These accounts were funded from his Swiss accounts.

[62] Besides Cohen and the two companies, UDC and EPC, other intermediaries who feature in the charges are a Mr. JM du Plooy of Ficksburg, Free State, who held an account at Nordfinanz Bank, Zurich, Mr Z M Bam, a consulting engineer, and his wife, Mrs MM Bam, who operated various accounts in Swiss Banks. Bam, who was the Managing Director of a consultancy firm known as LESCON, died in 1999.

[63] There was no evidence that Du Plooy had any involvement in the LHWP. A "consultancy agreement" between a contracting consortium, HWV, and Du Plooy was produced in the court *a quo*. The trial court held, in effect, that the agreement was not *bona fide.* It will be observed that Du Plooy acted as an intermediary in respect of the payments to the appellant in

Count 1. All that needs to be noted at this stage is that the appellant's counsel did not suggest that the trial judge's assessment of the agreement was incorrect. Indeed, and in the absence of any evidence from the appellant, Du Plooy or HWV, it is difficult to imagine what skill or expertise Du Plooy could have provided and, more importantly, why he made payments to the appellant.

[64] LESCON was involved in the project by providing assistance in the supervision of certain contracts. In this capacity it earned considerable sums of money which were paid into its accounts in Maseru. What was not explained was why certain contractors and consultants paid Bam in foreign currencies in Switzerland or why Bam, in turn, paid the appellant. Nor is there any explanation for similar payments by consultants or contractors to Mrs Bam.

[65] This is an appropriate stage to consider the counts on which the appellant was convicted. These will be dealt with in the same order as the trial court did. It will, however, suffice to do so in outline as the trial judge covered each count comprehensively and his factual findings were, save to the extent set out hereunder, largely unchallenged.

[66] <u>Count 1:</u>

On this count the appellant was charged with and convicted of receiving bribes totalling USD 370 000 from HWV, a partnership consisting of seven partners. HWV's involvement in the LHWP appears in para [56] above. During the currency of its contract HWV paid Du Plooy the following amounts by transferring the money to Du Plooy's account with Nordfinanz Bank, Zurich:

USD 250 000 on 9 October 1991

USD 233 404 on 28 February 1992

USD 250 000 on 10 September 1992

Significantly enough Du Plooy made three payments of USD 125 000 each to the appellant within ten days of receiving each transfer from HWV. The payments made to the appellant were credited to his account at UBS on 9 October 1991, 10 March 1992 and 18 September 1992. There were two other payments made by, or on behalf of, HWV to Du Plooy but there was no evidence of any other payment by Du Plooy to the appellant. The trial judge held, with reference to the payments received by the appellant that

> **"during the period 1 October 1991 to 22 September 1992 HWV paid Mr. Du Plooy the total sum of USD 1 139 404 from which sum Mr Du Plooy paid the accused the total sum of USD 375 000".**

Nothing turns on the fact that during the relevant period the payments to Du Plooy amounted to USD 733 404 and not USD 1 139 404. What also may be observed is that although HWV operated bank accounts in Lesotho and South Africa and furnished the LHDA with details of six European banks for receipt of payment (none of which were Swiss banks) the payments to Du Plooy came from Swiss bank accounts.

[67] Count 2:

On this count the appellant was alleged to have received FFR 808 270.37 as a bribe from Sogreah, alternatively Coyne, alternatively Cegelec, alternatively one or more of them. The trial court's conviction was on the basis that Sogreah, Cegelec and Coyne had in fact paid him GBP 20 986.36. The participation of the three firms in the project is evident from para [57]. The facts show that FFR1.726 million was transferred by Cegelec, Coyne and Sogreah into UDC's account at the Zurich branch of

the UBS during April 1991. During the same month GBP 20 986.36 was transferred from UDC's account into the appellant's account at the same bank. The trial judge was satisfied that the payment to the appellant was made from a joint fund into which Sogreah, Coyne and Cegelec had contributed and added:

> **"Bearing in mind their joint association with the LHWP, with Mr. Cohen, and with the accused, I am then satisfied the payments of all three contributed to the payments to the accused."**

[68] Count 15:

In the indictment the Crown alleged that Cegelec or Sogreah or Coyne or some or all of them paid the appellant over FFR 6.5 million during February 1990 to May 1995. The Court *a quo* held that out of a payment of FFR 935 000 made by Cegelec to EPC, the said intermediary (represented by Cohen) transferred FFR 211 828, converted into USD 35 842.30 (the equivalent at the time of R100 000) into the appellant's UBS account at Zurich. It was on that basis that the appellant was convicted.

[69] Count 3:

The appellant was charged with receiving FFR 941 882.12 from Spie during or about 27 May 1988 to 8 January 1991. The trial court's conviction was based on the following facts which it found were established: on 27 May 1988 Spie paid UDC FFR 140 251.90 out of which UDC paid the appellant USD 5617.11 and GBP 3020.81 on the same day. The amounts were paid into the appellant's account with UBS Zurich, each amount being the equivalent of 8187.50 Swiss Francs or R12 500. We have referred to Spie's involvement in the project, both singly and as part of LHPC and MHPC in paras [54] and [55] above.

[70] Count 4:

It was alleged that during March 1991 to August 1994 LHPC or one or more of its constituent members paid the appellant FFR 4 638 594.62, GBP 139 102.95 and 1 221 016.58 German marks ("DM"). Cullinan AJ held that during 17 November 1992 to 31 March 1994 LHPC (whose involvement in the project is detailed in para [54] above) paid UDC a total of GBP 123 310.95 from which UDC paid the appellant FFR 58 654.90, GBP 15 200 and USD 17 180.49 by transferring the said sums into his account at UBS, Zurich. It may be noted that although the construction work performed by Spie in the LHWP had ceased before the payments to the appellant were made, the involvement of LHPC and MHPC had not. Spie, as the lead partner in both these partnerships, retained a significant interest in the project until 1998.

[71] Count 6

On this count, according to the indictment, ABB Sweden, alternatively Spartak Trading Limited ("Spartak") on behalf of ABB Sweden, alternatively on behalf of an unknown contractor or consultant involved in the LHWP, paid the appellant USD 181 760 during June to July 1994. The evidence disclosed that two amounts - USD 122 542 and USD 59 218 - were paid into Bam's account at UBP Geneva on 21 June and 25 July 1994 respectively. The money was paid from an account holder at UBS Zurich but the identity of the transferor was not established. Within a month of receipt of each payment, Bam transferred approximately half of his receipts into the appellant's account at UBS Zurich - USD 62 000 on 21 July and USD 29 609 on 19 August 1994.

On behalf of the Crown it was submitted that the payments to Bam were made by Spartak on behalf of ABB Sweden or on behalf of an unknown contractor or consultant concerned in the LHWP. Cullinan AJ held that these averments had not been proved. However he went on to say:

> **"Considering the percentage (50%) of that received being paid forthwith to the accused and considering the system and pattern of all the other payments by Mr. Bam and others to the accused, I am satisfied that the present payments are but evidence of a corrupt agreement."**

He consequently convicted the appellant on Count 6 for accepting bribes totalling USD 91 609 from a consultant or contractor "involved in the LHWP to the Crown unknown."

[72] Count 7

According to the indictment, Lahmeyer and/or LMC bribed the appellant to the extent of DM 261 747.64 and R184 774.20 during the period April 1992 to April 1997. The trial judge held that the appellant received substantially less as bribe money from Lahmeyer, *viz*. FFR108 599.10 and USD 85 053.41. He held, moreover, that LMC (in which, as we have mentioned, Lahmeyer was a partner) paid a bribe of R50 000 to the appellant. Those payments formed the basis of the conviction on Count 7. The evidence established that in all instances Bam acted as the intermediary, that payments were transferred to him by Lahmeyer and, in one instance, by LMC, out of accounts held at German banks into Bam's account at UBP Geneva. The evidence also disclosed that Bam, in turn, transferred money (amounting in all to FFR 108 599.10, USD 85 053.41 and R50 000) into the appellant's account at UBS, Zurich.

There are some interesting matters arising out of these transactions. Firstly, a transfer of R100 000 to Bam on 30 April 1992 was followed on 20 May 1992 by a payment of R50 000 from Bam to the appellant. Secondly, of the payments made by Lahmeyer to Bam during the period 20 January 1995 to 10 April 1997 (totalling DM 261 747.64), one payment of DM 61 870 was transferred to Bam on 11 May 1995. The identical amount was

transferred to the appellant on the same day, was received by him on 15 May, and was immediately transferred (converted into USD 42 730.17) from his UBS account to his Ladybrand account.

Moreover, precisely half of the amounts received by Bam in four out of the ten receipts, were paid over to the appellant. Finally it is to be observed that the trial judge concluded as he did in respect of the other counts, that the payments by Bam were funded by Lahmeyer or LMC, in other words, had it not been for the contractors' payments, Bam would not have been able to pay the appellant as he did.

[73] Count 8

This count relates to a payment of FFR 135 760 allegedly made to the appellant as a bribe by Lahmeyer, alternatively Dumez, alternatively Dumez Nigeria for and on behalf of Dumez, alternatively one or more of them. The appellant's conviction on this count was based on the finding of the trial court that the payment was made by Lahmeyer in the following circumstances:

1. Various payments by Dumez to Bam resulted in his account at BMC having a credit of FFR 1 020 000.

2. On 20 October 1990 Bam closed the account and transferred the proceeds into an account opened by his wife at the same bank.

3. Mrs Bam placed the money in an investment account. This and other payments resulted in her current account having a debit balance.

4. On 8 February 1991 Lahmeyer transferred FFR 135 760 to Mrs Bam's current account. Although this account went into debit again, partly because of a transfer of over FFR 118 000 to her investment account, she still had substantial

investments, exceeding FFR 1.2 million, with the bank.

5. As a result she was able to transfer FFR 458 600 to the appellant's account with BMC Geneva on 4 March 1991.

Consequently Cullinan AJ said that the

> **"Payment of FFR 135 760 by Lahmeyer on 8th February 1991 contributed to the payment of FFR 458 600 to the accused. I am thus satisfied, under Count 8, that the payment of at least FFR 135 760 to the accused was funded by the payment of Lahmeyer."**

[74] Count 12

This count related to a payment of FFR 509 905.62 to the appellant during the period 11 October 1989 to 21 June 1990. The trial judge held that the money was indeed paid to the appellant by Dumez Nigeria on behalf of Dumez and that the payment amounted to a bribe. He duly convicted the appellant.

According to the evidence, Dumez Nigeria paid the appellant FFR 232 761 on 11 October 1989, the same amount "less charges" - FFR 232 644.62 - on 15 June 1990 and FFR 44 500 on 22 June 1990 by transferring these amounts into the appellant's account at BMC Geneva. It is significant that on the same day of each of the first two payments the identical amounts were transferred to Bam's account with BMC Geneva, the transferor again being Dumez Nigeria. Now although Dumez Nigeria was not a contractor or consultant concerned in the LHWP, it was part of the Dumez group. This appears clearly from the Group's consolidated financial statements as at 31 December 1989. Dumez's own involvement in the LHWP appears in para [53] above. It may also be noted that the evidence disclosed that most of the plant used by Dumez in carrying out contract 104 was brought into Lesotho from Nigeria, presumably from Dumez Nigeria.

[75] Count 14

The indictment charged the appellant with receiving GBP 51 478.01 as a bribe from Gibb during the period December 1990 to September 1994. The trial court found that Gibb had paid the appellant GBP20 000 on 22 January 1991. According to the evidence Gibb transferred GBP 22 420 to UDC's account with UBS on 28 December 1990. On 22 January 1991 GBP 20 000 was transferred from UDC's account to the appellant's account with the same bank on Cohen's instructions. The trial judge held that he was satisfied that the aforesaid transfer to the appellant's account was

> **"funded by the transfer of GBP 22 420.65 by Gibb to UDC on 28 December 1990."**

[76] Count 9

This count concerned payments made by Acres to the appellant through Bam as the intermediary. The trial judge held that during the period 4 June 1991 to 26 January 1998 Acres paid Bam CAD 493 061.60 from which Bam paid the appellant CAD 320 697.50, converted into FFR 1 306 920.22. He convicted the appellant on this basis.

Even before the commencement of the payments to Bam, Acres had paid Mrs Bam CAD 180 000 on 5 February 1991 and CAD 8255.48 on 3 April 1991 by transferring these amounts to her account at BMC Geneva. By April 1991 interest on the payments had increased the balance in the account to CAD 192 356.90 and this sum was transferred to Bam's account with UBP Geneva. Within about six weeks thereafter Acres began to make payments, totalling CAD 493 061.60 to Bam. The pattern of these payments (more than twenty in all) is revealing. It shows that, apart from

the first payment of CAD 188 255 received by Mrs Bam and transferred to her husband, Bam paid the appellant 60% of the money that he received from Acres and that such payments were generally made on the day of receipt. What is more, once Bam's payment to the appellant ceased (his final payment was made on 7 May 1997), Acres's subsequent payments to Bam (of which there were three) were reduced by roughly 55%, from approximately CAD 23 478 each to CAD 10 500 each. It is only necessary to add that the transfers by Acres were deposited into Bam's CAD account with UBP Geneva and that Bam's payments to the appellant were transferred into the latter's FFR account with the same bank, and that the payments by Acres were made from three branches of the Royal Bank of Canada apart from the same bank in Geneva.

[77] We have mentioned that the convictions on the bribery counts were based on inferences drawn by the trial judge. On the appellant's behalf it was submitted that the facts did not justify the conclusions reached by the court *a quo*. The main submissions may conveniently be summarised as follows:

6. On each bribery count the Crown failed to prove the existence of an agreement between the contractor or consultant and the appellant whereunder the former undertook to pay the appellant in return for a benefit in relation to the LHWP.

7. There was no or inadequate evidence to establish that the contractors or consultants had received any benefit from the appellant either before or during the currency of the LHWP.

8. It was not proved beyond reasonable doubt that the contractors and consultants concerned knew that the intermediaries intended to pay, or did pay, the appellant out of the money received by them. Thus there was no evidence that they intended to bribe the appellant.

9. The payments by the intermediaries to the appellant were independent of and unconnected with the amounts received by the former. Consequently it was not proved that the intermediaries were mere conduits for the alleged bribers or that the appellant intended to receive payments from the contractors and consultants in question.

10. The fact that the appellant received money from the intermediaries was reasonably consistent with an innocent explanation.

[78] There is some overlapping between the first two grounds and the last three, but before dealing with the appellant's argument it is desirable to state the legal principles which govern the enquiry. There was no dispute before us concerning the principles in question and there is no need to deal with these at any length. One matter that requires consideration, however, concerns the legal effect of the appellant's failure to give evidence. The trial judge said, in this regard, that

> **"No adverse inference should be drawn from the accused's silence in the sense that it is an <u>evidential</u> item bolstering the Crown case, and it certainly cannot cure defects in the Crown case. Such silence is simply not evidence in the case."**

This does not appear to us, with respect, to be a correct exposition of the law. HC Nicholas (formerly a Judge of Appeal of the then South African Appellate Division) dealt with the subject in his contribution to **Fiat Justitia (Essays in Memory of Oliver Deneys Schreiner)**. In his essay entitled **"The Two Cardinal Rules of Logic in Rex v Blom",** he wrote at 326:

> **"Where the facts are such as to call for an explanation by the accused and he does not give one, the trier of fact may conclude that any hypothesis consistent with his innocence should be discarded as not reasonably possible."**

The learned author was concerned with the process of reasoning which is to be applied when considering the circumstances in which an inference of

guilt may be drawn from circumstantial facts. He concludes his essay with the following sentence (at 328):

> **"In investigating other reasonable inferences [i.e. inferences consistent with the accused's innocence], the field of enquiry may be limited by the fact that the accused has given an explanation, or by the fact that he has failed to give an explanation where one was called for in the circumstances."**

This view accords, in our judgment, with sound legal principle and with authority (see, for example **S v Mthetwa** 1972 (3) SA 766 (A) at 769 B - C).

[79] We hold, therefore, that in considering whether the proved facts exclude every reasonable inference, save the one sought to be drawn, (see **Rex v Blom** 1939 AD 188 at 202 - 3), regard may be had to the accused's failure to testify. This is not to say that such failure gives rise to an inference of guilt in itself: it is merely one of the circumstances to be taken into account in establishing whether the accused's guilt has been proved beyond reasonable doubt.

[80] It is convenient at this stage to refer to another submission put forward on the appellant's behalf - that the appellant had the constitutional right to remain silent. We understood the implication to be that, as a matter of law, no adverse inference should be drawn from the appellant's failure to testify as he was merely exercising his constitutional right to remain silent. There is no merit in this submission. The appellant undoubtedly had a right to remain silent. But he was also entitled to testify. His failure to do so cannot be ignored as a matter of course. It is a factor to be taken into account and its significance depends on all the circumstances of the case. This is a matter that will be dealt with later in the judgment.

[81] Concluding the resume of the principles of inferential reasoning, it is hardly necessary to re-state the second rule formulated in **Rex v Blom** and applied in this court on more than one occasion. It is only necessary to emphasise that, on a consideration of all of the circumstances of the case, the question is not whether the inference sought to be drawn is a reasonable one: it is whether the facts are such that all other reasonable inferences are excluded. As H.C. Nicholas pointed out in his erudite essay:

> " **The second rule of logic in *Blom* is a salutary rule, whose field of application is limited by its nature. It is a tool for detecting and avoiding fallacy, for testing the logical validity of a conclusion. It is no more than that. It is not a legal precept. It is not another way of stating the criminal standard of proof. It does not in itself provide an automatic answer to the question whether guilt has been proved beyond a reasonable doubt. Even if the rule is satisfied, it does not follow that the trier of fact *must* convict the accused. It does not license speculation as to facts not proved by the evidence, nor does it mean that the State is obliged to close every avenue of escape which might otherwise be open to an accused. "**

[82] We now have to apply the above-stated principles to the facts of this case. We commence by considering the position of the appellant. Clearly he occupied a key position on the LHDA. Quite apart from the fact that he could nominate members to the evaluation committee, he acted as a link between the committee and the LHDA's board. Indeed, according to the witness Rafoneke, he had to approve of the committee's recommendation before passing it on "for further clearance" by the LHDA and, where applicable, the JPTC and the funding authorities. The chief executive, moreover, was intimately involved in the negotiating proceedings before the signature of the MOU. And as the work progressed the LHDA had no direct communication with the contractor. It depended for information and advice on the engineer who supervised the work and on the chief executive's knowledge, for the chief executive himself maintained close

contact with the engineer at all material times. It is clear that the chief executive had to assist in resolving disputes during the currency of the contract, including claims by a contractor or consultant for additional remuneration. Although he had to report to the board and obtain its authority in respect of all important decisions, his views nevertheless had significant weight and his influence was considerable.

[83] In addition the appellant, in his capacity as chief executive, had access to confidential information, that is information known only by the officials and the board of the LHDA. One example suffices. The engineer's estimate of the value of a particular contract was known to only a few before the issue of the tender documents. One of these was the chief executive. There was no evidence that the appellant passed on any confidential information to benefit a prospective tenderer, nor, indeed, has it been clearly proved that he unlawfully granted favours to any consultant or contractor involved in the counts on which he was convicted. As we have mentioned in para [52], the evidence relating to the promotion of Acres's personnel to the detriment of local engineers was not compelling enough to warrant a finding. The evidence relating to the implementation of the escalation clause in contract 129 B was certainly indicative of improper, if not unlawful, conduct by the appellant. The contractor concerned in that contract was MHPC. Although at least one of MHPC's partners, Spie, was implicated as a briber, MHPC as such was not, and for this reason we prefer to leave that evidence out of the reckoning as well.

[84] The absence of clear evidence that the appellant unlawfully advanced the position of contractors or consultants is not decisive. The fact remains that the appellant occupied a position of importance and influence in the LHDA and the evidence shows conclusively that contractors and consultants paid him considerable sums of money at least in the expectation that he might

use his position to benefit them. It is undisputed that the appellant opened and operated bank accounts in Switzerland at a time when contractors and consultants were attempting to obtain contracts in connection with the LHWP or, having obtained such contracts, were actually engaged in the project. The opening deposits into the first account were made by Cohen and all subsequent deposits into the accounts (save in respect of count 12) were effected by transfers from intermediaries. The accounts were used for no other purpose; they were receptacles for the receipt of money from intermediaries and Dumez Nigeria.

[85] All of the contractors and consultants operated bank accounts in Lesotho or South Africa or in both countries. Some of the payments made to them by the LHDA were in local currency to enable them to meet local expenses. But payments to intermediaries and transfers from intermediaries to the appellant were carried out through overseas banks. There was no obvious legitimate reason why all payments to intermediaries came from overseas accounts, nor was it explained why transfers were made into the Swiss bank account of the intermediaries and the appellant. The only plausible reason appears to be secrecy - an attempt to conceal the transactions from the LHDA or other authorities.

[86] This conclusion is substantiated by the appellant's false and disingenuous evidence in the civil proceedings instituted against him by the LHDA. There is no need to set out his evidence in any detail. What he said *viva voce* and on affidavit is reflected in full in the extensive judgment of the court *a quo*. Nor did counsel for the appellant challenge the accuracy of what his client had said: he objected to its admissibility. The original grounds for objection, contained in the heads of argument, were not persisted in, and rightly so. In this court it was submitted that the appellant's statements in the earlier proceedings were inadmissible for the purpose of proving the truth of what he had said. As a general rule this is

correct. However, the evidence was not tendered for that purpose: it was adduced by the Crown only as proof of what had been said. There is no doubt that it is admissible for that purpose and this was eventually conceded by the appellant's counsel.

[87] In the civil proceedings the appellant initially denied in oral evidence that he held any bank accounts overseas or in South Africa. Subsequently he denied on affidavit that he had ever had or conducted a banking account with the Union Bank of Switzerland. In a later affidavit he admitted that money from the UBS had been paid into his account with the Ladybrand branch of the Standard Bank but claimed that the payments had been made to accommodate an acquaintance who held the overseas account. These statements are clearly relevant and show not only that he was deliberately untruthful under oath but that his false denials were made for the purpose of concealing his involvement with the intermediaries and, through them, with the contractors and consultants.

[88] We have referred to the intermediaries in paras [60] to [64] above. Before dealing with their significance in the overall picture, we comment on the trial judge's findings on the part they played - or lack of it in most cases - in the LHWP. He pointed out that Cohen and his companies - UDC and EDC - were not in any way involved in the project and that there was no need for Du Plooy to enter into a contractual agreement in a foreign country and conduct financial transactions there if he was involved in the project in Lesotho. We agree with these findings. Moreover two of the senior local engineers closely connected with the LHWP - Rafoneke and Putsoane - testified that they did not know Du Plooy. It is inconceivable that they would not have know him had he been actively concerned in the project as a consultant.

[89] Something further needs to be said about Bam. We have already referred in para [64] to the fact that money was paid into his personal account in Switzerland in addition to bona fide payments to LESCON in Maseru by Lahmeyer and others. Moreover Lahmeyer paid Mrs Bam FFR 135 760 for no apparent reason in February 1991.

[90] Dumez Nigeria (on behalf of Dumez) made two payments to Bam on the same days in which this company paid identical sums to the appellant. The amounts were substantial - over FFR 464 000 to each payee. These payments cannot be explained on the basis of work performed by LESCON, nor was there any attempt to do so.

[91] Next we consider the trial judge's findings in relation to the payments made by Acres to Bam and Mrs Bam. The payments were effected through the company's Canadian bankers from three different branches. At least one payment was processed by the bank's Swiss counterpart. The first payment to Mrs Bam, in a significantly large amount of CAD 180 000, was made on 5 February 1991, some sixteen days before the award of the sole-sourced contract (contract 65) to Acres. The trial judge pointed out, quite correctly in our view, that the

> **"payment was suggestive of a strong incentive for the award of a contract."**

[92] The subsequent payments were to Bam and were in smaller amounts at fairly regular intervals. We have referred to these payments in para [76] above and they require no further comment. We agree with the trial judge, for the reasons given by him, that there was no need for

Bam to render any services or assistance to Acres at the times when the payments were made. In our view, therefore, the payments to Bam and his

wife were not made in return for services rendered to Acres for the legitimate purposes of the project. It only remains to add that Putsoane, despite his senior position and long association with Bam, and, for that matter with Lahmeyer and Acres, was unaware of any agency agreement between the consultants and the intermediary.

[93] The only counts that require further consideration are counts 6 and 12, the former because the identity of the payer to the intermediary was not established and the latter because the appellant did not receive payment from an intermediary. The pattern of payments and the system adopted on count 6 were similar, if not identical to, other counts where an intermediary was used. What is more the intermediary was Bam. Two payments were transferred in US dollars from UBS Zurich into Bam's account at UBP Geneva. Within a month of each transfer Bam paid roughly 50% of his receipts in the same currency into the appellant's account at UBS Zurich. In the absence of any other explanation and having regard to the dates of payment, the only reasonable inference to drawn is that the original transferor of the money was a contractor or consultant involved in the LHWP. The submissions of appellant's counsel to the contrary must therefore fail.

[94] While no intermediary transferred money to the appellant on count 12, the transferor was an associated company of Dumez. Here, too, the money was paid in foreign currency (French francs) into a Swiss bank account held by the appellant. What is equally incriminating for the appellant is that identical payments were made to Bam by the same payer, Dumez Nigeria. Count 12, therefore, presents no difficulty.

[95] The Crown presented a strong case against the appellant. It called for an answer. The trial judge advised the appellant's counsel that this was so

and invited him to reconsider his decision to close the defence case. The invitation was not accepted. Not only was no explanation given for the appellant's extraordinary dealing, the appellant when faced with the need to testify in the civil proceedings gave false and contradictory explanations on oath. We refer in this regard to the comments made by H C Nicholas in paras [78] to [81] above.

[96] The case presents no great difficulty. There were payments in foreign currency by contractors and consultants to intermediaries who took part of the proceeds and passed on the rest to the appellant. The payments to the appellant were, in almost all cases, funded by (to use the trial judge's expression) the money received from the contractor or consultant. The payments were not disclosed to the LHDA by any of the participants, including the appellant. He, the appellant, occupied a pivotal role within the LHDA, he was capable of influencing decisions of that body and he was in a position to benefit and favour contractors and consultants, even if the evidence may fall short of proving that he actually did so. The intermediaries, where they were used, were interposed between the consultants and contractor on the one hand and the appellant on the other, in an inept attempt to distance themselves from the intended recipient. And the intermediaries, too took their share.

[97] When regard is had to the facts and to the system employed, it would be idle to suggest that the original transferors - the contractors and consultants - were ignorant of the intended destination of the payments. In drawing inferences the trier of fact is entitled, in fact obliged, to use logic blended with common or human experience (see **R v Erasmus** 1945 OPD 50 at 71-2 and cf the remarks of **Centlivres CJ** in **R v Ismail** 1952 (1) SA 204 (A) at 210 B-C). Once this is accepted it is obvious that there must have been agreements between the contractors and consultants

concerned, the intermediaries and the appellant whereunder the former would pay money to the appellant in return for favours or benefits in relation to their prospective or actual agreements with the LHDA. It also follows, of course, that the appellant knew precisely that he was accepting money as bribes in all the counts now under discussion.

[98] Counsel for the appellant suggested that there was at least one other reasonable inference to be drawn from the payments to his client - that the money was paid to him for work performed outside the scope of his duties with the LHDA. In terms of his employment with the LHDA the appellant was not entitled to undertake outside work and, according to the argument, he might have accepted payments, not for corrupt purposes, but for the rendering of genuine services. This argument cannot prevail. The inference which counsel asks us to draw is far from reasonable, having regard, *inter alia*, to the scale of the operation, the foreign currency and the obvious involvement of other parties. Moreover, and if this were the appellant's explanation, he should have given it in evidence. At the time of the criminal trial, he had already been dismissed by the LHDA and had left the civil service and the civil claims against him had been determined in favour of the LHDA. He had nothing to lose by giving the explanation before the court *a quo.*

[99] It remains only to note that some payments to the appellant were made by consultants after his dismissal from the LHDA. This does not detract from our conclusions. The evidence clearly showed that the appellant remained influential in the LHDA long after he left. There may also have been other reasons for these later payments but it is not necessary to speculate on these.

[100] In the result the appellant was correctly convicted on the bribery counts.

[101] Although the appeal was apparently intended to cover the two fraud counts (counts 17 and 18), no argument was advanced to us in court on the appellant's behalf in respect of these counts. The matter was left expressly in the hands of this court. We have had regard to the evidence, to the reasons of the trial judge for convicting the appellant on these counts and to the submissions made in the heads of argument on both sides. In view of the attitude adopted by counsel for the appellant, there is no need for us to add to the trial judge's reasons. It suffices to say that we are satisfied that the appellant was properly convicted.

[102] In the result the appeal against the convictions fails and falls to be dismissed.

Sentence

[103] We turn finally to the question of sentence. Before considering the matter it is necessary to refer to something that transpired at the close of argument before us. Our attention was drawn to the fact that on 29 May 2002 the trial judge had refused an application by the defence to call a criminologist to testify on behalf of the defence and for the postponement of the matter to 7 June 2002 for that purpose. The trial judge had previously intimated that he was not prepared to delay the sentencing proceedings unduly. The refusal of the application was never the subject of appeal - it featured in neither the original nor the amended notice of appeal. Nor was the matter adverted to by the appellant's counsel either in his original or his supplementary heads of argument, nor in argument before us until his reply, when it surfaced almost as an afterthought. It was then for the first time raised and argued that the trial judge had acted

irregularly in refusing the application.

[104] We do not propose to canvass the relevant facts in detail. Suffice it to say that the decision to consult a criminologist was left to the last moment. No adequate explanation for the delay was advanced. The suggested criminologist had not consulted with the appellant; the arrangements that had been made were generally very tenuous; there was no indication of the probable nature of any report that it was hoped to receive nor of what assistance, if any, such report might be in the sentencing process. Quite clearly the nature and extent of the offences committed by the appellant permitted only of a custodial sentence. All relevant considerations in that regard were either already before the court or subsequently placed before it when the appellant and two witnesses testified in mitigation. In all the circumstances we are of the view that the trial judge did not act irregularly when, in the exercise of his discretion, he refused the application. Nor did such refusal operate unfairly towards the appellant. The fact that it was never sought to raise the point until the dying throes of the appeal is indicative of the appellant's lack of conviction that there was substance in it.

[105] The further point was raised in argument that the appellant had been refused the opportunity to engage another counsel at the sentencing stage. There is no substance in such complaint. The appellant did not have an absolute right to counsel of his choice, particularly not where he was receiving the benefit of Legal Aid. His counsel, who had appeared for him on that basis during a long and arduous trial, was available to represent him at the final stages. There was no reason why he could not have continued to do so. The fact that the appellant chose to continue unrepresented while giving evidence in mitigation, calling witnesses and addressing the court, in the circumstances, did not render the proceedings

unfair and he accordingly suffered no prejudice.

[106] Sentence is a matter pre-eminently in the discretion of the trial judge. Interference with such sentence is only permitted on well-known, circumscribed grounds. One such ground is if there has been a material misdirection by the trial judge in his assessment of an appropriate sentence.

[107] The trial judge sentenced the appellant to separate periods of imprisonment on each count, but then ordered the sentences on 11 counts (all those save counts 3 and 12) to run concurrently, resulting in an effective sentence of 12 years on those counts. To that he added the sentences on counts 3 (one year) and 12 (five years) to run consecutively, hence a total sentence of 18 years. In order to determine the amount involved in each count in local currency the trial judge converted all bribery payments received by the appellant in foreign currency into Maloti as at 1996. He acknowledged that this was not an accurate reflection of value at all relevant times and went on to say:

> **"In any event, the purpose of the exercise is not necessarily to establish the exact value of each payment as and when received, but to establish the relative gravity of the offence under each count in the scale of the thirteen offences involved."**

The reason advanced by him why he made all the counts save 3 and 12 run concurrently was that the offences relating to them "were committed somewhat contemporaneously" (starting in January 1991) whereas in respect of counts 3 and 12 they were committed in 1988 and 1989/90.

[108] It is difficult to appreciate why the trial judge singled out counts 3 and 12 because they were not that far removed in time from the other counts and in reality no less contemporaneous in the rather wide sense in which that

word was used. Nor did he apparently consider making part of the sentences on those counts (totalling six years) run concurrently with the sentences on the other counts. The logic of his computations is also not evident. An analysis of his figures shows that in respect of 44 transactions relating to 11 counts (including two of fraud), involving something in the order of M4½ million, he sentenced the appellant to an effective 12 years. By contrast, in respect of four transactions relating to counts 3 and 12 involving approximately M½ million the appellant was sentenced to six years imprisonment. The apparent imbalance is unexplained. When these considerations are viewed cumulatively it appears that the trial judge arrived at the ultimate sentence by means of a flawed process, amounting to a misdirection. In the result we are entitled to consider the question of sentence afresh.

[109] In the course of his judgment the trial judge observed:

> **"[T]he sentence imposed by the court must express the public abhorrence of what has transpired and in particular emphasise that Lesotho simply will not tolerate corruption in its midst. In this respect the sentence imposed must be such as to act as a deterrence to others in the future".**

We echo those sentiments. Corruption is inimical to sound public administration, itself essential to the strength of constitutional democracy; it also threatens investor confidence, development projects and employment, including in Lesotho. Nonetheless we are of the view that an appropriate sentence for the appellant's crimes, on a conspectus of all relevant considerations relating to sentence, would be an effective fifteen years imprisonment. As the bribery offences were part of a system which extended over a period of time, we deem it appropriate to take all the bribery counts together for the purposes of sentence.

[110] In the result the appeal against sentence succeeds. The sentence imposed by the trial court falls to be set aside and to be substituted by the sentence set out in the order:

ORDER

The following order is made:

11. The appeal against the convictions is dismissed.

12. The appeal against the sentence succeeds to the extent that the sentence imposed is set aside and there is substituted in its stead the following sentence:

"1. Counts 1,2,3,4,6,7,8,9,12,14 and 15 taken together: Fifteen (15) years imprisonment.

(4) Counts 17 and 18: One (1) year imprisonment on each.

(5) The sentences on counts 17 and 18 are ordered to run concurrently with the sentence of fifteen (15) years imprisonment in 1 above."

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SMALBERGER JA

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MELUNSKY JA

_____

GAUNTLETT JA

DATE OF JUDGMENT	:	14 APRIL 2003
COUNSEL FOR APPELLANT	:	MR E H PHOOFOLO (E H Phoofolo & CO)
COUNSEL FOR THE CROWN	:	MR G H PENZHORN SC MR H T T WORKER