P.D., vol. 38(2), P. 757-810

Crim. A. 71/83

1. SHMUEL FLATTO-SHARON

2. YA'ACOV BEN UDIS

3. YA'ACOV HALFON

v.

STATE OF ISRAEL AND CROSS APPEAL

In the Supreme Court sitting as a Court for Criminal Appeals
[June 27, 1984]
Before: Bejski J., D. Levin J. and Netanyahu J.

Penal Law 5737-1977, Sefer HaChukkim 226, sections 12, 17, 32, 242, 292, 499; Knesset Election Law [Consolidated Version], 5729-1969, Sefer HaChukkim 103, sections 122 (amended: Sefer Hachukkim 5727 74), 122(1), 122(2), 122(3), 122(4) 122(5), 123, 123(2).

The Appellants in the appeal and cross appeal of the judgment given by the Magistrate's Court were convicted for conspiracy to commit a felony pursuant to section 499 of the Penal Law, 5737-1977, and for election bribery under section 122(1) of the Knesset Election Law [Consolidated Version], 5729-1969. This followed a campaign for election to the Knesset whereby their faction included a promise to provide housing at low rental and on convenient terms in apartments which Appellant No. 1 would purchase with his own funds and with funds of investors over whom he enjoyed personal influence. It was also held that the Appellants' list paid numerous activists remuneration on election day for work that was not in fact performed. On the other hand, the Appellants were acquitted of similar offences attributed to them in connection with dispensing funds to certain public and community leaders in order that those persons would then exercise their influence over their followers, and with providing funds to a list vying for election to a local municipality in exchange for influencing its followers to vote for the Appellants' Knesset List. From this follow the appeal and cross appeal to the Supreme Court.

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The Supreme Court gave judgment as follows:

A. The essence of a free election is not merely physical freedom to cast one's ballot in the booth, but more importantly, one's absolute intellectual and psychological freedom to participate in the election process. Any action that either restricts or denies the voter's freedom of thought or expression be it by bestowing upon him a benefit or by coercing him to accept the views of another violates the basic principle of honest, independent elections. [p. 758]

B. (1) An offence under section 122(1) of the Knesset Election Law requires proof that a bribe was given or offered, with the intent of influencing the voter.

(2) Section 123 of the Knesset Election Law adopts for purposes of bribery the principles established under section 293 of the Penal Law, *mutatis mutandis*.

C. (1) To prove the elements of bribery under the Penal Law, the State must establish beyond reasonable doubt: that a public servant is involved; that there was the taking or giving of a benefit in the form of a bribe; that the giving or taking was in exchange for a certain activity which itself was connected to the employee's duties; and that the giving or taking of the bribe was done with the intent of obtaining some material benefit, either immediately or at an appropriate time in the future.

(2) In viewing the facts in their entirety, attention should be paid not only to the facts as they appear on the surface, but also to the entire fabric of relations between the giver and the taker, as well as the explicit and implicit intent of the actors. The intent of the legislator with respect to the norm that he intended to achieve must be considered *vis a vis* what the giver and taker of the benefit sought to accomplish by their acts.

D. There is no requirement of mutuality of intent between the giver and the taker of a bribe. In principle, there is nothing to prevent a situation whereby the giver is innocent while the taker is guilty, or *vice versa.*

E. The offence of campaign bribery under section 122(1) of the Knesset Law lies in the very act that an offer is made.

F. (1) An error attributable to the legal interpretation of a norm is not a defence under section 12 of the Penal Law.

(2) The fact that criminal acts committed in the past went unpunished does not sanction the commission of such acts now or in the future.

(3) Mistake in a legal norm or unpunished acts in the past may be raised, if at all, in connection with the severity of the punishment meted out by claiming that the absence of clear precedents or guide-lines left the campaign activists unaware of the full significance of their conduct.

G. (1) Whether a certain platform is legal or not depends upon an examination of the particular facts, the explicit and implicit contents of the platform, and the manner of its presentation to the public.

(2) A platform proposing a solution to the problem of housing is legal; however, if the platform contains not only a plan of action, but also a promise to certain voters that if they vote for a specific candidate, they will obtain housing on attractive terms, it is illicit and tainted by election bribery. [p. 759]

H. (1) While acts of charity by candidates should not be forbidden, they should be done discreetly.

(2) Because acts of charity or the dispensing of favours close to an election could serve as a camouflage for bribery of voters, the true intent of the person dispensing the favour should be closely examined.

(3) If the motive is genuine, then the intent is proper. If, however, the purpose is to garner votes on election day, then the intent is illegal.

(4) If both motives are present, the intent that actually guided the actor is the determinative one.

(5) In examining intent, one may be assisted by precedent and by logic.

I. (1) In examining the organizational and publicity aspects of a campaign, one starts from the fact that the use of paid election activists is not illegal.

(2) However, if the activist has no real function to perform in the campaign, and the only reason for his salary is to influence him and his family to vote for a certain candidate, the payment is tainted by election bribery and he who makes such a payment has committed election bribery under the Knesset Election Law.

(3) One should carefully examine the circumstances under which a worker purports to be engaged in organizational activities in exchange for payment.

J. Pseudo-employment is characterized by the following: general apathy on the part of the candidate regarding what the employee will do; the lack of a genuine need for the services of the employee either in whole or in part; employing workers out of all proportion to the number of voters in the locale; and lack of proportion between what the worker does and the amount of his remuneration, and between the number of voters in an area and the amount of money expended in hiring campaign workers there.

K. There is nothing illegal in community or public leaders identifying with a certain candidate in seeking to promote his candidacy by appealing to their followers. However, while such an alliance is proper if

based on an affinity of idea or position, it is illegal if based on direct payment to the leaders in exchange for their support and the support of their followers. [p. 760]

L. That the recipient of a payment was not a person of influence is irrelevant if the person giving the payment intended that the recipient exercise his authority over his followers.

M. (1) As in the case of employing campaign workers, dispensing a favour for both pure as well as corrupt purposes is also considered an election bribe.

(2) In examining intent, one must consider whether *bona fide* campaign activity was the primary consideration received in exchange for the payment, or whether the payment was given in order to secure the vote of that person as well as those subject to his influence. If the latter is the case, then the payment is an election bribe.

N. (1) Mutual assistance between two parties or movements is proper so long as the alliance is based on an affinity of ideas or personalities. However, if the assistance of one party to another has an ulterior motive, such as monetary help or a deal to buy the influence of one party on behalf of another, then the alliance may be illegal because it is intended to dispense a favour in exchange for obtaining influence over potential voters.

(2) The principles established in connection with buying the influence of leaders applies in even greater force to an alliance between two parties.

O. Section 123(2) of the Knesset Election Law forbidding the giving of a bribe to influence the conduct of a third party does not depend upon how much influence is wielded. Buying influence of any degree is forbidden, and the influence bought need not necessarily be of one, the supposed benefactor, whose command is obeyed blindly by a certain group.

P. The Knesset Election Law does not recognize vicarious liability for offences committed by a list's activists. Therefore, the leadership of a list can be held liable only if the acts were committed at their initiative, approval or assistance.

Supreme Court Judgments cited:

[1] *C.A.* 481/73 *Rosenberg, Adv. Executor of the Estate of EIza Bergman v. Shtoessel, P.D.* 29(1), 505.

[2] *Cr.A.* 647/75, *Klein et al. v. The State of Israel, P.D.* 30(3), 275.

[3] *Cr.A.* 126/76, *The State of Israel v. Sheffer, P.D.* 30(3), 466.

[4] *Cr.A.* 216/75, *Tamir v. The State of Israel, P.D.* 30(2), 169.

[5] *Cr.A.* 108/54, *The Legal Counsel to the State of Israel v. Abadi et al., P.D.* 9, 199; *P.I.* 19, 78.

[6] *Cr.A.* 794/77, *Hayat v. The State of Israel, P.D.* 32(2), 127.

[7] *Cr.A.* 257/79, *Seviri v. The State of Israel, and cross-appeal, P.D.* 34(3), 757.

[8] *Cr.A.* 265/70, *The State of Israel v. Lateen, P.D.* 24(2), 677.

[9] *Cr.A.* 763/77, *Beriga v. The State of Israel, P.D.* 32(2), 824.

[10] *Cr.A.* 190/82, *Marcus v. The State of Israel and cross-appeal, P.D.* 37(1), 225.

[11] *Cr.A.* 365, 383/81, *Oshri et al. v. The State of Israel, P.D.* 39(1), 113.

Sources in Jewish Law which are cited:

[A] *Deuteronomy*16; 19.

[B] *Exodus* 23; 9.

[C] *Ketubot* 105b.

[D] *Mechilta* (Horovitz), Mishpatim, XX 328.

[E] *Responsa Hatam Sofer,* H.M. 105.

[F] *Responsa Minhat Eliezer,* 16.

Appeal and cross-appeal by leave from the judgment of the Jerusalem District Court (Judges A. Goldberg, D. Tal, Sh. Brenner) given on January 11, 1983 in Cr.A. 237, 293/81 in which the appeal and cross-appeal from the judgment of the Jerusalem Magistrate's Court was accepted in part (Judges Y. Or and D. Cohen).

The appeal and the cross-appeal were accepted in part.

S. Toussia-Cohen for Appellant No. 1 (Respondent No. 1 on cross-appeal).

Y. *Lalo* for Appellant No. 2 (Respondent No. 2 on cross-appeal).

M. Kirsch and Y. *Roznik* for the Respondent (The Appellant on cross-appeal).

JUDGMENT

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The Background

D. LEVIN, J. 1. The election campaign to the ninth Knesset was distinguished by a colourful and unusual phenomenon. Among the lists that contested for representation in this Knesset was a one-man list signified by "F'SH" and whose slogan was "Flatto-Sharon - the one man - for the Knesset."

Shmuel Flatto-Sharon (Appellant No. 1, hereafter referred to as "Flatto-Sharon") was presented to the Israeli public as a wealthy person, a man of property, economically powerful, a person whose talents and initiative were worthy of support. This man had been mercilessly pursued by the French authorities, who accused him of committing business-related crimes while he was living and active in that country. The State of Israel was asked to extradite him to France so that he should stand trial there.

At the focus of the message of Flatto-Sharon's list to the nation during its election campaign were two central themes, as follows:

A. If Flatto-Sharon were to be elected a member of the Knesset, his extradition to the maws of French justice would be prevented, and he would be saved from the danger, distress, and discomfort awaiting him upon extradition. Therefore, a vote for him would mean that a talented, productive individual would be saved for the benefit of Israel society.

B. Flatto-Sharon formulated a plan for a radical solution to the problem of housing (hereinafter: "The RSH Program"), which he intended to implement and carry out, irrespective of his election to the Knesset. The program, as presented and understood both explicitly and implicitly was, in short, that he, together with serious entrepreneurs and with the help of economic experts close to him, would acquire approximately fifteen thousand flats from the Housing Ministry for rental on convenient, equal terms to families of limited means and to young couples. This was the socio-economic message upon which the F'SH platform was based, the glad tidings that Flatto-Sharon brought to the voting public. His election to the Knesset would enable him to exercise his influence even more and to be at the center of socio-political activity; thus, it would help him further his program. [p. 763]

2. Flatto-Sharon does not have a command of Hebrew, and he therefore recruited as his right-hand man and confidant Appellant No. 2, Jacques Ben Udis (hereinafter: Ben Udis), who served as his mouthpiece (as a translator), advisor, organizer and as an effective and dynamic administrator.

3. Neither Flatto-Sharon nor Ben Udis was experienced at Knesset electioneering. Therefore, they engaged the services of one who was adept and experienced in this area, Appellant No. 3, Ya'acov Halfon (hereinafter: Halfon), who characterizes himself as a veteran professional in organizing campaigns for election to governmental and public institutions. He considers himself as possessing skills, experience and knowledge, and as one who knows how to organize efficient campaigns to attract supporters to vote for a certain candidate on election day. Halfon took upon himself the co-ordination of the organizational aspect of the election campaign of the F'SH list, and, during the elections he indeed showed substantial dynamism in promoting Flatto-Sharon's election, as will become clear later on.

4. The trio effectively constituted the leadership that guided the one-man Knesset list. They regularly conferred together, giving advice on and planning the campaign. They crossed the width and breadth of the country, and they established nearly 40 branches throughout the country, especially in development towns and settlements in the Arab sector. In all of these places, they conducted rallies and meetings, and attracted a large number of activists. The Appellants' widespread, diverse activities and the publicity campaign were craftily planned, and yielded impressive results for Flatto-Sharon, the one-man list. Not only did he surpass the one-percent threshold, but he was elected a member of the Knesset. In effect, he gathered support for the list that clearly exceeded what was required for the election of one person to the Knesset.

5. Not long thereafter, complaints began to be raised concerning Flatto-Sharon's fitness for election to the Knesset.

Suspicions were raised against him, as well as against his confidants Ben Udis and Halfon who, in effect, assisted him in his election campaign, alleging corruption in promoting Flatto-Sharon's election. It was said that they had conspired to bring about Flatto-Sharon's election to the Knesset by dispensing bribes to the voters, and that through such bribes, as well as through other benefits that they conferred or promised to confer on various groups of activists and voters in general, the F'SH list garnered a large number of votes.

The elections took place in May 1977; however, the investigation continued for a long time thereafter due to the complexity of the matter and of the events under investigation, and a charge sheet was filed in the Jerusalem Magistrates' Court only on August 8, 1979.

Because of the importance and complexity of the case, as reflected in the substance and the scope of the charge sheet, the President of the Jerusalem Magistrates' Court decided to hold the trial before a panel of three judges. The case in its various phases continued for a lengthy period of time, so that the final decision was rendered seven years after the election. [p. 764]

THE CHARGE SHEET AND THE DECISIONS RENDERED IN ACCORDANCE THEREWITH

6. The charge sheet consists of a general section and five separate counts.

A. The Appellants were acquitted in the trial court on the fourth count from the offence alleged therein on the view of the prosecutor because the facts on which the count was based were not proven at all.

B. The State charged in the first count that the Appellants conspired to commit a felony, an offence under section 499 of the Penal Law, 5737-1977, and corruption (election bribery), an offence under section 122(1) of the Knesset Election Law (Consolidated Version), 5729-1969. The facts supporting this count were that in the election campaign of the F'SH list, Flatto-Sharon represented himself as someone who, together with a group of investors subject to his influence, was about to acquire flats at various locations in Israel to be rented out at a reduced price to those requiring some solution to their housing problems, *viz.,* young couples and those with limited means. Flatto-Sharon voiced this message in his appeals to the public throughout the country, both orally and in writing; in delivering the message, making the offers and giving the promises, he was assisted by the other accused herein as well as by activists employed by them. According to the State, the acts of corruption that emerge from the facts as we shall set out in further detail later consisted of the offers and undertakings that were woven into the message, all made for the purpose of influencing the voting group in need of housing to vote for the F'SH list by promising some amorphous benefit from Flatto-Sharon's program whereby everyone interested would be granted low rental housing at very convenient terms.

C. Count 2 charged the Appellants with corruption, as indicated above, by "camouflaged employment" of many activists on election day, whereby these workers were given a payment for "this disguised, camouflaged employment" in connection with activity that took place only figuratively. On the basis of the details recounted in the charge sheet, the State alleged that a large portion of these activists were not called upon to perform any work in exchange for the "remuneration" that they received, and that the payment in respect of their "activities," which, as indicated, did not actually take place, was a form of bribe to these persons so that they and their relatives would vote for the F'SH list.

D. Count 3 also charges the three Appellants with the aforementioned acts of corruption. It charges that the Appellants gave a number of people, who may be described as community and public leaders, sums of money in exchange for which they were to influence their followers to vote for the F'SH list on election day. [p. 765]

E. Count 5 charges Appellants 1 and 2 with conspiracy to commit a felony and with acts of bribery as mentioned above. According to this count, with the help of local activists in the city of Dimona, the two conspired with a group of residents that had been organized to vie a list for election to the Dimona municipal council, which was to take place a short time after the Knesset elections. This list, whose organizers and promoters chose the symbol RT (*i.e.*, the "Pure List"), reached an arrangement through several of its main activists with the aforementioned Appellants, whereby the two lists would assist each other's election campaigns. RT would influence its supporters, estimated by its leaders to be some 2,000 strong, to vote for the F'SH list in the elections for the ninth Knesset, in exchange for which Flatto-Sharon would assist them in their contest for the city council by putting at their disposal an imprecisely specified sum of money for their election campaign, described by Ben Udis to be in the area of six figures. The State charges that this amounted to a promise by the Appellants of an unlawful benefit in favour of RT in order to obtain the votes of RT supporters in Dimona for the F'SH list to the Knesset.

7. A lengthy, thorough trial of this case was held in the Magistrates' Court (hereinafter: "the trial court"), and in three detailed, thorough, in-depth opinions, written by each of the learned judges that sat on the panel hearing the case, it was decided as follows:

Flatto-Sharon and Ben Udis were unanimously convicted of the offences that were the subject of counts 1 and 5, while Halfon was acquitted on these counts. Concerning count 2, the learned Judge R. Or, in a minority opinion, held that the Appellants should be convicted on this count as well; however, in the opinion of the majority, learned Judges Shabtai and Dr. Cohen, guilt was not adequately proved; accordingly, the Appellants were acquitted on this count. The Appellants were similarly acquitted on count 3. Flatto-Sharon was sentenced to a period of three years imprisonment, nine months of which were to be served, for the commission of each of the two offences for which he was convicted, the remainder to be a suspended sentence in accordance with the terms specified in the judgment. The two terms were to be served concurrently. Ben Udis was sentenced to a period of 18 months imprisonment, all of which was to be a suspended sentence in accordance with the terms of the sentence. In addition, Ben Udis was fined the sum of 4,000 sheqalim (2,000 sheqalim for each offence) or 80 days in prison in lieu thereof.

8. Neither the State nor the Appellants who were convicted, were satisfied with the decision of the trial court, and each appealed to the Jerusalem District Court (hereinafter: the court of appeals), each on separate grounds and with different aims in mind.

The State appealed the acquittals of all three Appellants on counts 2 and 3, and the lighter sentence imposed on Ben Udis. For their parts, Flatto-Sharon and Ben Udis each filed a separate appeal in which each took issue with their convictions on counts 1 and 5 and, alternatively, with the severity of their sentences. [p. 766]

9. The court of appeals heard all three appeals on a consolidated basis and in its judgment, none of the issues was unanimously decided. The court of appeals reversed the decision of the trial court on some counts on which Appellants 1 and 2 had been convicted, as well as on some counts on which the three Appellants had been acquitted. Thus, the court of appeals decided as follows:

A. In so far as count 1 is concerned, it affirmed the conviction of Appellants 1 and 2 and the acquittal of Appellant 3.

B. In so far as count 2 is concerned, the majority decided to convict the three Appellants on the charges alleged therein.

C. In so far as count 3 is concerned, the acquittal of the Appellants by the trial court was affirmed.

D. Regarding count 5, the convictions were overturned, and Appellants 1 and 2 were acquitted on the charges alleged therein.

E. Regarding the sentence, it was unanimously decided to reject Ben Udis' appeal. The majority also decided to reject the appeal of Flatto-Sharon, and to reinstate the sentences handed down by the trial court notwithstanding the different conclusions reached by the trial court regarding conviction.

The minority judge in the court of appeals, the Deputy President, A. Goldberg, held that only three months imprisonment from the 18-month sentence imposed on Flatto-Sharon was appropriate.

F. Halfon was first convicted by the court of appeals, which sentenced him to a six-month suspended sentence, on condition that for a period of three years he would not commit an offence under section 122 of the Knesset Election Law [Consolidated Version].

10. Once again, the parties were not satisfied with the decision rendered by the court of appeals, and each of them filed for leave to appeal the decision, which was granted by the President of this court. Thus, we have before us four separate appeals, which we have decided to hear on a consolidated basis. The accused, Flatto-Sharon and Ben Udis, both appealed their convictions on counts 1 and 2 of the charge sheet, and the sentence laid down and reinstated against them. Appellant Halfon appealed his conviction on the charge in count 2. The State for its part appealed the acquittal of the three accused on the charges in count 3, and the acquittal of Flatto-Sharon and Ben Udis from the charges in count 5; in this regard, the State seeks to reinstate the judgment of the trial court. [p. 767]

THE PRINCIPLE OF FREE ELECTIONS IN A DEMOCRATIC SOCIETY

11. This case deals with one of the fundamental, crucial elements of a democratic society, which has been a bedrock of the system of government in effect since the founding of our country, and of which we are proud. Thus, the case before us is of cardinal importance, and it justifies the broad, in-depth treatment by the trial court and the exhaustive, instructive hearing before us.

12. Political democracy is, first and foremost, a system by which, through competition for sanctioned authority, persons are elected to lead the body politic: G. Sartory, *Democratic Theory* (Detroit, 1962) 124. One can state that contemporary democratic society incorporates two principles: minority control of the majority, in other words, democracy is a political system which guarantees the influence enjoyed by the minority over the majority, who compete for the votes of the electors and are elected by them, and who for a time are entrusted with managing the affairs of the state. (See p. 127 at *ibid.*).

13. In Israel the democratic system is implemented by means of the proportional representation method, which satisfies the basic principles of a democratic regime. An instructive, exhaustive explanation of this form of representation is given by J. F. Ross in his book *Elections and Electors, Studies in Democratic Representation* (London, 1955), at 12:

> "Proportional representation, then, is the principle that in a party election.... the distribution of seats on the elected body between the parties shall correspond with the distribution of their votes by the electors. Or, putting it into other words, we may say that the principle of proportional representation requires that the distribution of opinion in the elected body shall correspond with the distribution of opinion amongst the voters who elected it." [p. 768]

Thus, the system of proportional representation attempts to ensure the realizations of the important principle in democratic elections, namely, that the public opinion and the people's will be accurately reflected, so that it may guide the party in power, whilst limiting the ability of the party to abuse the authority that has been given to it by virtue of the will of the majority, and by reflecting the majority's desired policies. The thread connecting the philosophy of the citizen to his elected representatives, who are supposed to express his desires and represent his views in the legislature, is the election platform, that is to say, the ideological foundation formulated by the candidates and presented to the public in order to influence the voter on election day. The platform is supposed to articulate the basic principles and the policy that represent the philosophy of the candidate

and the political body he represents. It is possible that this platform will be a broad one, encompassing all matters of the state and the citizen, but it is also possible that it will be narrow and circumscribed and will articulate a formulated policy in specific areas; sometimes, emphasis in the platform will be on means of action, while at other times it will concentrate on a person or on a leader, and will seek identification with that person and belief in that person's ability to lead the people in the proper, correct manner. The common element here is that all candidates for election, who seek the voter's confidence and promise to represent his views and desires, set forth the principles of their policy and their political leanings by way of publicity and propaganda. The voter casts his ballot, therefore, for the list of candidates whose platform comes closest to his own inclinations.

14. In order to achieve this important, basic goal, namely, proper, genuine proportional representation of the opinions and views of the community of voters in the legislature of the state, the Knesset, and in order to make certain and to ensure that those elected will not abuse the prerogatives of their elected office, scrupulous attention must be paid that the elections will be free and without any taint of coercion, unfair influence or corruption, and that it be clear that the citizen, in exercising his right to vote and in implementing his political will by means of the ballot, has done so freely and in accordance with his unfettered judgment. A coerced election or a bought election distorts and perverts the fundamental principles of genuine democracy. Depriving the voters of the freedom of choice and of independent deliberation shatters and destroys the heart and soul of the democratic system, which should be preserved and maintained in order that power will not be turned over to persons who will seek to impose their views on everyone else.

15. The key to the process of free elections is that the voter, and he alone, at his discretion and of his own free will, shall decide who will be the preferred leaders and who, in his view, are fit to lead the people and to improve the citizen's lot. This requires exercising a certain degree of independent judgment. Sometimes it will be deliberate, serious and profound, and sometimes it will turn out to have been done in error, rashly and naively; but always, and this is the essence of the matter, it is the true, willful choice of the voter, reflecting the will of that citizen at that time. There is no doubt that this vote will be influenced by various factors, including a proper, legal campaign of information and publicity waged by the parties and lists contending for the elector's vote, namely the

platform which is presented to the voter, which may on the surface seem colourful and optimistic, and perhaps even illusory and evocative of false hopes. It is reasonable that the judgment and choice of the voter will also be influenced by the lessons learned from the past and from the achievements or failures of the administration that formerly guided the affairs of state, all in accordance with the citizen's particular views and approach. However, the vote may not be influenced by improper favours and corruption on the part of those contending for the elector's vote, acts that negate the independence of the voter and his freedom of choice. Therefore, the Israeli legislator attended to maintaining clean elections through rules prescribed in the Knesset Elections Law [Consolidated Version] (hereinafter: the Election Law). [p. 769]

THE MEANING OF "BRIBERY, CORRUPTION AND ELECTION BRIBERY"

16. Section 122 of the Election Law provides that an act intended to obtain a citizen's vote by an act of bribery or by means of threats, or in other words, as I described above, by way of a forced or bought vote, is an offence justifying harsh punishment either by imprisonment or fine. Subsections (1), (2) and (4) of section 122, that are the important sections for our purposes, discuss a wide variety of acts of bribery that are intended to influence the vote of the elector by dispensing favours. Subsections (3) and (5) deal with acts intended to obtain the vote of an elector by various types of threats. The common element to all these acts is that, whether due to a bribe or whether due to submission in the face of threats, the voter is denied his freedom and is deprived of his independent and free will at the time of his vote.

In our situation, subsection (1) of section 122 includes:

> "a person who gives or offers a bribe for the purpose of inducing a voter to vote or refrain from voting, whether generally or for a particular candidate's list. "

It is absolutely clear and incontrovertible that in order to establish this offence, one must prove that a bribe was given or offered, and must show that such giving or offer was intended to influence the voter in his vote. One may ask the question - What is the meaning

of "bribery?" Section 123 of the Election Law basically adopts, *mutatis mutandis,* the rules prescribed in section 293 of the Penal Law regarding bribery, and therefore we will quote section 123 for ease of subsequent discussion:

> "With regard to a bribe, it shall be immaterial -
>
> (1) whether it is money, money's worth, a service or any other benefit, except transportation of a voter in a vehicle to and from the polling-station for the purpose of his voting;
>
> (2) whether it is for an act of the taker himself or for his influence upon an act of another person;
>
> (3) whether it is given by the giver personally or through another person, whether it is given to the taker personally or to another person for the taker, whether it is given in advance or *ex post facto,* or whether the person benefiting from it is the taker or another person." [p. 770]

Another question that we shall address is the degree of intent that must be proved regarding undue influence on the voter in connection with his vote.

Prima facie, one might ask what the reason is for this prohibition against influencing the voter by way of dispensing favours. After all, the recipient of a favour exercises his civil right to vote, and he votes for whom he wants, so what consequence is it if his choice is influenced by a payment or by a favour, so long as his freedom to exercise his right to vote in accordance with his wishes was not taken from him. Anyone asking this question should be enlightened and made to see and understand correctly what genuine democratic elections are all about, as explained above. Freedom of choice election means not merely the physical freedom to cast a ballot in the booth, but also, and principally, the complete freedom to go through the voting process as a free person, both psychologically and intellectually. Therefore, any act that may reduce or eliminate, either directly or indirectly, the voter's freedom of thought and his ability to give genuine expression to his preferred plan of action and his philosophy in accordance with his independent judgment - because of a favour that inhibits his freedom or because the opinions of others have been imposed on him - violates the basic principle of freedom and independence of choice. Hence, acts such as these are fundamentally improper. A different or less harsh approach to this subject, that would reconcile itself with conduct of this type and that would follow it,

would necessarily undermine the democratic process and would distort its character, because the inevitable result would be that he who pays the piper would call the tune, as well as exercising the reins of power with all that it implies; there can be no greater perversion of the principle of the democratic system in an enlightened society.

17. In light of the foregoing, in establishing for ourselves the boundaries of conduct that amounts to election bribery, we should examine the accepted interpretation of the offence of bribery under the penal laws. In doing so, we must examine the legislator's intent as it can be understood from its definition in both the letter and spirit of the law, and according to the legislative purpose that is implicit in the provisions of the law and the interpretation thereof in the case law. "The law is a mechanism for carrying out legislative purpose, and therefore it should be interpreted according to the purpose inherent therein" (C. A. 481/73 [1], p. 516). The words of the law do not always in themselves give a clear, unqualified meaning to the expressions contained therein; therefore, it is proper for the judge in interpreting the law to ask himself what normative, social goal this law is seeking to accomplish, inasmuch as:

> "The law is an expression of policy..... The words of the law were chosen because they were intended to realize a certain policy. Interpretation is, therefore, a process intended to uncover from among the range of possibilities in the language that meaning that will give realization to the law's purpose..... Just as the law is a 'purposeful creation,' so too is interpretation a 'purposeful process' " (A. Barak, *On the Judge as Interpreter, 12 Mishpatim* (5742-43), 248, 252). [p. 771]

Thus, the issue of a bribe that was given to or received by a public employee has been broadly, consistently, and thoroughly interpreted in accordance with its legislative purpose. One can summarize matters generally as follows: In order to prove all of the elements of a charge of bribery under the penal laws, the prosecution must prove that a public servant was involved; that a favour in form of a bribe was taken or given; that the taking or giving was for an activity connected with the public servant's duty; and that the giving or taking of the bribe was with the intention of obtaining a substantial result, either immediately or at some other time. All these elements require proof. Since we are dealing here with a

criminal proceeding, which requires proof of the elements of the offence beyond reasonable doubt, when all of the evidence is taken together, generally in light of the totality of the circumstances, attention should be paid not only to the obvious facts, but also to what these facts imply, the logic embedded therein and the fabric of relations between the giver and the taker; their desires and hidden intentions should be examined, as should other signs, indications and elements that become evident or are reasonable from the recounting and unfolding of the event. This is because when all of these factors are interwoven with each other, they establish the probative evidence as well as define the boundaries of the act in its proper square - whether the square is white, bearing testimony that the act is untainted, or if the square be black, bearing testimony that the act is improper. In examining the circumstances in their entirety, it is important that the examination be done with a comprehensive, realistic and careful assessment of the case, but not necessarily rigidly and punctiliously, provided that we always keep before us, on the one hand -what the purpose of the legislative act is, and what the legislative norm is that the legislator seeks to accomplish, and on the other hand - what the giver or the taker sought to obtain from the act. The foregoing is a summary of the extensive case law on this subject, and it is sufficient to point to several judgments in which rules bearing thereupon have been set down and reviewed (Cr. A. 647/75 [2]; Cr. A. 108/54 [5], and others).

18. When an offence of bribery committed by a public employee is proven, everyone will denounce him vociferously because of this. Why? Because, in effect, he has abused his position and has violated the trust given to him as a public servant. From the normative point of view, it is expected that a public servant will fulfil his duty and will exercise the authority given to him to the best of his discretion in a business-like fashion by thinking and deciding freely. A public servant who takes a bribe forfeits his own will and subjugates his freedom of thought to the will of the giver, who thereby seeks to achieve his desired purpose. This is why the matter is viewed so seriously. This is the result that the legislator sought to prevent in promulgating this legislation, because it disrupts proper administration and harms its integrity.

Thus, bribery generally, and election bribery *a fortiori,* as explained above, is meant to subjugate the will and freedom of choice of the citizen, and to render his vote, which should be free and independent, dependent on something else. The purpose of the law is to prevent this situation and to preserve the integrity of the election.

19. We will discuss later in the appropriate context the principles regarding bribery and election bribery that have been set down in Israeli and English case law. However, it seems to us that it would be instructive and useful to describe the treatment of fraud in the Jewish tradition and in Jewish law. Bribery is viewed extremely negatively, in Jewish law and tradition. We already find in the Scriptures how negatively our forefathers viewed the act of bribery, which they condemned in absolute terms as follows: [p. 772]

> "Thou shalt not wrest judgment; thou shalt not respect persons; neither shalt thou take a gift; for a gift doth blind the eyes of the wise, and pervert the words of the righteous" (Deuteronomy 16; 19 [Jewish Publication Society Translation] [A]).

And further:

> "And thou shalt take no gift; for a gift blindeth them that have sight, and perverteth the words of the righteous" (Exodus 23; 8 [Jewish Publication Society Translation] [B]).

The following brief, but bold words from the Tractate Ketubot 105b [C] are also apt here:

> "The rabbis taught: 'thou shalt take no gift' means not only a monetary gift, but even verbal corruption is forbidden, since the bible does not say 'thou shalt take no bribe.' "

The Tractate continues:

> "What does verbal bribery mean? It means, for example, as in the case of Shmuel, who whilst crossing the bridge encountered a man who proffered his hand.

> Said Shmuel: 'Who are you?' He replied: 'You are to sit in judgment on my case?' Shmuel answered: 'I am disqualified from hearing your case.'
> "

In other words, even if the benefit lay only in the fact that the person assisted Samuel, nevertheless, when it was understood that he was about to stand before him in judgment, that alone was grounds for disqualification. The Tractate Ketubim continues:

> "Where there is bribery, the hearts of the giver and of the taker become one. Says Rava: Why is bribery forbidden? It is because someone who takes a bribe from another favours him and is as one with him, and nobody would do wrong to himself." (See also *Mechilta* (Horovitz), Mishpatim, XX 328[D]).

That is to say, from the moment that a person takes a bribe from another, he forfeits his selfhood with respect to that person, and he no longer enjoys the same freedom of decision or ability to make an independent judgment on merits.

This strict prohibition against bribery in Jewish tradition is not limited only to judges, but applies to everyone dealing in public affairs; such persons must act equitably and faithfully, and their decisions must be without taint or blemish. The Rabbinic arbiters of Jewish law went even further, maintaining that:

> "The prohibition against the taking of a bribe applies not merely to a judge, but to all those appointed over and who deal with public matters, even if their decisions are not, strictly speaking, religious law, and they may not deviate from the law because of liking or disliking, and certainly not by taking bribes." [p. 773]

So our sages ruled and held regarding bribery generally and what we call election bribery. Rabbi Moshe Sofer, among the most prominent Hungarian rabbis (during the late 18th century and early 19th century), held even then that if competent witnesses testify that some of the electorate for the community rabbi took bribes, the election is void and new elections must be held. The Rabbi went further, holding that "if the witnesses testify that

the rabbi himself instructed that the bribes be given, he is disqualified from serving as a rabbi until he repents." With respect to those taking the bribes, some took the position that they were disqualified from appointment to a public position, and in any event they were not allowed to participate in the re-election for the community rabbi, even if they returned the bribe, repented, and swore on oath that they would not repeat such a misdeed in the future. The reason for this was explained as follows:

> "...because they already favour him, they will not retract their actions and they remain biased forever."

See Responsa Hatam Sofer, H.M. 105[E] and see also Responsa Minhat Eliezer, 16[F]. For references to their opinions, see the volume of A. Shoheman, *Deeds Accomplished Through the Violation of Law* (Hebrew). (Jerusalem, 5741), 232.

THE ASPECTS OF THE CHARGE SHEET

20. In examining the charges alleged against the Appellants in the charge sheet to the effect that their Knesset campaign conduct was tainted by election bribery, there are four different aspects to which we will relate as follows:

A. The programmatic aspect - Was the platform presented by the Appellants to the public tainted by bribery? This subject was discussed at length by the lower courts in connection with Count 1.

B. The organizational aspect - Did the extent and the way in which the Appellants employed activists stray into the realm of the grant of impermissible favours? This will be addressed in our discussion and examination of Count 2.

C. The nature of the influence - Did the Appellants acquire, by means of favours, influence over community leaders and personalities so that the latter would influence the members of these communities to vote blindly for the F'SH list at their leaders' behest? This is the bone of contention regarding Count 3.

D. The "deal"- Was the agreement between the F'SH list and the RT list that was supposed to compete in the local Dimona elections an illicit transaction reeking of the odour of bought votes? This is the subject of Count 5 of the charge sheet. [p. 774]

PRINCIPLES REGARDING THE SCOPE OF INVOLVEMENT

21. Pending our treatment of each of these aspects of the charge sheet, this is a convenient spot to address a number of legal issues whose resolution at this juncture, even before I address each of the subjects separately, is desirable:

A. Does liability, under the penal laws and under section 122(1) of the Election Law, on the part of one who gives a bribe depend on proving a corrupt intent on the part of the bribe's recipient as well?

The law on this matter is that with respect to the crime of bribery there is no need for there to be mutuality of intent between the giver and the recipient of the bribe. This rule has been established in Israel in connection with bribing a public official:

> "In principle, there is nothing to prevent a situation in which the taker of a bribe is innocent while the giver is liable for bribery, or vice versa. The lack of mutuality may be due to the different intent of each party at the time the act was carried out" (Ben-Porat, J. (as was her title then) Cr. A. 794/77 [6]) pp. 128-129.

She continued:

> "In my opinion, there is a possibility of non-mutuality in both cases: In the second case - when the giver of the bribe intended to bribe a public official who himself was not aware of such intent; and in the first case - the official demanded payment as a bribe whereas the giver was not aware of that" (*ibid.*, p. 129).

This principle has been established in England in connection with election bribery:

> "Where the intention of the giver is proved to be corrupt the intention of the recipient becomes immaterial so far as concerns the offence of bribery by the former." (J.F.N. Rogers, *On Elections* (20th ed., Vol. 2, 1928) 269.

B. Is the criminal act (the *actus reus*) of the offence of bribery under section 122(1) of the Election Law consummated by a promise which is a form of an offer of, or must the offer itself be realized in order to establish this element of the offence?

From the point of view of the offerer of the bribe, the criminal act is consummated as a component of the offence of bribery with the very act of the offer. Section 122(1) of the law prescribes this explicitly when it speaks of "one who gives or offers a bribe in order to influence...." Also in English law, a promise of a favour is enough to consummate the criminal act required of someone who offers an election bribe, but stronger evidence is required that the offer was a bribe (see, Representation of the People Act, 1949, c. 99(2), and the same holds true at common law. See, for example, Coventry Election Petition (1869) [12]. [p. 775]

C. Can the Appellants' claim that they did not consider their acts and promises to fall within the prohibition established by section 122(1) provide a defence against their conviction?

The Appellants do not claim lack of knowledge of the prohibition in the law against election bribery, nor do they claim mistake of fact within the meaning of section 17 of the Penal Law. Rather, they claim that they did not know that their acts fell within the scope of the normative prohibition of section 122 of the Law. The answer to their claim is found in section 12 of the Penal Law, which provides that:

> "Ignorance of the law shall not serve as the basis for exemption from criminal responsibility, unless it is specifically provided that knowledge of the law is one of the necessary elements of the crime."

An exhaustive rule in connection with the interpretation of this section was set down in Cr. A. 257/79 [7], at 773:

"The provision of section 12 regarding lack of knowledge of the law which does not excuse criminal liability relates to the offence itself, *that is to say, the accused is not entitled to argue that he did not know that a certain act is prohibited under the Penal Law.* However, when knowledge of the existence of a certain legal condition constitutes one of the elements of the *commission* of the offence, then a good faith mistake by the accused concerning the existence or non-existence of this element is a mistake of fact.

Regarding the rule that ignorance of the law is no excuse, it has been held that it applies only to the criminal law, and ignorance of the non-criminal law does not fall within the rule..." (Emphasis added - D.L.).

In our situation, we are dealing with a criminal norm (section 122(1)), and the Appellant's claim concerning the legal construction of the norm. This type of mistake does not fall within the scope of the defence afforded by section 12 of the Penal Law (see the article of Prof. S. Z. Feller, *Mistake in Criminal Law and in Extra-Criminal Law: Where is the Boundary?* Mishpatim 5 (5734), pp. 508, 511-12). We add here, for purposes of comparison only, that in the United States there is no uniform legislation concerning mistake of the type mentioned above with respect to the promises of an election candidate (see, for example, 26 Am. Jur. 2d (Rochester and San Francisco, 1966), at 108).

D. Can the claim of the Appellants, and in particular that of Halfon, that the actions attributed to them in the four counts reflect the accepted manner of elections in Israel, provide a defence?

The answer to this question is no. This claim cannot provide a defence against the Appellants' conviction, if indeed they are found guilty, because the fact of the commission of unpunished criminal acts by others in the past does not validate the commission of these acts in the present or in the future.

Similarly, in connection with the custom of distributing holiday presents to public servants by those with whom they have contact, it was held in Cr. A. 126/76, p. 470, that: [p. 776]

"The fact that others give with the same intention and for the same purpose does not alter the character of this particular act of giving, nor does it make this objectionable custom a legally proper act."

This argument, as well as the claim regarding the lack of knowledge concerning the correct normative interpretation of the Appellants' actions, may be heard, if at all, in connection with the degree of the punishment to be meted out because there, due to the lack of prior case law on the subject, it is possible that the campaign activists were not properly warned and made aware of the significance of their conduct.

THE PRAGMATIC ASPECT - THE RSH PROGRAM (COUNT 1)

22. It is only natural that every candidate or list of candidates will at campaign time seek to capture the heart and mind of the voter by means of an attractive platform. I have already indicated above that a platform may either be broad, serious, and directed to the issues, or narrow, simplistic, and directed to unattainable aspirations; it may either articulate the fundamental outline of a clear, pragmatic policy, or it may be general, non-obligatory, and unattainable - both are proper, legally speaking, and it is the voter who by his vote decides the seriousness of the platform and of the candidates who stand behind it.

A candidate may view as a panacea a solution of the problems of housing for those of limited means and for young couples, proposing ideas to this end and focusing his election campaign on this issue. This type of platform is proper, and should not be invalidated. However, if such a platform includes, for example, not merely a plan of action and details on how it can be realized, but an actual promise to give residential apartments on tempting terms, to a certain voter or group of voters who vote for that candidate, then such a platform will be deemed invalid and tainted by election bribery.

Between these two possibilities - the first legitimate and the second illicit - there is a broad expanse within which various appeals to the voting public will be marginal in terms of legitimacy. Putting the platform into its proper category, as either legitimate or illicit, requires examination of the particular circumstances of each situation; evaluation of the platform's contents and its significance, explicitly or implicitly; and evaluation of how it is presented to the public, and application of the legal principles reviewed above to these.

Therefore, in approaching the decision of the lower courts in connection with Count 1, we ask ourselves - What has been proven concerning the ideological platform of the F'SH list, which concentrated on the RSH program (Revolutionary Solutions for Housing)? What are the ensuing legal conclusions regarding the legality of this platform, and was the RSH program as presented by the F'SH list tainted, as alleged, by election bribery? [p. 777]

23. The court of appeals adopted the principal findings of fact of the trial court (pp. 3-7, 11 of the decision of the court of appeals), and we see no reason to interfere with or to alter these findings. The principal facts established are as follows:

A. Housing was the central issue in Flatto-Sharon's election advertising.

B. The election advertising emphasized that apartments would be acquired through Flatto-Sharon's resources and through the resources of investors under his influence.

C. Flatto-Sharon had the intentionally cultivated image of a wealthy person who was financially capable of delivering what he promised. This image contributed to lending a degree of credibility to his promise.

D. At various opportunities prior to the election, Flatto-Sharon's undertaking to purchase 500 apartments in Kiryat Shmona for subsequent rental at a low price to young couples was stressed.

E. On April 26, 1977, Flatto-Sharon held an election rally at Physicians House in Tel Aviv at which he announced that he intended to purchase 20,000 apartments for subsequent rental at a low price to young couples.

This plan was also announced at election rallies at other sites in Israel, in newspaper advertisements (E/58, E/117, A/4-B, and in a publicity film strip aired on television (A/A-36A).

F. Not only was the plan presented and promises to make good on it publicized and articulated, but representatives of the list initiated and conducted registration of young couples interested in solving their housing problems in this manner. Actual registration was conducted as follows:

(1) Before and after the gathering at Physicians House.

(2) At the F'SH list's branch in Dimona, through witnesses Rachel Cohen, Marco Zanti and their helpers, pursuant to Ben Udis' instructions for conducting the registration.

(3) In Bet Shemesh, after an election rally there on the evening prior to the elections by the local co-ordinator for the F'SH list in accordance with Ben Udis' guidelines.

(4) In Ashkelon, registration was conducted by the local co-ordinator for the F'SH list, also in accordance with Ben Udis' guidelines.

G. The purpose of the registration was not, in Ben Udis' words, to establish a "movement," but to provide real solutions from private sources to the problem of housing, and on the basis of this promise to acquire the votes of the plan's registrants for the F'SH list. [p. 778]

The trial court decided on the basis of these proven facts that a promise of residential apartments at a low rental was an illegal favour. Such a favour was indeed offered to the voters by Flatto-Sharon and Ben Udis; thus, the required causal connection between the favour as offered and the vote as cast by the voters was established. Accordingly, the plan as presented to the voters, especially in tandem with the registration campaign, was tainted with election bribery, and those responsible are guilty of the acts attributed to them in Count 1.

The court of appeals took issue with the trial court on two points:

A. In light of the "common sense" test set down by the court in determining the meaning of bribery under section 122(1) of the Election Law, the court of appeals held in contrast to the trial court, that the advertisements that were taken out by the F'SH list, in which young couples were called upon to participate in the RSH plan, was not an offer of a bribe but rather election advertising. The reason for this was that the advertisements failed to mention the source of the funds for purchasing the apartments, nor did they suggest that joining the "movement" would solve one's housing problems. The court of appeals further held that for the purpose of deciding whether the housing plan was an offer of a bribe to voters, the court would view the factual situation in entirety rather than splitting it up into discrete factors. Thus, the fact that the advertisements are not *per se* an offer of a bribe was not enough to rule out the conclusion that given the entire factual context, the offer of a bribe occurred. I accept the approach of the court of appeals, and thus I will deal with the facts and circumstances in their totality and draw my conclusions accordingly.

B. The trial court felt it necessary to clarify whether the causal connection between the offered favour and the actual vote had been proven. The court of appeals was of the opinion that because everything done in the election campaign was for the purpose of

influencing the voter, the question that needed to be answered was not the extent of the causal connection, but rather if the facts involved an offer of bribery. If the answer is yes, then the conclusion that follows is that the offer was intended to influence the voters.

24. Presentation of the aforementioned housing plan raises, as aforesaid, the following basic legal question: What is the difference between an election platform, which by its nature includes the promise to do good, which may be permissibly presented to the voting public, and does not constitute bribery and express or implied promises of favours as compared to the same platform, which might be regarded as being tainted with bribery?

The distinction required to answer this question as I presented it has been made in American courts, and it appears to me that the principles that have been established in these judgments are also applicable to the Israeli electoral system.

In the case of *Prentiss v. Dittmar,* Judge Jones held on page 1022 as follows: [p. 779]

> "There is a wide difference between a promise of this character and those multifarious pledges made by candidates in the interest of reform, economy, and a rigid and effective administration of office in compliance with their official oaths. The latter are made in the public interest, and are consistent with personal fitness. The former savors of vicious tendencies, involving a personal pecuniary consideration offered by the candidate in order to accomplish his election, in which the test of fitness is not an element."

Another source (26 Am. Jur. 2d, *supra,* at 109-110) characterizes promises that do not amount to a bribe, thus:

> "The thing offered is of public nature pertaining to the public, and not to individuals, and the parts to be influenced is a whole country in a manner whereby every inhabitant thereof is to be benefited."

There is no doubt that the housing problem of young couples is a matter of cardinal social-public importance, and therefore there is nothing to prevent any party or candidate from choosing to focus its ideological platform during its election campaign on this

special, important subject. However, in this situation, the promise included in the F'SH platform and that which its presentation to the public implied, was not intended to provide a general, public solution to the problems of housing. In this situation, the emphasis was placed on purchasing apartments from the private resources of Flatto-Sharon for subsequent rental to a certain sector of the public who registered, whether through newspaper advertisements or at a rally at Physicians House, or through the F'SH co-ordinators in Dimona, Ashkelon or Bet Shemesh. In this, the program exceeds the presentation of a platform that describes an acceptable promise by means of suitable election publicity, and becomes instead a specific, intentional bribe. Thus, we have the answer to the argument made by learned counsel for Flatto-Sharon, Advocate Toussia-Cohen, that the offer of the solutions did not contain the necessary specificity to render the offer corrupt.

The fact that F'SH's programmatic platform stated that the apartments "were to be turned over for rent through the local authorities, with an option to purchase the apartment after 10 years" (the issue of turning over apartments through the local authorities was also raised in other places, such as election rallies in Dimona) - is of no consequence. For the following reasons, such an offer cannot confer upon the promise a general, public character intended for the public at large:

A. In effect, the registration was not done through the local authorities, but rather through F'SH activists. This fact reinforces the conclusion that the housing plan was intended to constitute a concrete solution for those people who would be registered by F'SH activists, rather than a general, institutional solution. [p. 780]

B. Even if the registration had been done through public institutions, the nature of the promise would not thereby be changed, because funding of the program would still be through Flatto-Sharon's private resources, a fact that was emphasized in the election campaign by high-lighting the close connection between Flatto-Sharon and the program, because even if the registration for the program and the distribution of apartments had been done through the local authorities, it would have not turned Flatto-Sharon's promise into a purely philanthropic promise or a legitimate act of charity. The conclusion is not altered even if we add to the institutional registration and distribution Flatto-Sharon's declaration that he would make good on his promise regardless of whether or not he were elected. Philanthropy should be encouraged, and those who contend for elected office should not be

prohibited from performing such acts, although it is desirable that they should not be done conspicuously but rather should be done discreetly (Wigan (1881[13]).

It is natural that a philanthropist, or an act that carries with it a certain benefit, enjoys popularity among its beneficiaries. This is understandable, and there is nothing illegitimate in it *per se*. However, because acts of philanthropy or the conferring of a benefit so close to election time may serve as a camouflage for voter bribery, it is incumbent upon us in such circumstances to examine closely the true intent of him who makes such an offer of philanthropy. The intent of the offerer, which naturally is in his mind, must be examined in the light of what is suggested by the facts of the matter, as well as in regard to the fundamental motive or purpose of the philanthropy or benefit. If it is clear from the facts that the motives underlying the generosity of the offerer are simply concrete means of expressing his generosity, integrity, and benevolence, his intent is certainly proper and even desirable, and it is allowed. If on the other hand, the motivation or purpose for the philanthropy or benefit is in effect to garner the votes of grateful voters who received or were promised favours, then the intent is improper and points to an illegal act. When the intent of him who dispenses the favour is a mixed bag of both the permitted and the prohibited, the guiding principle that emerges from the English case law is that both motives may have guided the philanthropist. In such a case, it has been found that we must examine which motive is dominant, because the dispensing of the favour will amount to giving an election bribe only if the motive of corruption is the one that guided the person in his action (Rogers, *supra,* at 282-290).

Israeli law has ruled on the issue of the dual concurrent motives of one who gives a bribe (or offers a bribe), but in connection with benefits dispensed to public servants rather than in the context of elections. We are here speaking of the judgment of this court in Cr. A. 265/70 (hereinafter: the Lateen Rule). There, Judge Sussman held at p. 679, as follows: [p. 781]

> "It is also true that if the money is given for a mixed activity, that is to say, both a proper one and one connected to the position of the accused, the accused is liable. However, before convicting, the judge must be convinced that the money was given on the basis of this dual motive."

The common denominator between the English rule regarding election bribery and the Lateen Rule, Cr.A. 265/70, regarding bribery of a public official in connection with the performance of his duties is that if the true intent that guides the giver of the bribe is improper and corrupt, conviction is called for.

When we speak of favours dispensed to a public servant, the fact situation is generally simple and uncomplicated, and involves a two-party relationship. In such a situation, it is easier to discover the true intention of the giver; and it is enough that if, upon an analysis of the facts, it becomes clear that the intent of the giver clearly resulted from a dual motive, one proper and the other improper, the true intent will be revealed and the giver will be found liable for bribery.

In dealing with election campaigns and the complex process by which candidates for election influence the voters, the factual background is most complicated. There is a wide diversity of situations and possibilities. A candidate or a list does not necessarily appeal to a given individual, but to the public at large, with a variety of levels, ways of thinking and manner of reactions. Capturing the heart and mind of the voter involves the exercise of different, often clever means of influence and persuasion. Under such circumstances, it is significantly more difficult to discover the true intentions of the person who committed the act. It is possible that a certain action by a candidate or his supporters may be fundamentally tainted in purpose and in underlying motive by an intent to bribe, yet this action will nevertheless be accompanied by a fundamentally positive act with pure motives. The opposite is also true, namely, that a certain action whose fundamental purpose and whose underlying motive are positive and without taint, may yet turn out to be accompanied by an act whose fundamental motive has despicable traits which bear an imprint of illegality.

Therefore, in situations such as these, in establishing the true intent that guided the person who committed the act, broadly speaking, one should determine intent through the distinction made in England between the decisive (dominant) motive and the secondary motive since it is the dominant motive that leaves its imprint on the true intention of the person who committed the act.

Therefore, both pursuant to the Lateen Rule, Cr. A. 265/70, that deals with bribery of a public official, and to the English rule, which provides guidance regarding election bribery, the principle is that one should examine the facts, strictly and carefully proven, and assess everything that emerges from the act under scrutiny, in order to reach the

correct conclusion concerning the central element of the offence of bribery - the intention of the giver of the benefit. This examination should be made pursuant to the guiding principles reviewed above and in accordance with common sense, paying attention to the various motives that underlie the act and, with respect to election bribery, to the extent possible, by examining the dominant motive - if it exists. [p. 782]

There is no doubt that applying the principles and distinctions to an act is no simple task, but it is always possible to be aided by precedent and by the test of logic. Thus, for example, dispensing benefits generously to the voters at election time - uncritically and with no concern for the identity of the recipient - leads one to the general conclusion that this is no mere act of benevolence, but an act intended principally to influence the voter and his vote through the enticement inherent in the promise or the actual giving of the benefit (East Nottingham (1911) [14]). The result is not different if such an act is accompanied by another, incidental act that, while it is without taint, is only of marginal importance.

It is correct, as a general principle, to hold that in such circumstances, the correct distinction will be made and the proper result will be reached through the "criteria that common sense dictates" (Cr. A. 763/77, p. 827).

25. Moving from the theoretical to the concrete issue before us, it is noted that the RSH program, as it was presented to the public, was neither an ideological platform that espoused a socio-economic position, nor the expression of philanthropy and generosity of an enlightened person who held the common weal and society's welfare paramount. When one strips away the outer raiment, the concrete, unadorned program that remains is simply that Flatto-Sharon personally promised substantial favours to the voters generally, and to young couples and to those defined as needy-who were enticed to register for the program - in particular, for the clear, transparent purpose of influencing the voting public by the glitter of the offer and enticement contained therein to vote for the F'SH list - the one-man list of a kind-hearted soul.

In his public appearances, Flatto-Sharon saw fit to emphasize more than once that he would make good on his promise, whether or not he were elected. On the face of it, one could conclude therefrom that he was making a point of emphasizing that he was not seeking to influence the voters through his promises. However, any reasonable person

would understand and draw the conclusion that this statement was intended to reinforce to listeners the credibility of the promise and the earnestness of the promisor, and that it was aimed at enhancing the influence of the promisor to acquire votes, because of the image of credibility that his words conveyed. One can add that there is also the sneaking suspicion that this statement sought to confer upon the promise a cloak of legitimacy, and to distract the attention of those charged with ensuring a clean election from the offer's basic corruptness. [p. 783]

The fact is that even after Flatto-Sharon succeeded in his election bid thanks to the votes of a relatively large number of voters, he did nothing to make good on his promises. This fact, *per se,* still does not indicate even by virtue of a retroactive examination of things, that an intent to bribe was part of the platform of the RSH program from the beginning. This is a dangerous and not at all sure way to examine campaign promises, because many of the promises made by all of the lists during an election are not kept afterwards. Practically speaking, every platform that is presented to the public is accompanied by various promises, where it is clear from the outset that not all of them can be kept; and some times only the most minuscule portion of that which is promised is kept. However, when examining the event in different contexts and from different angles, this fact can also suggest what the primary intent is, and can be considered as part of the general calculation. It is possible to hold that in a given situation, we are indeed not dealing with a genuine promise made pursuant to true motives, but with the promise of a favour - lacking all substance from the outset - which was intended to influence the voter (F. R. Parker, *Conduct of Parliamentary Elections* (London, 7th ed., by H. W. Wollaston, 1970) at 306. The trial court and the court of appeals were correct, therefore - each on different grounds - in reaching their respective conclusions that the F'SH list promised housing assistance to the voters, to be financed from Flatto-Sharon's own resources, with the intent of influencing the voters by means of this favour to vote for his list on election day; in so doing, those responsible for formulating the RSH program and for presenting it to the public committed an offence under section 122(1) of the Election Law.

THE ORGANIZATIONAL ASPECT-
EMPLOYING ACTIVISTS (COUNT NO. 2)

26. The modern election campaign is a sophisticated, complex, and diverse activity. It is not just for amateurs; well-informed professionals, experienced and well-versed in public relations and political campaigns, also take part. Therefore, one should neither expect nor demand that only unpaid volunteers who identify with the candidate will take part in the election campaign. One must examine the organizational aspect of the election campaign of the lists from the starting point that the various parties, movements, and individuals contesting for election will use paid activists in the areas of both organization and publicity. There is nothing improper in this. Indeed, it is possible that these activists - who work in specific areas to influence the voters to prefer their candidate over others on election day - instead of being merely persuaders will become persuaded themselves, and that they who praise and glorify the list from which they receive payment to the public, will themselves vote for that list. On the basis of this fact alone one cannot say that in such a situation the election is tainted by the impropriety of corruption and that harm has been done to its integrity, and one should not accuse those who pay such activists for their services. On the other hand, when an activist is defined as such only figuratively, and his actions are "hypocritical and camouflaged" and limited principally to activities that lack all substance, all merely to justify the payment of a sum intended in whole or in large measure to influence the activist and his friends to vote for the candidate, who made the payment, then the payment is tainted by election bribery, and the employer/maker of the payment has committed an offence of bribery in contravention of the Election Law. Even here, there is a wide distance between the one possibility - pure motive and genuine intent - and the other possibility - corrupt intent. Therefore, in critically assessing the organizational activities of candidates, and in examining the essence of the payments made on its behalf to activists, one should strictly examine each situation by applying the principles discussed above to the particular facts and circumstances. [p. 784]

27. The opinions of the judges differed over this complex, complicated subject. The majority opinion of the trial court was that there was nothing improper in the payments made by F'SH to various workers prior to and on election day, while the minority held that at least some of the payments were tainted with election fraud and therefore, under such circumstances, the Appellants had committed the offence attributed to them in the charge sheet. The majority in the court of appeals held that a portion of the payments were tainted with bribery, and therefore that the three Appellants had committed the offence attributed

to them, whereas the minority judge held that even if some of the payments to activists were tainted with bribery, only Appellant Halfon was responsible therefore.

Both of the lower courts decided this issue on the basis of three principal factual elements that comprise the episode under consideration, as follows:

A. The talks that led to the employment of and payment to the workers of a salary in the manner and scope as actually took place. This means the three-way talks in which the three Appellants took part.

B. The instructions and statements made by each of the three Appellants, on the basis of which, directly and by implication, the State sought to convict each of the Appellants for the offence attributed to them in this episode.

C. The execution - that is to say, what actually happened prior to, and principally on, election day.

The State sought to deduce the criminal intent needed to establish guilt from each of the elements mentioned above, and in any event, from their cumulative weight.

The starting point of each of the two lower courts in examining the facts was, therefore, similar, but the conclusions reached by the judges in the opinions differed in part. We must resolve these differences.

28. Regarding the talks, the trial court held that as an interim conclusion, there is no doubt that talks took place between the three accused concerning employing activists on behalf of the list, and that during the talks the question of the connection between the employment and the vote of the activists was also raised (p. 82). The majority held that it is not possible to conclude from this factual finding that there was illicit intent on the part of the appellants:

> "In this situation, the talks do not contribute any tinge of criminal intent either to the instructions or the execution thereof ..." (p. 110). [p. 785]

The court of appeals adopted the factual finding in connection with the existence of talks (p. 32), but took issue with the trial court over the latter's interpretation of the substance of the conversation, and the inference of criminal intent that was drawn therefrom (p. 33).

The court of appeals, in contrast to the trial court, decided to take Ben Udis' statement to the police (E./102) at face value, and the implications therefrom, and it had a sufficient basis for so ruling.

The conclusion of the majority in the court of appeals was that "criminal intent to 'hypocritically' engage numerous activists for the purpose of securing their votes for F'SH, even if they did not really identify with the list, was present in the conversation as it was (and all the more when we add the conclusions that follow from the instructions and the manner in which they were executed). In this context, we recall that under the rule established in Cr. A. 265/70, *State of Israel v. Lateen, P.D.* 24 (2) p. 677, even if, on the face of the statement, the respondents intended to secure both objective goal and the aforementioned subjective goal, there is still enough to convict ... ."

As to the instructions and statements: The conclusion of the trial court was that "... the statements dealing with the votes of the activists at election time still do not point to an intent to give a bribe to a voter or on his behalf so that he would vote for the F'SH list ..." (p. 99), and that "the three types of statements mentioned above undoubtedly create a triangle that encompasses an area in the center of which lies the choice of the voter. However, this is not enough - there must also be reliable, material evidence to support the finding that the activist's vote for F'SH was given in exchange for a payment to the activist, or in exchange for the list's consent to employ him as an activist" (p. 100).

The court of appeals took issue with this conclusion, and held that the "slogan" of the activists' program, as formulated and expressed by Appellant Halfon, was that "you take an activist, you give him cash, and you get a vote" (Tr. 65, p. 66), and that "the instructions and statements solidly support and confirm the existence of a "master plan" and the criminal substance of the talks, which are merely the external expression, pure and simple, of the program devised by the Respondents to garner the votes of all or most of the activists by means of 'disguised employment'."

Regarding the conclusions which must be drawn from the way in which the activists were employed on election day - the majority of the trial court held that, "in sum, the evidence does not support the allegation in the charge sheet that the activist's job was generally not defined, and that, in sum, this evidence is not sufficient to support the conclusion that what was done was a mere ruse, or that Halfon was indifferent to what the activists would do on election day" (p. 105). [p. 786]

The majority found that the explanation given for the total number of activists, and for the way they were allocated to certain branches, was reasonable, and that there was nothing in it to point to criminal intent. Therefore, it concluded that with respect to this count, "in its situation, the talks did not contribute an element of criminal intent to the instructions and their execution, that the instructions did not contribute an element of criminal intent to their execution, and that their execution did not lead unequivocally to the conclusion that the instructions were characterized by criminal intent" (p. 110).

The majority opinion of the court of appeals adopted the approach of the minority in the trial court, and concluded that "the true function of the activists was that they and their wives should vote for the F'SH list, from which they received payment, and that this was the principal, if not the sole, consideration that F'SH expected to receive from the activists in exchange for paying each of them 150 Israel Pounds" (p. 48).

Therefore, the majority of the court of appeals concluded that "the actual execution together with the instructions and guide-lines lead us to the unequivocal conclusion that the respondents decided and jointly agreed - in the talks described in Exhibit 102 *et seq.* -to hire, rather than to employ, paid activists for election day, with the clear intention to get them to cast their vote for a list with which they did not identify, in exchange for the aforementioned payment."

We should point out that the minority in the court of appeals, Deputy President A. Goldberg (as was his title then), agreed that "employing the activists was merely camouflage for a premeditated plan whereby the payment made to these 'activists,' who would have no work to do on election day, was likely to lead him automatically to cast his vote for his benefactor's list, as well as to get his wife and family to vote likewise" (p. 50). In his opinion, sole responsibility for this lay with Halfon.

29. Given the disagreement between the two lower courts, both in their respective approaches and in their conclusions on the subject of employing workers, which was the principal, essential point of dispute between the prosecution and the Appellants, the issue will be examined in depth, and the true intent that guided the Appellants in employing the activists will be examined.

This examination will be carried out in accordance with the appropriate criteria, including common sense and those criteria that have been established in similar contexts by English

and American courts. Such an approach is both desirable and instructive, because of the extensive experience acquired in these countries from years of maintaining a complex, sophisticated and free electoral system which we in Israel are inclined to adopt, because of their inherent logic.

The basic principle accepted in both England and in the United States concerning colourable employment is as follows: [p. 787]

> "The dispensing of a favour to a voter in the guise of employment during or near election in order to garner his vote in the election constitutes election fraud, and testifies to the corrupt intention of the 'employer'": (15 Halsbury, *The Laws of England* (London, 4th ed., by Lord Hailsham, 1977); 29 C.J.S. (Brooklyn, 1965) 626; Parker, *supra,* at 310; 420), and the judgments referred to therein.

In order to examine the employer's good faith and to establish whether we are in fact dealing with only illicit pseudo-employment, we shall examine several of the factors that characterize this process.

A. Did the candidate expect that the employee would actually supply the required services within the framework of his job description? If, from the beginning, the candidate was indifferent to the question of what, to what extent, and whether the employee carried out his duties, if at all, and therefore showed no effective interest in supervising it, it can be concluded that we are dealing with a case of pseudo-employment and corrupt intent. See, for example: R. v. Stewart (1888) [22].

B. Were the services, work or actions actually necessary to the candidate, and did the number of activists correspond to the election services required by the candidate?

It has been held that if it is clear that the services were not required at all, or that the candidate in good faith required only a portion of them, we have pseudo-employment with corrupt intent by the employer (see, for example, the Salisbury Case). Moreover, the employment of an exaggerated number of activists on election day, out of all proportion to the total number of voters at the place in which they are asked to work, indicates pseudo-employment with a corrupt intention by the employer (Oxford City Case (1857) [16]). If it were not so held, we would find ourselves encouraging a situation in which a candidate of means could, by way of example, employ without risk all the voters in a certain locale as

election "activists," while in effect supervising and in fact buying their votes. Therefore, even in not so extreme a situation as that presented above for purposes of illustration, the excessive, unsupervised employment of activists bears witness on the face of it to the employer's corrupt intent. Reconciling oneself to conduct such as this and giving it the stamp of approval would disrupt the process of democratic elections (for an examination of this possibility - although the court did not find it under the circumstances of that case - see *City of Tecumseh v. City of Shawne*e [21]).

C. Was there a proper relationship between the work and services provided and the consideration paid?

A negative answer, that is to say, a large sum paid in relation to the actual legitimate consideration required of the employee, suggests that a corrupt intention underlies the employment; see Nottingham Case (1843) [17] and Tamorth Election Case Petition (1869) [18]. [p. 788]

D. The absence of an acceptable relationship between the number of voters in a certain area and the sizable financial investment made by the candidate in employing election workers, and the expenditure of a large sum to pay election activists whose activities cannot be explained by the number of voters in the area, require explanation, and *prima facie* point to a desire to buy the activists' votes (Bradford Election Petition (1869) [19]).

30. When we examine the probative facts concerning how the F'SH activists were employed prior to, and more to the point on election day, on the basis of these criteria, there is only one possible conclusion - that the hiring of the activists in this fashion was done, at least in part, without regard to any genuine need for election work, but merely to secure the votes of the activists and their relatives for F'SH.

The election day activists did not receive any instructions concerning their duties. The Appellant Halfon confirmed this explicitly in his testimony as follows: "Do I have to tell the activists what to do with activists? Did I have time for this?" (Tr. 66, p. 23). If I had defined specifically to the activists what they had to do - it would have taken three years (Tr. 66, p. 46; see also pages 27, 35 and Tr. 65, pp. 29, 37 and 38).

Not only were advance instructions not given, but there was no supervision of the workers:

> "I did not know whether the co-ordinators engaged in any supervision, but I do not believe that they did anything in an organized fashion because I did not give any instructions in this regard. Why was any supervision necessary?" (Tr. 65, p. 53).

Halfon said in his first statement to the police (P/105) that the job of the paid activists was to be observers at voting booths. Such a job indeed merits the payment of remuneration; however, in our situation, we refer to the testimony of Mordechai Biegler, the F'SH co-ordinator for Haifa and the Krayot area, who stated that in the absence of supervision, observers were not required to do anything.

In a subsequent statement (P/107), Halfon enumerated eight additional tasks that he designated for the workers. The minority in the Magistrate's court analyzed in great detail which of these tasks were genuine, which were disingenuous and precisely what they were. I accept her conclusions in principle, and I shall address only some of her comments, as follows:

A. *Transportation* - On Halfon's instructions, 131 vehicles with drivers were leased; the drivers, together with the election activists assigned to the various vehicles, were supposed to transport voters - this in accordance with the law. However, the drivers and the activists were not given in advance any prepared list of supporters, even though the election headquarters had a list of thousands of people who, during preparation of a petition against Flatto-Sharon's extradition to France, had expressed their support for, and their willingness to, help him. The result was that drivers and the workers wandered aimlessly throughout the city. Even Halfon himself admitted that the transportation campaign served no purpose (Tr. 68, p. 78). While this fact alone would not have led me to hold this employment was illegal, it nevertheless adds to other facts that arouse suspicion, facts that I will shortly review, and reinforces them. [p. 789]

B. *The Stewards and the Distribution of F'SH Leaflets* - The presence of party stewards in the area of the polling booths on election day is forbidden by law. As for the distribution of F'SH tickets, Halfon himself expressed doubt concerning whether it was necessary (Tr. 68, p. 58). In any event, this was a marginal and essentially worthless task

that did not require that people be hired, and certainly fails to justify the relatively high remuneration that was paid to these activists.

C. *Wearing a F'SH Tag on the Lapel* - Paying 150 Israel Pounds for doing this was excessive and is suspect on its face, especially because not all workers were asked to carry the tag, nor was it prescribed for how long the workers would have to wear the tag and to remain in the vicinity of the polling booths. The suspicion that payment was made for an illicit purpose is strengthened by the fact that Halfon, in his own words, designated more than half of the workers for this task (Tr. 68, p. 16). We further point out that Halfon himself did not treat this task seriously (Tr. 65, p. 43).

D. *Sticking Leaflets on Vehicles* - Here we are talking about hiring workers to stick placards on vehicles that were used by F'SH on election day. The learned judge pointed out that apparently this was a make-work task, because the driver as well as the activist who sat beside him, both of whom were being paid, could have done it without any difficulty.

Our conclusion that some of these aforementioned tasks lacked all substance and were mere window dressing to garner votes and not to help in the campaign's organization takes on greater force against the backdrop of Halfon's definition of the principal task of the campaign workers as follows:

> "Don't do anything - go out and vote, and bring your neighbors, bring your family" (Tr. 66, p. 17, and pp. 26, 27 and 40, as well as Tr. 67, p. 60, and Tr. 68, p. 53, 70 etc.).

31. From analysis of the tasks that were intended for the activists - which we have reviewed in part - we reach the following conclusions:

a. Some of the activists did no work at all;

b. There was no supervision or guidance of the activists' activities;

c. Some of the activities were totally unnecessary;

d. There was no relationship between the size of the payment that an activist received and the work he in fact did in connection with the elections in exchange therefore.

In this connection, it is worth mentioning that it was proved that the workers were recruited at random without appropriate criteria (see Halfon's testimony in Tr. 69, p. 39). [p.790]

If this were not enough to show the true nature of the employment and the corrupt purpose of those behind it, we also add the fact that the number of the election-day activists generally (approximately 3,500), and the number of activists in various locales specifically, was out of all reasonable proportion to the needs of the F'SH list which had set for itself the modest goal of garnering a limited number of votes, sufficient to elect a single person to the Knesset. An instructive example of this "over-employment" can be found in connection with the hiring of the activists in Tel Mond.

In Tel Mond, 59 activists, who received remuneration that varied from 100 to 300 Israeli Pounds each, were employed. Two additional activists were employed at an even higher salary. Most of the activists were residents of a single neighbourhood - known as Wolfson. One activist received remuneration as a driver, even though she does not know how to drive. The activities of nearly sixty of these activists were concentrated in a community that contained 1,995 eligible voters. This activity resulted in 120 (!!) votes for F'SH.

In the Arab sector in the village of Misar, 15 workers were hired for 251 potential voters. In the village of Sajor, 17 workers operated among 527 eligible voters.

I shall conclude my remarks on this matter by emphasizing an additional decisive fact that is based on and was confirmed by both Halfon and his principal activists:

What most of the election-day activists were primarily called upon to provide was simply their vote and those of their relatives (the remarks of Halfon and of Marco Zanti, a F'SH worker from Dimona -"It is enough that the activist bring the family along with the neighbours": Tr. 67, p. 70 and other similar expressions).

It should be emphasized that the inherent illegality is the purchase of the votes of a portion of the activists and their families. This is the root of the wrong.

Hence, from the point of view of organization, and with respect to how some of the workers were employed, it has been proven that those responsible acted corruptly, and even if the hiring was "mixed" in the sense that some was genuine and some was disingenuous in accordance with my ruling regarding how the intent of the candidate is determined, the employment here was "disingenuous" and this defect is of substantial, if not decisive significance.

THE ASPECT OF PERSUASION - PUBLIC FIGURES
AND COMMUNITY LEADERS (COUNT NO. 3)

32. The essence of an election campaign by a candidate or a list vying for public opinion is the intensive, unceasing effort to persuade the public to cast its vote on their behalf. This campaign of persuasion is conducted in the main through publicists and spokesman graced with the skills, ability and experience to reach the heart of the silent voter and to penetrate his consciousness. The message that they choose to deliver to the vote is the ideological platform, the candidate's qualities, what he has done for the society, and similar types of representations which may capture the voter's fancy. [p. 791]

Sometimes the publicist or spokesman identifies ideologically with the candidate and because of this he hopes for the candidate's success and prestige. It is also possible that he may be among the candidates on the list or an activist of the party backing it, in which case he does his task faithfully and with devotion, without concern for personal gain. Nevertheless, publicity is today a profession; experts in public relations are skilled in bringing to bear advanced, sophisticated means for delivering the message that they are called upon to inculcate into the public's mind, skilled experts who are paid for their work, and there is nothing wrong in the fact that candidates or lists of candidates employ such publicists and spokesmen.

Sometimes publicity is done for the public at large, and sometimes it is directed at discrete, circumscribed groups. In either event, and even if it is done for remuneration, it is legitimate, provided that it is genuine and is done in good faith for the purpose of influencing the voter who lends a willing ear and who is ready to consider and weigh his vote. In this vein, the following words are appropriate:

> "We refuse to say that it is lawful to employ a man to make a speech to a hundred men, and unlawful to make a speech to one man. We refuse to say that it is lawful to employ one to discuss public questions in a public meeting but it is unlawful to employ one to discuss public questions with those with whom he comes in contact outside of a public meeting. We refuse to say that it is legitimate and proper to pay a man

> to prepare an argument and to pay to have it circulated, and that it is unlawful to pay that man to go from one voter to another and make the same argument verbally." *(City of Tecumseh v. City of Shawnee, 297 P.R. (O.K.L.) p. 286, 295).*

However, just as the false, camouflaged employment of activists is improper and is tainted by corruption, so too is such employment of "publicists and spokesmen" improper and tainted by corruption. Dispensing favours to influential persons, when the payment is given not because of their ability as publicists nor because they actually perform such work in good faith, but rather so as to influence them to vote for a candidate themselves, and so that they will persuade those subject to their influence also to do so, is improper, corrupt employment.

33. In a society, there are individuals, mayors, and persons well-accepted and admired by the public, who exert vast influence over their followers and admirers. It is enough that they call out to their followers to motivate their admirers to heed their cry and act accordingly. [p.792]

Public figures such as these are sought after and coveted by candidates. Candidates seek to gain their support so that they will influence their followers to vote for them.

There is nothing improper in community or public leaders identifying themselves with a certain candidate and seeking to advance his interests, and if for this purpose they appeal to their followers in order to influence them to vote on behalf of such a candidate. However, allying oneself with such public figures, which is proper so long as it occurs against an ideological background and on the basis of a belief that it is for the best interest of the public at large, either because of the candidate's talents or because of the substance and practical content of the message that the candidate carries with him, becomes improper if it rests on favours given directly to the public figure for his own behalf or for that of his group.

The rabbi of a Hassidic sect may address his flock with the command that they vote for a certain candidate. Such an appeal may well be influenced by the fact that the rabbi is himself convinced either rightly or due to mistake or illusion that the candidate is a God-fearing person, and that his platform promises that he will act for the advancement of

religious and religious educational institutions. A candidate who turns to such a rabbi and convinces him, either by virtue of promises to make good on his intentions in the future, or that he will demonstrate his generosity and righteous behaviour in the past, has not thereby acted improperly. On the other hand, if the rabbi's support is obtained in exchange for the promise of a substantial benefit for the rabbi or his followers, such as support for their institutions and the like, then the alliance is tainted by corruption.

Similarly, there is nothing improper with a widely-admired artist or athlete urging his supporters to support a certain candidate because of his support for cultural or athletic institutions, or because the candidate's ideological platform contains a promise to assist such institutions. However, if the call to the admirers is influenced by the promise of a substantial benefit to that person or his followers in return for their vote, then the alliance is improper, and the influence exercised over the voters is the product of election bribery.

The F'SH List also turned to community and group leaders in order to gain their influence over their followers and to secure their votes on election day. Count 3 of the charge sheet charged the Appellants with gaining the support of these public leaders improperly and in exchange for favours. The two lower courts, each on its own grounds, rejected this charge and acquitted the Appellants on this count. The prosecution appeals this conclusion and requests a ruling against (p. 792) and the conviction of the Appellants.

34. The trial court held that in order to find the Appellants guilty, there must be proof of their responsibility for entering into, or suggesting, the purchase of influence, as distinct from purchasing such electioneering services as organization or publicity. "The influence that we seek is not measured by the number of people that a person can influence (thousands, hundreds, tens or mere individuals), but rather by the degree of influence if it can substantially impel a voter to vote for the F'SH list irrespective of its platform and due solely to recognition of that person's authority" (p. 119 of the decision). The court concluded that none of the ten persons accused of receiving payment in exchange for exercising his influence is the type of person who has such influence and who can impel a voter to vote solely by virtue of their recognition of his authority (p. 120), and that the testimony concerning "the buying of votes" was weak. Therefore, the three Appellants were acquitted. [p. 793]

35. The court of appeals also ruled in favor of acquittal, albeit on different grounds. The court adopted the approach proposed by counsel for Flatto-Sharon, Adv. Toussia-Cohen, whereby "the only thing that is forbidden is payment in exchange for influence that negates or limits the unfettered discretion of the voter, and causes him to heed the call of the influential person for the simple reason that he has decreed him to do so. A person subject to such influence subjugates his judgment to that of the influential person, be it an employer who influences his employees, or a rabbi who influences his followers. The buying of influence in this way is election bribery" (p. 15 of the decision of the trial court).

The court of appeals took issue with the ruling of the trial court, which had held that in practice the issue here was not one of influential persons where, it held, as with a list such as F'SH, there was no need for, nor practically speaking, were there any high-level leaders of influence; it was sufficient that there were low-level leaders of influence. Such were in fact the type of "leaders" who were recruited, and this is enough to prove the potential influence of such persons. (p. 18).

The court of appeals ruled in favour of acquittal notwithstanding this finding of fact. On the basis of its interpretation of and the conclusions that it reached on the basis of the Lateen rule, Cr. A. 265/70 [8], which holds that dispensing a favour for an activity that is at once both proper and improper constitutes bribery, it was of the view that it is possible to apply this rule in the case of direct election bribery, such as paying an election day activist in exchange for both his work and for his vote, but that "it is difficult, if not impossible, to apply it to a payment given to a publicist who is also an influential person, wherein one cannot separate the publicist from his personage, the two always being intermingled, combined, and interwoven" (p. 17).

This legal view joined the finding of fact that the heads of the communities and the public leaders received a fixed, equal salary irrespective of the number of votes that were expected from them, and that in fact they worked within their family circles, conducted rallies, and recruited workers. Hence, in this situation, where there was payment in exchange for a mixture of actual election work and the exercise of personal persuasion, and in light of the ruling that the Lateen rule, Cr. A. 265/70 [8], is inapplicable, we do not find that an illicit payment was made in this situation; we therefore acquit the Appellants. [p. 794]

36. The law in England is that a payment given to an influential person in order to secure his influence, as distinguished from his activity, is election bribery:

> "The employment of an influential person to exercise his influence on voters is bribery" (Parker *supra,* at 309; *see also, Coventry Election Petition* [12], at 411-412; *Bradford Election Petition* (1869) [19]).

The rule is similar in the United States:

> "Are we to say an election is free when [sic] the leaders are hired for their exertion and expression which motivate the electorate? or, indeed are these leaders themselves free when hired and paid to influence others. We think not... To influence leaders by the use of money to work for Shawnee is within the constitutional inhibition and just as much to be condemned as the outright purchase of such leader's vote." *(City of Tecumseh v. City of Shawnee* p. 297).

We re-emphasize what we stated at the outset of our discussion on this issue (p. 39):

The bribery is illegal because it derives from the buying of the influence of the influential person, but not because of the fact that he performed legitimate election activities within a homogeneous, limited circle of people.

37. The defence is correct when it argues that the court of appeals erred when it overruled the factual finding of the trial court that the community heads who received payment were not influential.

The court of appeals concluded that the community and public leaders were indeed influential persons on four grounds:

1. For a list such as F'SH, it was enough that the leaders were of a low level of leadership and influence; therefore, it was improper to hold that on the basis of the impression derived from the weak personalities of the community activists and public leaders who received

payment that they were not influential persons for the purpose of committing the offence of election bribery.

2. Halfon recruited these persons because he believed that they were influential persons.

3. Some of the public leaders, such as witnesses Calo and Daniel Oksh, testified that they were able to ensure votes for F'SH.

4. In the locales in which these public leaders operated, their influence could be seen in the high percentage of voters who voted for F'SH relative to the percentage of voters who voted for F'SH in other places in Israel. [p. 795]

These grounds do not justify overruling the factual finding of the trial court.

It is well-known that a court of appeals will not usually interfere with the findings of the court that took the testimony and that formed an impression based on the witnesses' testimony, demeanour, and credibility. There are exceptions to this rule (see Cr. A. 196/82 [10], p. 233), but the present situation does not merit applying them here.

The trial court, in examining the question of the influence of community leaders, was guided by the rule that prohibited influence is not measured by the number of people subject to the influence, but by the level of such influence (p. 119). The significance of this rule is that the trial court, no less than the court of appeals, was conscious of the fact that leaders of lesser stature and influence can also exercise forbidden influence.

As for the testimony of Halfon as well as that of the community leaders themselves with regard to the extent of their influence, it seems to be insufficient to support a finding that the public leaders were influential persons; in any event, the trial court's analysis of this testimony was exhaustive and thorough (p. 119-121), and adding thereto or detracting therefrom would be inappropriate.

The relatively high percentage of voters in places where the public leaders operated does not necessarily mean that the public leaders were influential persons. To no less a degree, one could also explain this high percentage by the fact that many activists were employed in these areas on election day, on the success of the housing plan, and the quite distinct factor of the success of the other legitimate campaign publicity by the F'SH list.

In light of this, I am of the opinion that this issue should be examined according to the findings of the trial court and in accordance with its conclusion that the public and community leaders that received payment from F'SH did not actually wield influence over others.

38. Section 123(2) of the Election Law speaks of bribery given for the influence the taker of the bribe has over the action of another person. Does the fact as proven that the taker of the bribe is not an influential person *per se* preclude conviction for the crime of election bribery under section 122(1)?

The answer to this question depends on the answer to the question of culpability for "an unsuccessful attempt." The rule regarding this issue was formulated by President I. Cohen in Cr. A. 365,383/81 [11], p. 135 in connection with a conviction for an attempt to destroy evidence (an offence under sections 32 and 242 of the Penal Law), as follows: [p. 796]

> "The fact that when Danoch went to the place, it was already impossible to remove the weapon, cannot serve as a defence to a conviction of an attempt to commit the offence because at that time Danoch did not know that the weapon was already in the hands of the Police and that it had been removed from the place, and according to section 33(C) of the Penal Code:
>
> 'The lack of the possibility to actually commit the crime, because of circumstances unknown to the criminal, is of no consequence' *(see also* the article of Dr. M. Gur-Arye *Impossibility to Complete an Offence and its Effects on Punishability of the Attempt"*(8 Mishpatim, 5737-38) 310).

This rule is also applicable to our case, and therefore the fact that in effect payment was given to persons who were not influential does not alter the possibility that the Appellants will also be found liable for this act, provided that the payment was given to that person in order for him to exercise personal influence on the voter by virtue of his power, and that they did not know that the recipients of the payment lacked influence.

39. As stated, the court of appeals rejected the application of the Lateen rule, Cr.A. 265/70 [8], to our situation, and held that giving payment to an influential person in order to exercise personal influence at election time is not illegal, provided it is also accompanied by legal elections publicity.

I am unable to agree with this holding, which may well lead to a perversion of the freedom of election in a democratic society and to frustrate the ideological foundation of the system of representative election of which we spoke at the outset, viz., fair proportional representation of voter opinion by the elected. Permitting the dispensing of a payment based on a mixed motive such as this is like a hole beckoning a burglar, which will lead to the wide-spread buying of personal influence, sanctioned by genuine but merely token election work performed by the influential persons.

True, we do not disagree that there is a difficulty in applying the Lateen rule, Cr. A. 265/70 [8], to this situation because one cannot avoid completely the publicist's personality in his attempt to explain and to persuade one why one should vote for a certain list rather than for another. This difficulty can be overcome, however, as explained above, by a logical analysis of the facts, which does not require us to reach the unacceptable result that the "buying" of personal influence is *de facto* legitimized.

This difficulty leads us to conclude that regarding influential persons, as in connection with the employing of workers, the Lateen rule Cr. A. 265/70 [8] cannot be avoided; that is to say, if a favour is dispensed for both corrupt as well as for pure motives, the favour in its entirety is a bribe. Nevertheless, as we explained above, the main thing is to examine the true intent of him who dispenses the favour. This can be determined from the motive in fact. [p.797]

Here, as in the case of the activists, each matter must be examined in accordance with its particular circumstances. What did the offerer seek to obtain by so acting; that is to say, what was the decisive motive in forming his intent? As an indication, and an indication only, in examining motive, one should clarify whether the legitimate campaign activity performed, or whether the intent to benefit the recipient - the influential person - in order to secure his vote and particularly those of his community, was the principle consideration for the payment.

If it is found that the central motive was the desire to buy personal influence, then the payment is an election bribe. If, however, it is held that the true, central motive was really persuasion, then the payment is proper.

40. Upon examination of all of the evidence on this matter, the *prima facie* conclusion from Halfon's statements is that the decisive motive in forming the payment and in crystallizing the Appellants' intent was to buy the public leaders' influence.

Thus, for example, journalist Mordechai Gilat testified that Halfon told him that "all that I learned during 34 years with Mapai I now did on Flatto's behalf. I recruited the Alignment's vote contractors for the struggle on behalf of this man, I persuaded three complete communities, who had always been in Mapai's pocket, to switch to our side, and I delivered to Flatto, as I promised him in advance, nearly 50,000 votes" (Tr. 23, p. 35). Halfon confirmed this in the Transcript on p. 44 and in Tr. 86, p. 8).

It is certainly possible that the Appellants placed great hope on the abilities of a number of activists who seemed to be community leaders, to influence their supporters by dint of their personality.

However, the probative facts show that the lion's share of the 10 community heads and leaders had been employed since March 1977 at a uniform monthly salary of 5,000 Israel Pounds, plus 1,500 Israel Pounds for expenses unconnected to and independent of the number of expected votes. In return for this payment, they performed substantial election work in the election as F'SH activists, organizing family groups, convening rallies and recruiting activists, etc.

When we review these facts in entirety, and consider the fundamental motives for paying the community heads and leaders, it is not clear that the Appellants' intent in making the payment was to buy the votes of voters subject to the influence of these persons to the extent that they were personalities and enjoyed influence. In this case there is more doubt than certainty with respect to whether the intent was corrupt and whether the motive was illicit, and the Appellants are entitled to the benefit of this doubt.

Therefore, the acquittal of the Appellants from the charges in Count 3 remains in force.

THE DEAL - THE EPISODE OF THE RT LIST IN DIMONA (COUNT NO. 5) [p. 798]

41. It is not unusual for there to be some ideological affinity between two movements operating in the public. Sometimes, groups in a particular society may actually belong to

two such movements. Therefore, such movements often assist each other when necessary, such as when they are involved in an election campaign. It is possible, and it has actually occurred, that a political movement, association, or list operating only in the municipal sphere will extend its help to another group to which it has an affinity as described above and which is competing for election to the Israel Knesset, or *vice versa.* There is nothing illicit in such mutual assistance, so long as it is influenced by ideological or personal motives, such as an identity of views regarding the socio-economic message acceptable to each, or the common esteem that the two movements hold for the persons leading them. However, when such mutual assistance does not bear these characteristics, but rather "depends on something else," that is to say, it rests on financial help or on a deal for securing influence over the voters of one movement on behalf of the other movement - then such an agreement may well be corrupt because it is intended to obtain influence over a group of potential voters in exchange for a monetary benefit.

What we stated above in regard to buying the influence of community and group leaders is also apt here, inasmuch as a public movement headed by certain individuals who are respected by a certain segment of the public qualify as public leaders in the sense that we described above. While in the alliance described above the influence obtained is bi-directional, with respect to public leaders as we discussed above it is only uni-directional. Therefore, the principles which I set forth in that context are all the more appropriate when there is an alliance between two lists or movements. Such an alliance is the subject of Count 5.

42. The so-called Pure List (hereinafter: the RT list) was an independent list that had been organized in Dimona and which sought to vie in the elections for the local authorities. The charge sheet alleges that Flatto-Sharon and Ben Udis promised a six-figure sum to the leaders of this list to assist it in its local election campaign in exchange for their help in electing Flatto-Sharon to the Knesset. Counsel for the State of Israel, Adv. Kirsch, claimed that this agreement amounted to "buying" the votes of the RT list's leaders and their Dimona supporters.

On this matter, the trial court made the following findings:

A. The idea of the RT list assisting Flatto-Sharon in exchange for money was presented to Flatto-Sharon and Ben Udis by witness Marco Zanti (who was both a F'SH and an RT activist) while they were on their way to a meeting with the secretariat of the

RT list at the home of a member of the secretariat, one Mr. Katz (p. 168). The aforementioned Marco Zanti also presented to the two the draft of a resolution of the RT executive (E./3a) which states as follows:

> " Resolutions:
>
> At the Wednesday, March 9, 1977 meeting of the executive, it was resolved as follows, that the executive will not support any party standing for election to the Knesset. However, since the list of Flatto-Sharon is comprised of only a single person, and because the extradition of a Jew to a hostile country - *i. e.*, France - is a matter of conscience for us, we resolve that after meeting with him - *i.e.*, Flatto-Sharon - to accept his undertaking that he will remain a one-man list, and further, in the event that he is elected to the Knesset - we hope that he enters the Knesset - he will undertake to meet with us to assist our list (RT) for the municipality of Dimona, monetarily or otherwise, in such amount as shall be determined at such meeting with him, while honouring this agreement, in so far as there be such. For our part, we undertake, as an unaffiliated list, to assist him with everything in our power, and we will do our utmost to see to it that he will be elected a member of the Knesset. If it transpires that Mr. Flatto-Sharon fails to honour this agreement, each member of the executive is free to act in accordance with his conscience." [p. 799]

B. The matter of monetary assistance by Flatto-Sharon to the RT List was the main subject of the discussion that took place at the Katz home, because the readiness of the members of the RT executive to aid in Flatto-Sharon's election was stipulated upon it. Flatto-Sharon refused to give a written undertaking in connection with the monetary assistance requested from him.

C. Ben Udis and the Treasurer of the RT List, Eliezer Bor, held a private discussion at the Katz home on the issue of the assistance. In answer to Bor's question about how much financing Flatto-Sharon would give the RT List, Ben Udis replied: "Count on an amount in the six-figure range." Ben Udis' version was that he answered that "I assume that an election campaign for a municipality like Dimona will cost a six figure amount." There is

nothing significant in the difference between these two versions, because even if Ben Udis only intended to put off Bor with an indefinite answer such as "six figures," there is no doubt that Ben Udis intended that Bor understand these words as a promise to assist RT by covering its election expenses with a six-figure amount.

There is no doubt that Bor actually did understand these words in this way because also according to Ben Udis himself, Bor was satisfied with Ben Udis' response, and immediately returned to the room in which those present were sitting in order to inform them of the response, without Ben Udis making any attempt to correct the impression that his comments had made.

D. Flatto-Sharon chose not to respond in order to correct the impression of the members of the RT executive with respect to Ben Udis' response and Eliezer Bor's announcement. Thus, *de facto and ex silentio,* while aware of the subject-matter of the discussion and its significance, he confirmed what Ben Udis had promised in his name.

E. It follows from this that even before Ben Udis and Flatto-Sharon left the Katz home, it was clear to those present that agreement had been reached between Flatto-Sharon and the people on the RT list, "that in exchange for the assistance of members of the RT list in Dimona to the F'SH election campaign to the Knesset, Flatto-Sharon would give a six-figure sum to finance the election of the RT list to the local authority" (p. 173).

F. We reject Flatto-Sharon's version that the F'SH List and the RT list had merged.

G. The members of the RT executive were employed as co-ordinators of Flatto-Sharon's Knesset election campaign, most of whom received compensation for their work.

H. In point of fact, Flatto-Sharon did not give the RT list the promised monetary assistance.

I. Members of the RT list enjoyed influence over various circles in Dimona. [p. 800]

J. The compensation that the members of the PL executive received as co-ordinators for F'SH's Knesset election campaign was given in return for their organizational activities on behalf of Flatto-Sharon's election. Hence, the six-figure amount promised to the RT list "was not consideration for the organizational activities of its members but to buy the potential hoped-for influence over a large portion of Dimona's voters."

Given these findings, Flatto-Sharon and Ben Udis were convicted by the trial court for election bribery pursuant to Count 5.

43. The court of appeals accepted and adopted the principal factual findings of the trial court, but took issue with its view regarding the strength of the influence of the members of the RT list:

> "... it was not proven that the influence of the members of the RT executive was greater than that enjoyed by respected individuals in the city, whose words naturally carry greater weight and acceptability than those of an ordinary citizen. All that we have here is buying of the work and activity of an existing organization for the purpose of election publicity on behalf of F'SH. The fact that the staff of the organization are not good-for-nothings in their city does not make the deal corrupt."

The court of appeals did not accept the trial court's position that the co-ordinators were paid a salary in consideration for their organizational work and that the six-figure sum was promised as consideration for "buying" influence; it held that:

> "It is true that most were paid a salary and their expenses for being co-ordinators in addition to the promise, but the essence of the work was done in expectation of that promise (which was not kept)".

Just as the court of appeals acquitted the Appellants on the influential persons issue, on the ground that in addition to exercising influence, they also engage in organizational activities, so too, *a fortiori,* the court of appeals acquitted the Appellants on this count, where the influence involved is the influence of public figures and that "their work was beyond doubt organizational" (p. 24).

44. I am unable to accept the finding and conclusions of the court of appeals. The court of appeals recognized the influence over the public in Dimona that was enjoyed by members of the RT list, as was found and concluded by the trial court, but in the opinion of the court of appeal judges, the influence of such people did not reach a level that could negate or limit the voter's exercise of discretion. In their view, we are dealing with the influence exercised by respected people

"whose words naturally carry greater weight and acceptability than those of an ordinary person" (p. 79).

This conclusion is contrary to the clear findings of the trial court and the evidence in its entirety. Even if we accept the view of the trial court that the degree of influence enjoyed by members of RT was limited, that is still not enough to limit Flatto-Sharon's and Ben Udis's liability for the election bribe that was offered here. [p. 801]

Generally, the degree of influence actually enjoyed by such people is of no importance; rather, it is the essence of the alliance that is of consequence. If the alliance was meant to exercise influence, whether genuine or not, in order to buy votes, then it is a bribe. Section 123(2) of the Law prohibits giving a bribe for the influence of the taker thereof over the actions of another party. This section does not define, as a condition for applying the prohibition provided therein, that the recipient of the bribe have influence of a certain degree.

Any limitation on the exercise of discretion granted to the voter in casting his vote constitutes a violation of the principle of free elections in a democratic system, and distorts the true representation of the diversity of voter views in the legislative body. Therefore, "buying" of influence at whatever level by payment is prohibited, and it is not necessary that the influence so bought is that of a person with the power to command his followers to blindly follow his every command.

As with the episode involving the community and public leaders, so too in the episode involving the RT list, the trial court held that the Lateen rule, Cr. A. 265/ 70[8], does not apply to employing influential persons when both corrupt and legitimate motives are involved, because of the difficulty of distinguishing between the personality of the publicist and his legitimate electioneering work. Therefore, upon concluding that the members of the RT executive engaged in organizational work as co-ordinators for the F'SH list, the court acquitted Flatto-Sharon and Ben Udis, in accordance with its view that under this set of facts, one could not prove the requisite corrupt intention for purposes of conviction.

As I have said, I do not accept this approach. When payment or an offer of payment to an influential person is at issue, then in any case one should examine in accordance with the particular circumstances whether at the foundation of the alliance there lay a corrupt motive on the part of him who dispensed the favour, or whether the predominant motive

was proper. Examining the facts in this manner, one can determine whether the offerer had the psychological foundation required for conviction - a corrupt intent.

45. In this situation, the principle motive in offering the assistance of Flatto-Sharon and Ben Udis to the members of the RT list was corrupt, that is to say, the desire to buy the influence of the members of the RT list's directorate over the Dimona voting public. Hence this was the true intention for this alliance, an intention which is corrupt in its essence.

On the basis of the findings of the trial court, which were also adopted by the court of appeals, it follows as aforesaid that Ben Udis promised (whether explicitly or by seeing to it that his statements would be understood as a promise) members of the RT list, through the list's Treasurer, Eliezer Bor, a six-figure amount to assist in the election campaign that they were conducting for the Dimona local authority. Flatto-Sharon, who was present when Eliezer Bor advised of the extent of the aid to be given, and who on the way to the meeting with the RT list's directorate already knew about the essence of the proposed transaction, confirmed by his silence the impression held by the members of the RT list that, pursuant to the agreement with Ben Udis, he would aid them in a six-figure amount. [p. 802]

The nature of the help that Flatto-Sharon wished to receive from the RT list can be gleaned from the words of Flatto-Sharon and Ben Udis, who described the RT list as "a powerful electoral force in Dimona." Flatto-Sharon testified that his goal was not to gainer the 12 votes of the members of the RT list directorate, but the 2,000 votes that stood behind them. He assumed that these votes could be obtained through the activity of the members of the RT list on behalf of the F'SH list. Flatto-Sharon added that the members of the RT list "bring their activity, help, and the *influence that they enjoy over people."* Regarding Yehuda Japhet, who was the head of the RT list, Flatto-Sharon stated that "Marco told me that Japhet enjoys great *influence in Dimona."* (Emphasis added - D.L.).

The conclusion that the six-figure sum was offered principally to buy the influence of the members of the RT list's directorate rather than the organizational apparatus of the list is reinforced by the fact that most of the members of the RT directorate were, in any event, employed on the F'SH list pay-roll as election co-ordinators.

Therefore, we conclude that the members of the RT list received a salary in their *personal* capacities as co-ordinators in exchange for the organizational work that was performed. Accordingly, the six-figure amount promised to the list *per se* was not connected to the organizational activities that it performed, and there only remains the

certainty that it was promised in order to buy the influence of the members of the RT list directorate over its supporters in Dimona on behalf of the F'SH list.

This conclusion is supported by the circumstances and facts in their entirety as described at length in the decision of the trial court. I emphasize the fact that we are not dealing here with a merger of lists for ideological motives, but a purely material alliance. That which was said at the decision of the directorate of the RT list on March 9, 1977, that "....if this agreement is not honoured by Mr. Flatto-Sharon, each of the members of the directorate of our list will act in accordance with his conscience," speaks for itself and bears testimony to how the members of the RT directorate understood the essence of the deal. This understanding was supported and reinforced by Flatto-Sharon's promise of a six-figure amount, made through Ben Udis, by the potential influence that the two estimated could be exercised by members of RT, and as aforesaid, by the separate payment that was given in exchange for the organizational work performed.

46. In light of the above, I conclude and I suggest that it be found that the trial court correctly convicted Flatto-Sharon and Ben Udis for the commission of the offence of election bribery under section 122(1) of the Law pursuant to Count 5. The acquittal by the court of appeals is reversed, and we reinstate the decision of the trial court concerning this count.

CRIMINAL LIABILITY

47. The Election Law does not recognize vicarious liability for a criminal act - in our situation, the commission of the offence of election bribery under section 122(1) of the Law - committed by a list's workers. [p. 803]

Therefore, we will not attribute criminal liability to the members of the leadership or the senior staffers of a list that is vying for election to the Knesset for an act of election bribery committed by one or more of its activists in the field, unless they themselves committed the act, assisted in its commission, or inspired its commission or assented thereto, in which case one should as a matter of law view them as having personally committed the offence or as having contributed either explicitly or indirectly to the commission of the offence.

48. In our situation, Flatto-Sharon personally, with Ben Udis beside him, constituted the leadership of the F'SH list. Inasmuch as the organizational component of the election campaign is concerned, Halfon was also part of the leadership. Flatto-Sharon and Ben Udis articulated, decided and took part in executing all facets of the campaign. Halfon, because of his talents and duties, was the central figure, upon whose inspiration and initiative the organizational work in the F'SH election campaign was carried out, with the assent of the other Appellants, particularly the matter of employing workers and engaging them in both genuine and "false" activities.

Flatto-Sharon was the number one of the F'SH movement, which had been established at his initiative, in order to elect him to the Knesset, and which was financed from his resources. There was one central purpose which guided his every action - his election to the Knesset and escape from extradition to France. Because of his unique personal involvement in the list and its activities and his longing for its success, he took part actively in every decision and in every action, even those to be carried out by others.

He had no understanding, knowledge or experience in election procedures or in the foundations of the democratic system of government. Without a doubt, he was unable to distinguish between what was permitted and what was prohibited in this area; apparently he had the feeling that here, as in the world of business in which he was well-versed, money would solve everything.

Ben Udis was also not an authority on how to organize an election campaign properly. Nevertheless, he committed himself to acting on behalf of the F'SH list in order to elect Flatto-Sharon. In addition to serving as Flatto-Sharon's Hebrew translator at meetings and discussions, he also acted as his advisor and confidant. He was the senior staffer in the hierarchy and his operational right-hand man. He contributed intellectually to discussions that were held, and contrary to counsel for the defendants, his role was not limited merely to translating. He initiated matters and also gave advice, and he instructed workers what to do and how to do it. He took part in making decisions and saw to their execution. Halfon, in his own way, conducted himself forthrightly and with propriety, in accordance with the outlook and the norms of conduct that he adopted for himself. He spoke openly and did not conceal anything. He maintains that he is a consummate professional of long-standing in organizing election campaigns, and that he had already served the largest political parties and movements which competed in election campaigns in Israel. Because of his ability and skills, he was also able to give advice and to guide those engaged in election campaigns in

foreign countries. His problems lie in that he adopted illicit practices tainted by corruption and contrary to the principles of free and democratic elections, practices that perhaps were once customary and accepted, and turned them into a doctrine and into a *modus operandi.*

Through such methods, which are illicit in part, he sought to successfully promote the F'SH lists election campaign. [p. 804]

49. On the basis of these fundamental principles, in terms of the legal principles and the facts as proved, we will determine which Appellants are criminally liable for the offences committed by the F'SH list according to the above findings with respect to Counts 1, 2 and 5.

With respect to Count 5, Halfon was not involved in the act at all, and he should not be held liable in this regard. On the basis of the evidence as shown above, Flatto-Sharon and Ben Udis were both involved in offering to finance the RT list's campaign in the local Dimona elections in a six-figure amount, with the hope and intention of thereby buying influence over the votes of citizens who followed the RT list and its leaders, and were subject to their influence. Therefore, the two are liable in equal measure for committing this offence as proved. They were rightly convicted of this offence by the trial court, and that conviction is therefore hereby reinstated.

Halfon was equally uninvolved in the subject-matter of Count 1- the RSH program.

As far as Flatto-Sharon and Ben Udis are concerned, there is no doubt that they are actually liable.

Ben Udis's involvement in this affair is clear. He testified that he himself articulated the housing program (although he made the argument, rejected by the trial court, that what was involved was a movement rather than a concrete program), and that he also initiated the rally at Physicians' House in Tel Aviv (see Tr. 32, pp. 7, 14; Tr. 29, p. 60; Tr. 29, p. 56). At the conclusion of the rally, Ben Udis instructed witness Rachel Cohen (who was employed by the F'SH branch in Dimona) to enlist young couples with housing problems. Similar instructions were given by Ben Udis to witness Marco Zanti in Dimona, to witness Armond Aloni in Bet Shemesh, and to witness David Yaron in Ashkelon. These witnesses served as co-ordinators for the F'SH list in those settlements.

Turning to Flatto-Sharon, we note that he adopted the housing program proposed by Ben Udis enthusiastically, and he incorporated the program in the F'SH platform (E. 97); he presented it at each election rally that was held throughout the country, as well as in the written and in broadcast election publicity. Flatto-Sharon also took care to emphasize that what was at issue was the purchase of apartments with his personal resources (see, for example, the wording of the second objective listed in the platform (E. 97), the publicity film clip that was screened on television (A. 36A), and the proclamations made at the RSH rally at Physicians' House (Tr. 47, p. 23, Tr. 49, pp. 19-20). In one instance in Dimona, Flatto-Sharon turned to the audience and said to them that he suggested to those interested in a solution to a housing problem that they go out and register (Decision of the Trial Court, p. 22).

The result of all of this is that Flatto-Sharon and Ben Udis are directly liable for the offer of a bribe inherent in the housing program and their convictions were proper.

50. Concerning Count 2 - the matter of employing the activists - the liability of each of the Appellants will be examined separately. [p. 805]

A. *Ya'acov Halfon's Liability*

Ya'acov Halfon conceived the idea of employing workers for payment: "The workers were my idea because it was impossible without paying, even if we were backed by Flatto-Sharon" (see Court of Appeals Decision, p. 30).

Halfon, relying on his experience in past election campaigns, assumed that the election activists hired, as well as their family and relatives, would also vote for the F'SH list. However, the assumption was not based on the activist identifying with the list for whom he worked, since F'SH activists were not selected from among those who had expressed a readiness to work to prevent Flatto-Sharon's extradition to France, but rather his assumption was based on the fact that the activists were paid. Evidence for this is scattered abundantly throughout the various testimony that was taken, of which I will only mention a portion.

Thus, for example, Halfon admitted that in the case of the F'SH list no political identification by the activists is involved (Tr. 48, p. 34), and that votes were to be bought with money (Tr. 68, p. 35). To the question why an activist would expend effort on behalf of the F'SH list or some other list, Halfon answered: "Because, as I understand it, when a

person works for something - with or without a salary - he wants the matter to succeed and he gives the maximum..." (Tr. 68, p. 55). In our case, Halfon intended to obtain the maximum, *i. e.,* the worker's vote, and in the best of all situations, also the vote of his family, in exchange for payment of the salary.

In another place, Halfon defined his plan in summary fashion as follows: "You take a worker, you give him money, you receive a vote" (Tr. 65, p. 66). Halfon said to Mordechai Biegler, co-ordinator of the F'SH list in Haifa, that: "I said, don't worry, ...there will be activists, there will be votes, don't get yourself worked up" (Tr. 65, p. 53). The general view of Halfon on the subject of the activists was clearly expressed in a letter that he sent to the Government's legal advisor (E. 106), in which he wrote as follows:

> "In my opinion, a person or a list which has or which has at its disposal an amount of 6 million Israeli Pounds, will be able to recruit 30,000 to 40,000 paid activists on election day, and it is enough that half of them will vote for the list that is paying the 'salary' to enable the list to cross the one-percent threshold and for the top candidate on the list to reach the Knesset."

Even though this was written after the fact, it can instruct us on his outlook as expressed at the time of the events and as arises from how they were expressed subsequently. On the basis of the above, it is clear that Halfon's intention was to employ numerous paid activists on election day in order to obtain their votes. [p. 806]

B. *The Liability of Flatto-Sharon and Ben Udis*

Learned counsel for Flatto-Sharon, Adv. Sh. Toussia-Cohen, bases his defence on the issue of the activists principally on the minority opinion in the court of appeals, who held that Ben Udis's statement to the police (E. 102) was insufficient to convict Flatto-Sharon for his involvement (and for that of Ben Udis). According to the learned judge, the statement shows that Halfon gave Flatto-Sharon and Ben Udis the idea that employing activists would likely also result in the votes of the workers themselves as well as those of their family; "however, the evidence in the statement and elsewhere is not conclusive of whether Flatto-Sharon and Ben Udis knew that the hiring of the activists was to be fictitious. Hence, in respect of Flatto-Sharon and Ben Udis, we are not speaking of paying

workers on account of a mixed, partially licit but partially illicit action, but rather payment for a solely permissible action from which, it was assumed, they would also profit by way of votes."

51. I do not accept this approach. Ben Udis's statement to the police (E. 102) is only one piece of evidence from the evidence as a whole that testifies to Flatto-Sharon's liability for bribery, in the form of the activists program and its implementation. As we made clear above, there is no doubt that Flatto-Sharon knew of and approved the activists program and that he was aware of the program's basic premise regarding how an activist who received payment would vote. In his statement to the police (E. 101), Flatto-Sharon said (p. 2): "I gave my approval to Halfon for the recruitment of election day activists because he was the expert on the subject and he said that he needed them." Ben Udis, in his statement to the police (E. 102), said: "Mr. Flatto-Sharon, Mr. Halfon and myself met at List headquarters at 64 Melchet Street in Tel Aviv. Mr. Halfon explained to Mr. Sharon and myself that hiring these activists was necessary for two reasons: one objective and the other subjective. Inasmuch as we had no representatives on the polling committees nor were there any observers on behalf of the list, we had to ensure through the help of these activists that voting ballots would not disappear from polling stations either accidentally or intentionally.... On the other hand, Mr. Halfon explained to us that it was reasonable to assume that a person who worked on behalf of a list would also vote for that list, and that at the least he would also convince his wife to vote for the list. Mr. Halfon added that he planned to recruit around 5,000 persons from throughout Israel in the hope that if these people and their spouses worked for us, they would also be likely to vote for us, so that we would have been guaranteed 10,000 votes on behalf of F'SH." Later on, in response to the question "What and how did Flatto-Sharon react to Mr. Halfon's suggestion as I told you?," Ben Udis answered: "Mr. Flatto-Sharon approved the plan regarding the activists."

It should be emphasized that in statement E. 102, the police investigator presented Halfon's plan as the hiring of election activists without any expectation that they would do any work, and that the salary was in exchange for the activist's vote and that of his family for the F'SH list (the investigator's question is found in E. 102, before the portion of the statement quoted above). [p. 807]

As previously said, following the court of appeals, I too adopt E. 102 literally, including that attributed therein by Ben Udis to Flatto-Sharon, and in effect confirmed in testimony, namely, the adoption of the activists program in its corrupt form.

Flatto-Sharon's knowledge of Halfon's approach and what it meant "A person who works for the list is also likely to vote for it," was also confirmed by Ben Udis in his statement, E. 103 (p. 4), wherein he also confirmed the essence of the statement that he gave the police E. 102, as appears in Ben Udis's book titled "The Flatto Case" (E. 104).

In his statement (E. 99), Flatto-Sharon admitted that a conversation took place regarding workers in the presence of Ben Udis and Halfon but he denied the details of the conversation as presented in the statement in E. 102. As I have already said, I agree with the decision of the court of appeals to accept as truthful the approach presented in the statement in E. 102.

That Flatto-Sharon was aware that hiring a large, exaggerated number of activists on election day was "problematic" comes across as well from the testimony of Mordechai Biegler, co-ordinator of the F'SH list in the area of Haifa and the Krayot. Biegler said to Flatto-Sharon and to Halfon that the over-deployment of activists at too many ballot sites would not enable adequate supervision, and that in the absence of such adequate supervision this deployment could "be incorrectly interpreted in the election campaign" (Tr. 12, p. 47). In Biegler's opinion, this misinterpretation would be that the people had not been hired in order to work, "but rather that this payment served as a camouflage for something else that no one wanted to call by name." Here it should be pointed out that this interpretation, namely fictitious employment, was in Biegler's view the correct interpretation, and in that connection, on the same page of the Transcript, a few lines above the material just cited, he said that:

> "In fact, the observers were not persons hired in order to work, but since we provided no supervision, then in effect they received payment in exchange for nothing at all, with the result that this payment could be described in another way."

There is no doubt that Flatto-Sharon was aware of this simple fact, but he did nothing to reduce the number of activists or to tighten control over them, despite the fact that had responded to Biegler that he would do so.

We point out that during that conversation, in Flatto-Sharon's presence, Halfon expressed his view about how the election activists would vote (Halfon's testimony in Tr. 65, p. 53; Tr. 66, p. 22, Tr. 68, p. 70).

Flatto-Sharon was aware of the payment to the activists, both with respect to the amount paid to individual activists and the total expense connected with paying so many activists. Concerning this, Halfon gave testimony to the police on April 8, 1979, as follows (E. 10):

> "The answer to the question of whether Flatto-Sharon was aware of the method of recruiting workers in exchange for 150 Israel Pounds is yes, because he approved the budget as I presented it to him and as I discussed it with him. This happened towards the end of April when I told him that I needed to recruit about 3,000 activists at a cost of 150 Israel Pounds per day...." [p. 808]

Yisheyahu Libna, who was in charge of the F'SH list election headquarters, also testified that the excessive outlay for payment of the workers was submitted to Flatto-Sharon for approval (Tr. 37, p. 605).

Flatto-Sharon's involvement was not limited only to approving Halfon's plan, but he took an active part in recruiting activists and instigated the establishment of branches which, in Halfon's opinion, were unnecessary:

> "Some of them came to us on their own accord. Some *Flatto-Sharon recruited on his own.* Some I recruited... Everyone that came to the job had his own reason for doing so. Perhaps some came because they received 5,000 Is. Pounds. Perhaps others came because he just had to work for Flatto - it was Flatto who was the big attraction - and he thought that later on he would receive two stores on Dizengoff" (Tr. 67 p. 6.). (Emphasis added- D.L.).

In the same Transcript, on page 30, Halfon stated:

"After that occasion, Flatto said to me: No problem, establish branches, it was all superfluous. But when my boss tells me to establish branches, I tell him that it costs money, he says that money is no problem...

Question: Did you establish branches because Flatto-Sharon forced you to do so?

Answer: "In the second round, yes."

It follows from this that Flatto-Sharon was directly involved in the program of employing activists and was aware of the fiction inherent in its foundation. This emerges from E.102, in which it was established that Flatto-Sharon approved the plan as it was presented by the police investigator, and it also emerges from his conversation with Biegler, from the fact that he himself recruited activists and that he pushed for the establishment of unnecessary branches, from his awareness of the number of activists planned to be hired, from the extent of the outlays in that connection, and from the fact that the work was unsupervised, so that in effect no work was received in exchange for the moneys paid to them.

52. Ben Udis's liability also emerges from this evidence. Thus, as stated above, he confirmed in his statement to the police (E. 102) that he was present when Halfon gave his version of the subjective need to The activists, and "the block of votes" that would be ensured as a result. Ben Udis testified that Flatto-Sharon approved the program presented by the policeman who questioned him, that is to say, he approved a corrupt program, and in any event Ben Udis knew about the program of which he testified, which he approved, and in which, together with Flatto-Sharon, he took part. Ben Udis repeated in his book (E. 104) the essence of his account in E. 102, and in his statement in E. 103 he confirmed what was said in his book about the hiring of workers.

53. In light of the foregoing, the clear, unequivocal conclusion is that both Flatto-Sharon and Ben Udis, as well as Halfon, are liable for the offence alleged in Count 2, and that their convictions by the trial court were justified. [p. 809]

THE SENTENCES

54. As indicated above, Flatto-Sharon was sentenced to three years' imprisonment, nine months of which were to be served, on account of his conviction by the trial court for each of the counts (Counts 1 and 5), the two sentences to be served concurrently.

As indicated above, Ben Udis was sentenced to an 18-month suspended sentence and was fined 4,000 Sheqels on account of his conviction on the aforementioned counts.

The two appealed their sentences which were then upheld by the court of appeals, notwithstanding the modification by the court of appeals of the counts on which they were convicted. The minority in the court of appeals was of the opinion that the actual sentence to be served by Flatto-Sharon should be reduced to three months.

Halfon, who was at first convicted by the court of appeals only on Count 2, was sentenced to a six-months suspended sentence.

Flatto-Sharon and Ben Udis again appealed the severity of their sentences. Halfon limited his appeal to the conviction only. According to the defence, the imprisonment was too harsh a penalty in light of the circumstances.

Regarding the sentence meted out to Ben Udis, we immediately point out that it is very light, perhaps even too light; however, at this stage, the State does not seek to alter it, even if its appeal on those counts on which the Appellants were acquitted by the court of appeals is accepted, and thus his conviction on Count 5 is reinstated.

Regarding the sentence imposed on Flatto-Sharon, we considered long and hard all arguments made by the defence and by the prosecution, and we conclude that, notwithstanding the fact that the appeal of the State was accepted and that he was convicted on an additional count, justice will be served if the sentence is commuted for the following reasons:

A. Seven years have passed since that election - the subject of the hearing - and nearly five years since the commencement of legal proceedings. Since then, Flatto-Sharon his already participated in another election, which he lost, and there was no allegation that in that later campaign he also resorted to corruption. It appears that the Appellant failed to a large extent because of his lack of basic understanding of what is permitted and what is prohibited in the course of free, democratic elections.

B. The primary importance of this trial, the first of its kind in Israel, is that it is intended to establish, to the extent possible, the rules of what is permitted and what is prohibited in an election campaign, which were not sufficiently clear to the public, and to

protect against the perversion of democracy by means of acts of corruption and duress intended to unjustly influence the civil election process. [p. 810]

Now, after we have established our view of this multi-faceted matter, it seems that in great measure the deterrence necessary to prevent incidents such as those disclosed here in the future has been accomplished.

C. Ben Udis was heavily involved in carrying out all the offences that Flatto-Sharon himself carried out, and his part in their planning and execution was substantial. Flatto-Sharon committed the offence involved in the illicit hiring of activists largely under the influence and instigation of Halfon.

It is true that Flatto-Sharon was the leader; the corrupting money came from him. The one who had the primary interest in influencing the way citizens voted, come what may, was he, the one-man list, who sought to be elected to the Knesset at whatever price. Therefore, it is fitting that his punishment be heavier and more substantial than that meted out to his cronies - the other Appellants. Still, there must be a reasonable relationship between the various punishments, something that is not the case here. Flatto-Sharon's punishment is immeasurably greater than those of the others.

Therefore, it seems to me that it is proper that the view of the minority of the court of appeals, Judge Goldberg, be accepted, and that Flatto-Sharon be sentenced to 18 months, three of which are to be served, and the rest to be suspended in accordance with the conditions prescribed by the trial court.

SUMMATION

55. Therefore, I propose as follows:

A. To reject the appeal of the Appellants regarding Counts 1 and 2.

B. To reject the State's appeal on Count 3.

C. To allow the State's appeal on Count 5 and to reinstate the convictions of Appellants Flatto-Sharon and Ben Udis on this count.

D. To reject Ben Udis's appeal from his sentence.

E. To allow Flatto-Sharon's appeal from his sentence and to sentence him to 18 months, three of which are to be served, and the rest to be a suspended sentence on the terms set down by the trial court.

P.D., vol. 38(2), P. 757-810

Bejski J: I concur.

Netanyahu J: I concur.

Decided as aforesaid according to the judgment of D. Levin J.

Given the 25 of Sivan, 5744 (June 27, 1984).