APPELLATE CRIMINAL

Before A. N. Grover, J.

S. GOPAL,— *Appellant*

versus

THE STATE,—*Respondent*

Criminal Appeal No. 62-D of 1966

September 14, 1966

Prevention of Corruption Act (II of 1947)—S. 5(3)—Repeal of, by Anti-Corruption Laws (Amendment) Act (XL of 1964) and substitution by a new one and addition of sub-section (e) to S. 5 during the pendency of trial—Effect of—Rule of evidence contained in S. 5(3) before amendment—Whether continues to govern the trial—S. 5(1)(d)—Use of Car belonging to firm whose case is under investigation by investigating officer without paying any consideration—Whether amounts to criminal misconduct

Held, that sub-section (3) of section 5 of the Prevention of Corruption Act, 1947, before its repeal by the Anti-Corruption Laws (Amendment) Act, 1964 embodied a new rule of evidence. It did not create a new offence but only laid down a rule of evidence, enabling the Court to raise a presumption of guilt in certain circumstances—a rule which is a complete departure from the established principles of criminal jurisprudence that the burden always lies on the prosecution to prove all the ingredients of the offence charged, and that the burden never shifts on to the accused to disprove the charge framed against him. It simply provides an additional mode of proving an offence punishable under sub-section (2) for which any accused person is being tried. The additional mode is by proving the extent of the pecuniary resources or property in the possession of the accused or any other person on his behalf and thereafter showing that the same is disproportionate to his known sources of income and that the accused person cannot satisfactorily account for such possession. If these facts are proved, the sub-section makes it obligatory on the Courts to presume that the accused person is guilty of criminal misconduct in the discharge of his official duty, unless the contrary, i.e., that he was not guilty, is proved by him. After its repeal by the Anti-Corruption Law (Amendment) Act, 1964, that rule of evidence ceased to be applicable and thereafter the prosecution could not ask the Court to raise a presumption under it. The future course and decision of the trial must be governed by the common law as contained in the Evidence Act and the Code of Criminal Procedure.

Held, that if an investigating officer uses the car of the firm whose case he is investigating, without paying any consideration or consideration which is inadequate, he will be deemed to have obtained pecuniary advantage for himself by the abuse of his official position by corrupt means within the meaning of "corrupt" in clause (d) of section 5(1) of the Act and would be guilty under that clause.

Appeal from the order of Shri C. G. Suri, Special Judge, Delhi, dated the 18th April, 1966, convicting the appellant.

R. K. GARG AND G. D. GUPTA, ADVOCATES, for the Appellant.

NIREN DE, SOLICITOR-GENERAL, R. L. MEHTA AND R. K. VERMA, ADVOCATES, for the Respondent.

JUDGMENT

GROVER, J.—The appellant, S. Gopal, who at the material time was Deputy Superintendent of Police, attached to the Criminal Investigation Agency of the Special Police Establishment, Delhi, has been convicted by the learned Special Judge, Delhi, of offences of corruption and crimnial misconduct under section 5(1)(b) and (d), read with section 5(2) of the Prevention of Corruption Act, 1947, and section 165 of the Indian Penal Code. He has been sentenced to rigorous imprisonment for one year and a fine of Rs. 2,000 on the first count and rigorous imprisonment for one year on the second count, the sentences to run concurrently. In default of payment of fine it has been directed that he shall undergo further rigorous imprisonment for six months.

The learned Special Judge has given an exhaustive and detailed history of facts and the background of the case, but it is unnecessary to repeat the same. It would suffice to state the material dates and salient facts. The appellant joined service as Sub-Inspector of Police in Madras State in 1941. He was promoted as Inspector of Police in 1949-50. He came on deputation to the Criminal Investigation Agency of the Special Police Establishment in February, 1959 and joined as Deputy Superintendent of Police. A case had been registered by the Criminal Investigation Agency against some Railway Engineers and certain contractors as well as firms of South Eastern Railway in Bihar State in Nohamundi-Banspani. One of these firms of contractors was known as Messrs G. S. Atwal and Company, a proprietor of which was Surjit Singh Atwal, (hereinafter called "Atwal"), a member of Parliament, according to the first information report registered

in that case, the Engineers and the contractors had entered into a conspiracy and the former and their staff had abused their official position to cause pecuniary advantage to themselves and to the contractors by giving exaggerated figures and wrong classification of earth work whereby the latter got overpayments from the South Eastern Railway which exceeded the legitimate dues by a sum of about Rs. 18,00,000.

The appellant started investigation of the above case in May, 1960. It is altogether unnecessary to refer to the investigation by the appellant relating to the other contractors except Atwal and Company, which mainly figures in the present case. On 10th June, 1960, the business premises of this firm were searched and certain documents were taken into possession at Asansol. Atwal, the proprietor, was interrogated by the appellant at Ranchi, on 27th August, 1960. On 13th September, 1960, the appellant opened a current account in his name in the Indian Bank Limited, New Delhi, in which he deposited a sum of Rs. 1,500 and he also opened a fixed deposit account in the name of his wife Shrimati Shakuntala, the amount of deposit being Rs. 5,000. On 18th October, 1960, a sum of Rs. 400 was credited to his current account. On 9th November, 1960, he deposited a sum of Rs. 1,000 in his joint account with his wife which he had opened quite sometime back at Madras. On 17th November, 1960, he made another deposit of Rs. 5,000 in the name of his wife in the New Delhi Branch of Indian Bank Limited for which a fixed deposit receipt was issued and deposited a sum of Rs. 300 in his current account.

Towards the last week of November, 1960, the appellant started preparing the final report in the case which was being investigated by him and it appears that the report was submitted after some time. In February, 1961, Atwal made an application for the return of a number of documents which had been seized in the case. The appellant made a report, dated 21st February, 1961, recommending their return subject to certain undertakings. On 4th March, 1961, the Government took a final decision on the report submitted by the appellant in the case. It was decided to prefer a challan with regard to a District Engineer and an Assistant Engineer of the South Eastern Railway along with two firms of contractors. The other contractors including the firm of Atwal were to be excluded. On 7th April, 1961, the appellant deposited a sum of Rs. 1,100 in his current account and on 14th July, 1961, a further amount of Rs. 2,000 was

placed by him in fixed deposit in the name of his wife. On 11th August, 1961, a sum of Rs. 2,159 was credited to the current account of the appellant by drafts. He also became the member of the Police Officers Co-operative House Building Society in Madras by paying a sum of Rs. 100 on 18th October, 1961. The first instalment of about Rs. 1,400 towards the price of a plot was paid by him in January, 1962. From January, 1962 to July, 1962, the appellant was in possession of and used the Fiat Car of Atwal, without payment of any price or hire or any other compensation. This car at first bore the registered number B.R.R. 7118, but subsequently on the application of Atwal, the number was changed to DLF 9996 on 20th August, 1962.

Owing to certain adverse reports against the appellant a departmental enquiry was started in August, 1962. He was reverted to his parent cadre in Madras. During the same month the appellant got the bank accounts standing in his name and in the name of his wife at Delhi transferred to Madras. There was a credit balance of Rs. 16,000/17,000 in these accounts at that time. After sanction to the prosecution of the appellant had been accorded by the competent authorities a challan was filed in Court against him in August, 1964.

It will be useful to reproduce the charges framed against the appellant:—

> "*Firstly.*—That you, S. Gopal, while posted as Deputy Superintendent of Police, C.I.A., S.P.E., New Delhi, during the period between 14th February, 1959, and 2nd June, 1962, committed criminal misconduct in the discharge of your duties inasmuch as you habitually accepted or obtained gratification other than legal remuneration or valuable things without consideration or by corrupt or illegal means or by otherwise abusing your position as a public servant obtained pecuniary advantage, which is evidenced by the fact that you between September, 1960 and August, 1961, deposited in your and your wife's account a sum of Rs. 16,300 on different dates, which said possession of pecuniary resources or property was disproportionate to your known sources of income and for which you could not satisfactorily account and you by corrupt or illegal means or by otherwise abusing your position as a public servant obtained pecuniary advantage and valuable things by

using without consideration for about seven months (January, 1962 to early August, 1962), a Fiat car No. BRR 7118 belonging to Sardar Surjit Singh Atwal, a senior partner of Messrs. G. S. Atwal and Co. whose conduct had been subject-matter of an investigation made by you in R. C. No. 3/60-C.I.A. and you thereby committed an offence made punishable under section 5(2) read with section 5(1)(b) and (d) of the Prevention of Corruption Act of 1947 and within my cognizance.

Secondly.—That you, S. Gopal, while posted as Deputy Superintendent of Police, S.P.E., C.I.A., New Delhi, being a public servant obtained for yourself a Fiat Car No. BRR 7118 belonging to Sardar Surjit Singh Atwal, a senior partner of M/s. G. S. Atwal and Co. without consideration, by taking physical delivery of the said car and using it as your own private property for a period of about seven months (January, 1962 to early August, 1962) and only returning it to said Sardar Surjit Singh Atwal consequent upon your abrupt reversion from the S.P.E., to Madras State Police, when you knew that said Sardar Surjit Singh Atwal, as partner of G. S. Atwal and Co., was concerned in the investigation of R.C. 3/60-C.I.A. wherein G. S. Atwal and Co. were shown as accused presons at Serial No. 7 of the F.I.R. and which said case was investigated by you and that you thereby committed an offence punishable under section 165, Indian Penal Code, and within my cognizance."

As the appellant pleaded not guilty, he was duly tried. It may be mentioned that the first charge showed that between September, 1960 and August, 1961, the appellant had deposited in his and in his wife's account a sum of Rs. 16,300 on different dates. This would represent the aggregate of the amounts mentioned before upto 14th July, 1961. After most of the prosecution evidence had been led, the Prevention of Corruption Act, 1947 was amended by the Anti-Corruption Laws (Amendment) Act, 1964, which received the assent of the President of India on 18th December, 1964. As will be presently seen, the amendments made are of material consequence in the present case and their effect will require determination.

The learned Special Judge has held:

(1) A conviction under the newly inserted clause (e) of sub-section (1) of section 5 of the Act of 1947 can be made if

the charges as framed and the evidence examined in support thereof would sustain a conviction under this category of the definition of the offence of criminal misconduct.

(2) Ordinarily a credit balance of sixteen/seventeen thousand rupees of a police officer who had put in about 20 years' service and had acquired gazetted rank may not necessarily lead to the only conclusion that these assets are disproportionate to his known sources of income or that the offence of criminal misconduct of any of the categories defined in section 5(1) has been committed, but in the present case the fast rate and the short period of acquisition coincided with the progress of the investigation of Nohamundi-Banspani case and the softening of the rigour of the investigation and a complete change of its complexion may lead to certain irresistible conclusions.

(3) The chart attached to the judgment showed side by side how the bank balance of the appellant kept growing during the time the investigation of the aforesaid case was pending and later on the Fiat car belonging to Atwal was made available for free use of the appellant at a time when the payment of bills of Atwals' Firm which had been withheld was to be made. These bills amounted to seven or eight lacs of rupees.

(4) Looking at the evidence relating to the financial condition of the appellant when he was in Madras it was obvious that he would not have possibly saved much. It is significant that he mortgaged his ancestral house for a sum of Rs. 1,700 in December, 1958 to arrange for the admission of his son in the Rashtriya Military Academy. In the years 1958 and 1959, the appellant had to draw certain amounts from his General Provident Fund as also he took loans in small amounts from certain parties and all this showed that the appellant could not have saved up any substantial amount from the salary and emoluments by the time he came to Delhi in February, 1959.

(5) The version of the appellant that part of the amounts deposited during the material period represented the sale-proceeds of the jewellery belonging to his wife and the evidence adduced in support thereof could not be accepted.

(6) It could not be said that at the time the appellant obtained the Fiat car from Atwal, for free use he was not in a position to show any favour to him. The delivery of possession of the car coincided in time with the payment of the bills by the Government to Atwal and the story of the appellant that he had bought the car from Atwal, but had later on returned it because the loan for which he had applied had not been sanctioned, could not be accepted.

(7) It was established by the evidence and the admissions of the appellant himself that bills of various petrol dealers and service stations during the period, the car was in his possession remained unpaid and the explanation offered by him that there was some dispute with regard to the amount due could not be accepted. All this showed that the use of the car for six or seven months was an advantage which the appellant derived without paying any consideration or for consideration which was altogether inadequate.

Before the amendment of the Act of 1947, sub-section (3) of secion 5 was as follows:—

"In any trial of an offence punishable under sub-section (2) the fact that the accused person or any other person on his behalf is in possession, for which the accused person connot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income may be proved, and on such proof the Court shall presume, unless the contrary is proved that the accused person is guilty of criminal misconduct in the discharge of his official duty and his conviction therefor shall not be invalid by reason only that it is based solely on such presumption."

By the amending Act of 1964, this sub-section was deleted by the substitution of a new sub-section which need not be reproduced. In sub-section (1) of section 5 clause (e) was added which runs thus—

"5. (1) A public servant is said to commit the offence of criminal misconduct—

* * * * * *

(e) If he or any person on his behalf is in possession or has, at any time during the period of his office, been in

possession, for which the public servant cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income."

Mr. Garg contends that, what was embodied as a rule of evidence in section 5(3) as it stood before the amendment has been made a substantive offence by addition or insertion of clause (e) in section 5(1) and that the learned Special Judge was wholly erroneously influenced by the consideration that conviction for the aforesaid newly-created offence could be made if the charges as framed and the evidence examined would sustain a conviction under the newly-added category of the definition of the offence of criminal misconduct. Mr. R. L. Mehta, for the State does not contend, and indeed has not contended, that the appellant could be convicted by applying the newly-added definition of criminal misconduct as embodied in clause (e) as the learned Special Judge at some places appeared to think but it is pointed out by him that in the ultimate result even the learned Judge did not convict the appellant by applying the newly-added definition of criminal misconduct as incorporated in clause (e). The entire discussion in the judgment of the Court below, therefore, in so far as it relates to the applicability of clause (e) becomes redundant.

Mr. Garg has really concentrated his efforts on showing that the provisions of sub-section (3) of section 5 being purely procedural, their repeal by the amending Act would make them wholly inapplicable to the present case which was pending at the time of their repeal. According to him, the conviction of the appellant under section 5(1)(b) and (d), read with section 5(2), of the Act of 1947 has been based on the rule of evidence embodied in section 5(3) as it stood before amendment. As soon as that sub-section was repealed, the prosecution could not rely on proving the aforesaid offences in accordance with its provisions. It is maintained that thereafter the prosecution had to prove its case under the ordinary law of the land, namely, the provisions contained in the Criminal Procedure Code and the Evidence Act and since neither adequate nor sufficient proof had been adduced to sustain a conviction of offences of corruption and criminal misconduct as defined by section 5(1)(b) and (d) the appellant was entitled to acquittal of those offences. It is necessary, therefore, to decide first whether the provisions of section 5(3) continued to govern the proceedings in the present case in spite of their repeal during its pendency. In all authoritative books on interpretation of statutes, it is consistently stated that the presumption against a

retrospective construction has no application to enactments which affect only the procedure and practice of the Court even where the alternation which the statute makes, has been disadvantageous to one of the parties. A person has only the right of prosecution or defence in the manner prescribed for the time being, by or for the Court in which he sues, and, if an Act of Parliament alters that mode of procedure, he has no other right than to proceed according to the altered mode. But to deprive a suit or in a pending action of an appeal to a superior Tribunal which belonged to him as of right is a very different thing from regulating procedure (Maxwell on Interpretation of Statutes, 11th Edition, pages 216-217). In Craies on Statute Law, 6th Edition, at page 400, it is stated that it is perfectly settled that if the Legislature forms a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way, clearly there by-gone transactions are to be used for and enforced according to the new form of procedure. Salmond considers that substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained [*vide The Unique Motor and General Insurance Company Ltd* v. *Kartar Singh* (1) at pages 111-112]. Sub-section (3) of section 5 sets out a new rule of evidence. It does not create a new offence, but only lays down a rule of evidence, enabling the Court to raise a presumption of guilt in certain circumstances—a rule which is a complete departure from the established principle of criminal jurisprudence that the burden always lies on the prosecution to prove all the ingredients of the offence charged, and that the burden never shifts on to the accused to disprove the charge framed against him. It simply provides an additional mode of proving an offence punishable under sub-section (2) for which any accused person is being tried. The additional mode is by proving the extent of the pecuniary resources or property in the possession of the accused or any other person on his behalf and thereafter showing that this is disproportionate to his known sources of income and that the accused person cannot satisfactorily account for such possession. If these facts are proved, the sub-section makes it obligatory on the Courts to presume that the accused person is guilty of criminal misconduct in the discharge of his official duty, unless the contrary, i..e., that he was not so guilty is proved by him

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(1) I.L.R. (1965) 1 Punj. 104.

see *Biswabhusan Naik* v. *The State of Orissa* (2), *C. S. D. Swami* v. *The State* (3), *R. S. Pandit* v. *State of Bihar* (4) at pages 661, 662, and *Sajjan Singh* v. *State of Punjab* (5)at pages 467-468. Mr. Garg's submission is that since it is settled by the aforesaid decision that section 5(3) contained only a rule of evidence, any change of that law would affect pending proceedings. He has pressed in support the observations in *Anant Gopal Sheorey* v. *The State of Bombay* (6) that no person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending and if by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode. In that case a complaint had been filed under section 282 of the Indian Companies Act and sections 465 and 477-A of the Indian Penal Code against Anant Gopal Sheorey and certain other persons. When evidence was being recorded the Criminal Procedure Code (Amendment) Act, 1955, came into force with effect from 2nd January, 1956. Anant Gopal Sheorey made an application to the Magistrate claiming the right to appear as a witness on his own behalf under section 342-A of the amended Code. His application was dismissed and so was his revision in the High Court. It was in that connection that the observations previously mentioned were made. It was held by reference to other provisions of the amending Act that Anant Gopal Sheorey could take advantage of the new procedure introduced by section 342-A.

Mr. Niren De, the learned Solicitor-General, who argued only the question of the effect of the repeal of section 5(3) of the Act of 1947, relied largely on section 6 of the General Clauses Act, 1897, as also certain authorities which will be presently noticed and has urged that despite repeal the provisions of section 5 (3) would govern the present case. Section 6 provides that in the event of repeal unless a different intention appears, the repeal shall not *inter alia* affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed or effect any investigation, legal proceeding or remedy in respect of such right, privilege, obligation, liability, penalty, forfeiture or punishment and any such investigation, legal proceeding or remedy may be instituted, continued or enforced

(2) A.I.R. 1954 S.C. 359.
(3) A.I.R. 1960 S.C. 7.
(4) 1963 (2) S.C.R. 652.
(5) A.I.R. 1964 S.C. 464.
(6) A.I.R. 1958 S.C. 915.

etc. as if the repealing Act had not been passed. In *Srinivasachari* v. *The Queen* (7) , S. was tried by a Sessions Court in December 1882 on charges, some of which were triable by assessors, others by jury. Before the trial was concluded, the Code of Criminal Procedure, 1882, came into force. By section 269 of that Act, all such charges were to be tried by jury. By section 558 the provisions of the Act were to be applied, as far as might be, to all cases pending in any Criminal Court on 1st January, 1883. Turner C. J. expressed the view that a change of procedure could not be made in the midst of a trial. Under the, circumstances, the limitation, "as far as may be" in Section 558 applied, and excluded the operation of Section 558. The provision, in the General Clauses Act, Section 6, that the repeal of an Act shall not effect proceedings commenced, took effect and the Judge must complete the trial under the rules of procedure which were in force when the trial began. Innes, J. said that the general rule as to new laws of procedure was that they took effect from their coming into operation; so that procedure from that date would be governed by such laws. But they were not retrospective; that is, they had no operation upon what had occurred prior to the date of their coming into force. In his opinion, the accused had a right at the commencement of the trial to be tried by assessors and on the general principles that right could not be affected by the coming into force of a new Code of Criminal Procedure. In *Jatindra Nath De* v. *Jetu Mahato* (8), Chakravartti, J. (as he then was) delivering the judgement of the Full Bench, has observed at page 347 that if rights and procedure are both altered but rights accrued under the repealed enactment are saved, then, in the absence of an intention to the contrary expressed or necessarily implied in the new statute, it will be proper to interpret the intention of the Legislature to be that the old procedure will subsist for the enforcement of the saved rights. There is no question of any vested right in procedure. The position simply is that the accrued rights having been saved and the new Act, not having abrogated the old procedure as respects those rights, nor made the new procedure applicable to them, the old procedure is consequentially saved, as the only possible machinery for enforcing those rights. In *Ajit Kumar Palit* v. *The State* (9) P. B. Mukharji, J. has explained the true position thus: The amended law relating

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(7) I.L.R. 6 Mad. 336.

(8) A.I.R. 1946 Cal. 339.

(9) A.I.R. 1961 Cal. 560. (F.B.).

to procedure operates retrospectively. But it only means that pending cases although instituted under the old Act but still pending are governed by the new procedure under the amended law. It does not mean that the part of the old procedure, already applied and concluded before the amendment came into force, becomes bad or can be reopened under the new procedure after the amendment. The procedure that was correctly adopted and concluded under the old law will not be reopened for the purpose of applying the new law of procedure. In *Ram Singh* v. *The Crown* (10) a Full Bench held that when a case was sent to the Court of Sessions under the provisions of section 37(1), Punjab Public Safety Act at a time when the district was declared to be a dangerously disturbed area, and before the trial actually commenced the district ceased to be a dangerously disturbed area, the Sessions Judge should continue with the trial under the provisions of section 37(1) of the Act and not under the ordinary provisions of the Code of Criminal Procedure regarding Sessions trials. The Sessions Judge had to follow the procedure prescribed for trial of summons cases. Achhru Ram, J., who delivered the judgment, said at page 33 that retrospective operation given to a rule of adjective law could not be taken to destroy the operation of another rule of the same law in relation to proceedings for which the new rule did not provide which proceedings had been properly and legally initiated in accordance with that other rule and at a time when the said rule was actually in force. The main decision of the Full Bench of this Court was overruled by their Lordships in *Gopi Chand* v. *Delhi Administration* (11). It was held that it was erroneous to apply by analogy the provisions of section 6 of the General Clauses Act to cases governed by the provisions of a temporary Act when the said Act did not contain the appropriate saving section. The view of this Court that the application of the ordinary criminal procedure was inadmissible or impossible after the area ceased to be dangerously disturbed was regarded as erroneous. The following observations at page 618 may be reproduced:—

> "With respect, the learned Judges failed to consider the fact that the procedure adopted in sending the case to the Court of Session under section 37(1) of the relevant Act was valid and the only question which they had to decide was what procedure should be adopted after Ludhiana ceased to be

(10) A.I.R. 1950 E. P. 25.
(11) A. .R. 1959 S.C. 609.

a dangerously disturbed area. Besides, it was really not a case of retrospective operation of the procedural law; it was in fact a case where the ordinary procedure which had become inapplicable by the provisions of the temporary statute became applicable as soon as the area in question ceased to be dangerously disturbed."

I am unable to accede to the contention of Mr. De, that even after the repeal of section 5(3) of the Act of 1947, which was purely a rule of evidence the prosecution could still ask the Court to raise a presumption under it. I venture to think that the law as laid down by Lord Blackburn in *James Gardner* v. *Edward A. Lucas* (12), at p. 603 has been consistently followed in England and in this Country. This is what he said—

"Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be. Then, again, I think that where alterations are made in matters of evidence, certainly upon the the reason of the thing, and I think upon the authorities also, those are retrospective, whether civil or criminal."

In *Smt. Sonabai* v. *Board of Revenue M. P.* (13), a Division Bench consisting of Hidayatullah, C.J., (as he then was) and B. K. Choudhuri, J., had to consider a situation where under section 40 of the C. P. Tenancy Act there was an explanation that a presumption of habitual subletting need not necessarily be drawn in the case of a woman. While the proceedings were pending, the Madhya Pradesh Land Revenue Code was enacted. It provided an express prohibition against the granting of declarations against women. It was contended that the law applicable would be the law as laid down in section 40 of the C. P. Tenancy Act by virtue of the provisions contained in the General Clauses Act. It was observed by the Court—

"No doubt, pending litigation is not affected by any change of law, except in procedural matters, and substantive rights are not taken away, unless they are expressly included. That, undoubtedly, is a general rule of construction of statutes; but where the law has been altered in

(12) (1878) 3 App. Cas. 582.
(13) A.I.R. 1958 M.P. 368.

such a way as to create a rule of evidence or a rule of decision, then the contrary rule applies and the person who claims to be governed by the old law has to show that pending litigation had been saved from the operation of the new law: See *K. C. Mukerjee* v. *Mt. Ram Ratan Kuer* (14)."

The converse would be equally true and where a special rule of evidence which has been enacted is abrogated during the pendency of a trial then the future course and decision of trial must be governed by the common law of evidence, namely, the Evidence Act. In *Waheed Hasan Khan* v. *State of Hyderabad* (15), a Full Bench was called upon to consider the effect of the coming into force on 1st April, 1951, of the Criminal Procedure Code (Amendment) Act, 1951. In view of the provisions of section 25(1) and (3), on 28th November, 1951, when the trial commenced in the Court of Session, the Hyderabad Criminal Procedure Code along with section 267-A stood repealed. The question was whether the opportunity of further cross-examination given to an accused under sub-section (2) of section 267-A of the repealed Hyderabad Criminal Procedure Code was not a substantive right which could be exercised by the accused in a trial commencing under the Indian Criminal Procedure Code after its application to the State. It was held that the right of further cross-examination was a mere qualified procedural right which could not be preserved to a party after the law which conferred the right was amended or another procedural law substantially altering the mode by which the credibility of witnesses should be tested, was substituted in place of the repealed statute. The opportunity of further cross-examination was not a substantive right and the trial could be conducted after 1st April, 1951, only in accordance with the Indian Criminal Procedure Code.

The cases which have been relied upon by Mr. De were decided on their own facts and at any rate even in *Srinivasachari* v. *The Queen* (7). Inns, J., who delivered a separate judgment, treated the right to be tried by assessors as a substantive right. There can be no exception to what P. R. Mukharji, J., has said in *Ajit Kumar Palit's case* that the amended law relating to procedure operates retrospectively, but that does not mean that the proceedings which

(14) I.L.R. 15 Pat. 288=A.I.R. 1936 P.C. 49.
(15) A.I.R. 1954 Hyd. 204.

have been held under the old law can be reopened Section 6 of the General Clauses Act cannot be held to be applicable in the present case unless the presumption which can be raised under the repealed sub-section (3) of section 5 could be treated as a substantive right of the prosecution or a substantive liability of the accused person which it is not possible to do. I would consequently hold that after the repeal of sub-section (3) of section 5, the trial of the case as also its decision would be governed by the ordinary or what may be called the common law as contained in the Evidence Act and the Code of Criminal Procedure. It is true that a certain amount of prejudice does result to the prosecution inasmuch as it led such evidence as it considered adequate and necessary in the presence of the presumption which could be raised under sub-section (3) of section 5, but after its repeal the prosecution should have and could have led more evidence with the permission of the Court owing to the change of law so as to discharge the burden which lay on it under the Indian Evidence Act to prove the ingredients of all the offences with which the appellant had been charged.

Once it is held that it was no longer open to the prosecution to ask the Court to draw the presumption on the fulfilment of the conditions laid down in sub-section (3) of section 5, as it stood before amendment, the charges based on the possession of pecuniary resources in the shape of deposits amounting to about Rs. 16,300 were bound to fail and the appellant was entitled to be acquitted of those offences.

Mr. Garg has sought to argue that even on the assumption that the aforesaid presumption was still available to the prosecution it had not been proved as a matter of fact that the appellant was in possession of pecuniary resources or properties which were disproportionate to his known sources of income which he could not satisfactorily account. As I have held that sub-section (3) of section 5 before amendment no longer governed the trial after its repeal, it is altogether unnecessary to decide the question of fact which has been sought to be raised by Mr. Garg.

Mr. R. L. Mehta, for the State, submits that even if the appellant is acquitted of the charges in respect of the deposits, his conviction must be maintained for the possession and use of the car under section 165, Indian Penal Code, and section 5(2), read with section 5(1)(d) of the Act of 1947. The conclusions of the learned Special Judge have been set out before and it is apparent from items 6 and

7 that it was found that the appellant had obtained the Fiat car from Atwal and that he had made use of it for six or seven months without paying any consideration or for consideration which was altogether inadequate. The question is whether the circumstances in which the appellant made use of that car justify his conviction under the aforesaid sections. This car was taken by the appellant from Atwal in the end of January, 1962. He had made an application for a loan for purchase of a car in February, 1962. On 20th February, 1962, he sold his old car to Jai Gopal (P.W. 12), for a sum of Rs. 2,000. The application for loan was rejected on 2nd June, 1962. On 2nd August, 1962, Atwal made an application to the registration authorities for changing the registration number of that Fiat car which was changed from BRR 7118 to DLF 9996. This application was made by Atwal as an owner of that car. It was towards the end of August, 1962, that the appellant was reverted to his substantive post in Madras. Atwal appeared as P.W. 31 and stated *inter alia* that he was residing at 75-A, Sunder Nagar, from 1960 to 1963. The appellant, who had investigated the case of his firm along with other contractors, came to his house when he was passing by in a car in front of his house and saw him standing there. The appellant met him again after two/three days at his residence and told him that his old car was not running properly and he wanted to buy some other car. The appellant met him next after eight or 10 days and enquired from him about some old car which might be available for sale. Atwal told him that he could not get information regarding any other old car, but he offered to sell him his own old Fiat car whose price was between five to six thousand rupees. This car bore No. BRR 7118 and was of 1959 Model. After four or five days the appellant again came to the residence of Atwal and asked him to give the Fiat car to him saying that he would not be able to pay him the price immediately and would pay it after selling his old car and also making some other arrangement. No amount was settled at that time with regard to the price of the car. The appellant then took Atwal's car towards the end of January, 1962 and returned it only in August, 1962, when he informed him that he could not make any arrangement for the money and he had been transferred to Madras. According to Atwal, in July, 1962, he had met the appellant and had told him that he should either get the car registered in his own name after making payment or he should return the same. The appellant wanted one or two weeks time for taking the final decision in the matter. After about two weeks he returned the car. In cross-examination Atwal stated that when the appellant took the car from him, there was no criminal

case with which he (Atwal) was concerned nor was the appellant making investigation in any case against him at that time nor was there any likelihood of his being involved in some criminal case. Atwal further stated—

> "When I gave the car to the accused, I did not expect the payment to me of any compensation for the use of the car by the accused and that the only stipulation was that he was to pay me the price. When the accused returned me the car, I did not ask him to pay me any compensation for its use."

Mr. Garg contends that the evidence of P.W. 31, namely, of Atwal who is a member of the Rajya Sabha must be accepted, firstly, because he had been produced by the prosecution and secondly, because he is a respectable witness. If his evidence is believed, there was a transaction of sale between him and the appellant in respect of the car and the appellant fully intended to pay its price provided he got the money for which he had applied as loan from the Government. It is pointed out that payment of the price was not a condition precedent for the completion of the sale and that the appellant never intended to make use of the car without consideration or for a consideration which was inadequate. Section 9 of the Sale of Goods Act provides that the price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties and where the price is not determined accordingly, the buyer shall pay the seller a reasonable price.

In answer to question No. 51 in his statement under section 342 of the Code of Criminal Procedure, the appellant stated that he got the car on promise to pay its price and it was not received without any consideration. He expected the loan to be granted but his loan application was arbitrarily refused and he was informed of the refusal by the middle of June, 1962. The transaction was honest and straightforward and when Atwal demanded Rs. 6,000 the appellant considered that the price was reasonable being the prevailing market price. In answer to the next question (No. 52) it was stated that there was no stipulation for payment of any compensation for the use of the car and in fact Rs. 500 had been spent on its maintenance, repairs and spare parts. According to the appellant, if there had been no intention of purchasing the car

he would not have spent this amount. Question No. 56 related to the bill of Messrs Raj Motors amounting to Rs. 221.46 on account of cost of petrol, servicing charges and repairs which had remained unpaid and the answer of the appellant was that he owed some amount but the matter was still under correspondence as he had been overcharged. Question No. 58 also related to another bill for serving etc., amounting to Rs. 194.26 and the answer was that the repairs had been got done but it is apparent from the answer that the bill still remained unpaid owing to the alleged correspondence which was going on with the repairers on account of certain items being on the high side. Question No. 63 related to the evidence of Atwal that in July, 1962 he had asked the appellant either to get the car registered in his name or return the same. The appellant admitted the aforesaid facts to be correct and stated that as the loan had been refused, he was hesitating whether to pay the price of the car from his own resources.

Now, although there may be no bar to a person entering into a transaction with regard to the purchase of a car on payment of price which was to be either at the amount mentioned by the seller or at a reasonable figure to be paid later, the entire facts and circumstances established by the prosecution show that the so-called transacion of sale was a mere excuse or pretext for making use of the car without payment of any amount. As has been carefully analysed by the learned Special Judge, the appellant was in possession of substantial amounts which have already been mentioned which were lying in deposit either in his name or in the name of his wife. He could have easily withdrawn sufficient funds for payment of the price of the car to Atwal if he so wanted. In February, 1962, he had sold his own old car to Jai Gopal, P.W. 12 for a sum of Rs. 2,000. This amount could at least have been paid in part payment of the price but it was never offered to Atwal. Even when Atwal demanded the price in July, 1962 by which time the appelant's application for loan for the purchase of a car had been rejected, the appellant did not surrender the car immediately nor did he make payment of its price from out of his other resources and retained the car till he was reverted to his parent State in the month of August, 1962. Mr. Garg says that some of these circumstances, namely the possession of other resources and the reason why he did not pay the amount of Rs. 2.000 being the proceeds of the old car to Atwal were not put to the appellant when he was questioned under section 342. Even if that be so and these circumstances are excluded from consideration, there is a good deal of other material,

which would establish the case of the prosecution in respect of the possession and use of the car without consideration or for consideration which was wholly inadequate. The main argument of Mr. Garg has been based on the so-called transaction of sale which was bona fide and in which the consideration failed because of the inability of the appellant to make payment of the price since his loan application had been rejected and further that he had even spent a sum of Rs. 500 on the repairs. As regards the amount spent on the repairs, it is abundantly clear and it has been so found by the learned Special Judge which finding has not been assailed that nothing was paid towards the bills relating to repairs of the various repairers or service stations. The appellant cannot, therefore, claim that he spent any amount from his pocket on getting the car repaired. It is further proved from the evidence of P.Ws. 33 and 34 that the appellant never wished to publicly acknowledge or declare that he had purchased the car. P.W. 33 Shri Bhiwani Mal, Superintendent, Special Police Establishment, stated that after January, 1962, the appellant was having a Fiat car which was in a fairly good condition and out of curiosity he enquired if the appellant had purchased the car. The appellant replied that it belonged to his relative who was his brother-in-law. P.W. 34 Shri Gurdas Mal, Superintendent of Police, stated after January, 1962, he noticed that the appellant was using a new Fiat car and on his enquiry he was told that the car belonged to his friend who was in the Army. Objections were taken to this question on behalf of the appellant but Mr. Garg has not shown in what way the statements of these witnesses were irrelevant. I am, therefore, satisfied that the appellant never entered into a genuine and bona fide transaction of purchase of the Fiat car of Atwal and that he made use of that car for a number of months without any consideration and even if it be assumed that he incurred some liability on account of the repairs to the car, that was a wholly inadequate consideration.

Now, section 165 of the Indian Penal Code reads as follows:—

> "165. Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public

servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

Section 4 of the Act of 1947 provides *inter alia* with reference to trial of an offence under section 165, Indian Penal Code, that where it is proved that an accused person has accepted or obtained for himself any valuable things, it shall be presumed, unless the contrary is proved, that he accepted the same without consideration or for a consideration which he knows to be inadequate. The appellant has been proved to have kept the Fiat car and made use of it for a considerable period without making payment of any kind whatsoever to Atwal knowing full well that the investigation of the case in which Atwal's firm was involved had been carried out by him. Section 4 of the Act of 1947 requires the presumption to be raised whenever it is shown that the valuable thing has been received by the accused without anything more,—*vide C. I. Emden* v. *State of Uttar Pradesh* (16), at p. 552. Therefore, a presumption has to be raised against the appellant that he had accepted the use of the car without consideration or for consideration which he knew to be inadequate. The explanation given by him has been found to be unsatisfactory and unacceptable as correct. He is thus clearly guilty of an offence under section 165 of the Indian Penal Code.

Mr. R. L. Mehta, for the State, claims that the appellant would also be guilty under section 5(2), read with section 5(1)(d) of the Act of 1947, for the possession and use of the car without consideration or for a consideration which was altogether inadequate. Sub-clause (d), read with sub-section (1) of section 5, provides that a public servant is said to commit the offence of criminal misconduct if he, by any corrupt or illegal means or by otherwise abusing his position as public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage. In *M. Narayanan Nambiar* v. *State of Kerala* (17), while considering clause (d) of section 5(1) of the Act of 1947, it was observed that taking the phraseology used in the clause the case of a public servant causing wrongful loss to the

(16) A.I.R. 1960 S.C. 548.
(17) A.I.R. 1963 S.C. 1116.

Government by benefiting a third party squarely fell within it. It was further observed—

> "The gist of the offence under this clause is, that a public officer abusing his position as a public servant obtains for himself or for any other person any valuable thing or pecuniary advantage. 'Abuse' means misuse, i.e., using his position for something for which it is not intended. That abuse may be by corrupt or illegal means or otherwise than those means. The word 'otherwise' has wide connotation and if no limitation is placed on it, the words 'corrupt', 'illegal', and 'otherwise' mentioned in the clause become surplusage, for on that construction every abuse of position is gathered by the clause. So some limitation will have to be put on that word and that limitation is that it takes colour from the preceding words along with which it appears in the clause, that is to say, something savouring of dishonest act on his part."

Finally it was said that on a plain reading of the express words used in the clause every benefit obtained by a public servant for himself, or for any other person by abusing his position as a public servant fell within the mischief of the said clause. In the case decided by their Lordships, the accused in order to assign the land to his brother-in-law had under-estimated the value of the land to conform with the rules and it was held that he had thereby abused his position as a public servant and obtained for him a pecuniary thing or advantage within the meaning of the said clause and, therefore, he was guilty of an offence under sub-section (2) of section 5. In *Dr. S. Dutt* v. *State of U.P.* (18), dealing with the meaning of the word "corruptly" in section 196 of the Indian Penal Code, it has been said that the word "corrupt" does not necessarily include an element of bribe-taking.

It is used in much larger sense as denoting conduct which is morally unsound or debased. Their Lordships appeared to have referred with approval to what was observed in *Bibhuranjan Gupta* v. *The King* (19) by Sen, J., while contrasting section 196 with section 471 that the word "corruptly" was not synonymous with dishonestly or fraudulently, but was much wider. It even included conduct

(18) A.I.R. 1966 S.C. 523.
(19) I.L.R. (1949) 2 Cal. 440.

which was neither fraudulent or dishonest if it was otherwise blameworthy or improper.

On the facts which have been found the act of the appellant in taking possession of the Fiat car from Atwal and using it in the manner in which he did would certainly fall within the meaning of the word "corrupt" in clause (d) of section 5(1) and he would be guilty under that clause also.

In the result, the conviction of the appellant is maintained under section 165 of the Indian Penal Code and section 5(2), read with section 5(1)(d), of the Act of 1947 in respect of the charge relating to the possession and use of the car. As the minimum sentence which can be imposed under the latter provision is one year, the sentences which have been imposed by the learned Special Judge of one year each for these offences are hereby maintained. However, as stated before, the appellant is acquitted of the charges in respect of the possession of pecuniary resources or properties which was disproportionate to his known sources of income. The appellant who is on bail shall surrender to his bail bond. The fine if paid shall be refunded.

B.R.T.

INCOME-TAX REFERENCE

Before S. B. Capoor and H. R. Khanna, JJ.

PRINCESS RUBY RAJIBER KAUR,—*Petitioner*

versus

THE COMMISSIONER OF INCOME-TAX,—*Respondent*

I. T. R. 14/C of 1961

September 16, 1966

Income-tax Act (XI of 1922)—S. 4—Assessee receiving annual allowance on the basis of Custom of the family—Whether liable to pay tax thereon.

Held, that according to section 4 of the Indian Income-tax Act, 1922, the total income of a person includes all income, profits and gains from whatever