Bribery Comr v Ranasinghe

Overview | **[1965] AC 172**, | [1964] 2 All ER 785, | [1964] 2 WLR 1301, | 108 Sol Jo 441

THE BRIBERY COMMISSIONER APPELLANT; AND PEDRICK RANASINGHE RESPONDENT. ON APPEAL FROM THE SUPREME COURT OF CEYLON. [1965] A.C. 172

[PRIVY COUNCIL]

VISCOUNT RADCLIFFE, LORD EVERSHED, LORD MORRIS OF BORTH-Y-GEST, LORD HODSON and LORD PEARCE.

1964 May 5.

Ceylon — Parliament — Constitution — Amendment — Bribery Tribunal — Personnel, constitutional validity of — Appointed under Bribery Amendment Act — Judicial officers — Conflict of appointing authority between Act and Constitution — Act not passed in compliance with constitutional legislative procedure — Invalid and ultra vires — Orders of tribunal null and inoperative — Bribery (Amendment) Act, No. 40 of 1958, ss. 41, 42 — Ceylon (Constitution) Order in Council, 1946, ss. 29 (1) (4), 55.

Statute — Parliament — Sovereignty — Mode of enactment — Noncompliance with constitutional legislative procedure — Ultra vires — Ceylon.

By section 29 of the Ceylon (Constitution) Order in Council, 1946: "(1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island. … (4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order … in its application to the Island: Provided that no Bill for the amendment or repeal of any of the provisions of this order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of members of the House (including those not present). Every certificate of the Speaker … shall be conclusive for all purposes and shall not be questioned in any court of law."

Members of the panel from which the personnel of Bribery Tribunals in Ceylon are to be selected hold, when sitting in the tribunal, judicial office and the provision in section 41 of the Bribery Amendment Act, 1958, for their appointment by the Governor-General on the advice of the Minister of Justice is in plain conflict with the requirement in section 55 of the Ceylon (Constitution) Order in Council, 1946, that "the appointment … of judicial officers is hereby vested in the Judicial Service Commission." Once it is shown that an Act conflicts with a provision in the Constitution the certificate of the Speaker under the proviso to section 29 (4) of the Constitution is an essential part of the legislative process. There was no such certificate in the case of the Bill of 1958 (post, pp. **192**, **193**, **194**).

A legislature has no power to ignore the conditions of lawmaking

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that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign, as is that of Ceylon. Such a Constitution can be altered or amended by the legislature if the regulating instrument so provides and if the terms of those provisions are complied with, and the alteration or amendment may include the change or abolition of those very provisions. A legislature has not, however, some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constitutional instrument has said shall not be valid unless made by a different type of majority or by a different legislative process (pp. **197-198**).

Alterations of the constitutional provisions about the appointment of judicial officers can only be made by laws which comply with the special legislative procedure laid down in section 29 (4) of the Constitution; the Ceylon legislature has not got the general power to legislate so as to amend its Constitution by ordinary majority resolutions (post, p. **198**).

Accordingly, in the case of amendment or repeal of the Constitution the Speaker's certificate is a necessary part of the legislative process and any Bill which does not comply with the condition precedent of the proviso to section 29 (4) - as the Bill of 1958 did not - is and remains, even though it receives the Royal Assent, invalid and ultra vires. Where invalid parts of the statute which are ultra vires can be severed from the rest which is intra vires it is they alone which should be held invalid (post, p. **200**).

Accordingly, orders made against the respondent, who had been tried before a Bribery Tribunal on a charge of bribery were null and inoperative since the persons composing the tribunal were not validly appointed to the tribunal - having been appointed pursuant to the ultra vires provisions of the Act of 1958 and not by the Judicial Service Commission in accordance with section 55 of the Constitution (post, p. **200**).

McCawley v. The King [1920] A.C. 691; 36 T.L.R. 387, P.C. distinguished.

Attorney-General for New South Wales v. Trethowan [1932] A. C. 526; 48 T.L.R. 514, P.C., and *Thambiayah v. Kulasingham* (1948) 50 N.L.R. 25 considered.

Judgment and order of the Supreme Court of Ceylon (1962) 64 N.L.R. 449 affirmed.

APPEAL (No. 20 of 1963), by special leave, from a judgment and order of the Supreme Court of Ceylon (H. N. G. Fernando and L. B. de Silva JJ.) (December 20, 1962) allowing the present respondent's appeal against a decision of the Bribery Tribunal (constituted under the Bribery Act, 1954, as amended to Act No. 40 of 1958) (October 18, 1961) whereby the respondent after a trial before the tribunal on two counts relating to a charge of bribery was found guilty on both counts and sentenced, on each

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count, to rigorous imprisonment for a term of six weeks, the sentences to run concurrently, and, in addition, to pay a penalty of Rs.50.

In allowing the appeal, the Supreme Court held that the conviction and the orders made against the respondent were null and inoperative on the ground that in trying and sentencing him for bribery members of the Bribery Tribunal, not having been appointed by the Judicial Service Commission in accordance with section 55 of the Ceylon (Constitution) Order in Council, 1946, were not lawfully appointed and had unlawfully exercised judicial powers.

The relevant terms of the Bribery Amendment Act, 1958, and of the Ceylon Constitution appear from the judgment of the Judicial Committee.

1964. March 10, 11, 12, 16 and 17. ***Neil Lawson Q.C.***, ***Victor Tennekoon***, ***R. K. Handoo, Ralph Millner*** and ***V. S. A. Pullenayegum*** for the appellant, the Bribery Commissioner. The Supreme Court held that the conviction of and sentence on the respondent were null and inoperative on the ground that the relevant provisions of the Bribery Act, 1954, of Ceylon, as amended in 1956 and 1958, relating to the appointment of the members of the Bribery Tribunal were contrary to the provisions of the Constitution of Ceylon so that the tribunal could not lawfully try, convict or sentence the respondent. The members of the Bribery Tribunal are nominated from a panel appointed (section 41 of the Act of 1958) by the Governor-General on the advice of the Minister of Justice. What the Supreme Court have held is that since members of the Bribery Tribunal were appointed by the Governor-General on the advice of the Minister of Justice it was a non-judicial tribunal because appointments to the Bribery Tribunal should, under section 55 of the Constitution, be made by the Judicial Service Commission in Ceylon. There is thus a conflict between the Bribery Act and the Constitution which comes into the forefront of this case.

Of the relevant provisions of the Ceylon (Constitution) Order in Council, 1946, as amended in 1947, section 39 is the only limiting provision on the full legislative powers of the Ceylon Parliament. It is important to observe that the Order in Council does not establish a judiciary for Ceylon: see Part VI. Section 55 - the vital section here - provides by subsection (1) that "The appointment, transfer, dismissal and disciplinary control of judicial officers is hereby vested in the Judicial Service Commission,"

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and in subsection (5) "'Judicial officer' means the holder of any judicial office but does not include a judge of the Supreme Court or a Commissioner of Assize." In section 3 - the interpretation section of the Constitution - "Judicial office" means any paid judicial office. One of the questions to be considered is what is the real effect of section 29 (4) of the Order in Council. What was said was that the Bribery Amendment Act of 1958 did not get the Speaker's certificate under the proviso to section 29 (4) and therefore was ineffective. This non-compliance with section 29 (4) is, of course, vital in the decision of the Supreme Court.

The main submissions are, first, that in exercising under section 29 (1) of the Constitution the power to make laws for the peace, order and good government of Ceylon the Parliament of Ceylon can set up tribunals, including Bribery Tribunals, for the exercise of judicial powers in

specific cases outside the courts established for the ordinary administration of justice. Secondly, the members of the Bribery Tribunal constituted under the amendment Act of 1958 are not "judicial officers" within the meaning of section 55 of the Ceylon Constitution. Thirdly, in any case the courts in Ceylon cannot inquire into the constitutional validity of the Bribery Act as amended in 1958 for two reasons: (i) the Act having received the Royal Assent the courts in Ceylon cannot inquire into procedural questions affecting its progress prior to its presentation for receiving the Royal Assent; (ii) since the Bribery Act of 1954 did have prior to presentation the Speaker's certificate, the 1954 certificate carries the 1958 amendment. Further, section 5 (4) of the Interpretation Ordinance provides that "Every amending Ordinance or Act shall be read as one with the principal Ordinance, enactment or Act, to which it relates."

[Counsel then referred to the historical sequence of the constitutional events in Ceylon, to the recommendations of the Soulbury Commission appointed in 1944, and to the constitutional instruments which brought about independence - the 1946 Order in Council; the 1947 Independence Order in Council; the Royal Letters Patent, c. 388 of the 1956 Revision of the Legislative Enactments of Ceylon; the Royal Instructions, c. 389, and the Ceylon Independence Act, 1947.]

The position of the judiciary in Ceylon is that since the 1833 Charter of Justice no Constitution Act of Ceylon has ever done anything by way of establishing or conferring jurisdiction or vesting functions in courts, and the Charter of 1833 continued to have

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effect until 1889 when the Courts Ordinance, now c. 6 of the Revised Laws of 1956, was enacted. It is a basic law dealing with the courts - section 3 is the important one - and is setting up the courts for the ordinary administration of justice in Ceylon. It is submitted that when the Constitution Order in Council of 1946 is talking about judicial office and the appointment of judicial officers it is talking about appointments below the Supreme Court. Section 52 of the Courts Ordinance is talking about appointments to the District Court, Courts of Request and Magistrates' Courts. The Bribery Tribunal is a special tribunal constituted for special purposes. The basic structure of the Ceylon courts is to be found in the Courts Ordinance and the Rural Courts Ordinance, c. 8 of the 1956 Revision. [Reference was made to *Attorney-General of Ceylon, v. De Livera*1 and *Ibralebbe v. The Queen*.2]

Before February 4, 1948 - when the present Constitution came into force - the legislature of Ceylon from time to time enacted laws conferring on tribunals, operating in particular spheres, powers of a judicial character. Those laws are preserved and subsequently appeared in the 1956 Revision of the Legislative Enactments, and the powers under them are exercised by persons who are appointed otherwise than by the Judicial Service Commission. Instances of such tribunals are: Registrars of Kandyan Marriages, under the Kandyan Marriage and Divorce Act, c. 113; Quazis and Boards of Quazis, under the Muslim Marriage and Divorce Act, c. 115; Commissioners for Workmen's Compensation, under the Workmen's Compensation Ordinance, c. 139; Debt Conciliation Boards, under the Debt Conciliation Ordinance, c. 81; Boards of Review, under the Income Tax Ordinance, c. 242. None of those tribunals impinged on the criminal law, but on civil rights and civil obligations. In *Shell Co. v. Federal Commissioner of Taxation*3 the Board held that the Board of Review under the Australian income tax legislation, which is similar to the Ceylon Board, was not a judicial body but an administrative one. That the

above-mentioned Ceylon laws survived independence appears, firstly, as a matter of principle in constitutional law, that is, that a change of status did not automatically bring them to an end; and, secondly, under the 1946 Order in Council it is clear that pre-existing laws survived independence - notwith-standing the provision made in Part VI of the Constitution Order

1 [1963] A.C. 103; [1962] 3 W.L.R. 1413; [1962] 3 All E.R. 1066, P.C.

2 [1964] A.C. 900; [1964] 2 W.L.R. 76; [1964] 1 All E.R. 251, P.C.

3 [1931] A.C. 275.

in Council of 1946 the Ceylon Parliament has reproduced these particular enactments since independence. That supports the submission that "judicial office" where it is used in section 55 of the Constitution refers to the position of judges of the ordinary courts in Ceylon and is not used to extend to persons exercising judicial powers who are in fact functioning as special tribunals exercising jurisdiction in special cases under laws which are made for the peace, order and good government of Ceylon. This is in line with the Soulbury Commission report, and is in line with the provisions of the Constitution read together with the Courts Ordinance, as, of course, they must be.

The Bribery Act of 1954 provided for the automatic termination of office in the public service of any public servant who was found to have been guilty of taking a bribe. The provisions of the Act of 1954 differ very little in all respects from those which set up the Bribery Tribunal in 1958, except that under the Act of 1958 there is jurisdiction over all persons, whether public servants or not, in bribery cases. The difference between the two Acts is not a difference of kind but of degree. There was no challenge to the validity of this bribery legislation until the end of 1961, when the Supreme Court gave judgment in *Senadhira v. Bribery Commissioner*.4 Next followed *Don Anthony v. Bribery Commissioner*,5 *Piyadasa v. Bribery Commissioner*6 and *Jailabdeen v. Danina Umma*,7 and finally, on December 20, 1962, the decision in the present case. The earlier cases, which form the background of the decision of the Supreme Court in the present case, were given on very different grounds and on very different approaches to the problem.

The legislature, by enacting the Bribery Act as amended, as a necessary measure for the maintenance of peace, order and good government, cannot, by any reasonable interpretation of the Act, be said to have "taken away" any judicial power in whomsoever previously vested even if it did confer judicial power on the Bribery Tribunal, newly created for a specific purpose. The Supreme Court never dealt with the appeal on the merits. They were wrong in holding that membership of the Bribery Tribunal was a judicial office within the meaning of section 55 of the Constitution Order in Council. They were wrong in taking the view that appointment to a special tribunal would be unconstitutional unless it were provided that the appointment should be by the Judicial Service Commission. They were wrong in

4 (1961) 63 N.L.R. 313.

5 (1962) 64 N.L.R. 93.

6 (1962) 64 N.L.R. 385.

7 (1962) 64 N.L.R. 419.

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taking the view that section 29 (4) imposed a limitation on the legislative competence of the Ceylon Parliament. They were wrong in taking the view that they were entitled to look behind the Act as it existed in 1954 and as amended to 1958 in order to determine whether or not the procedure prescribed by the proviso to section 29 (4) of the Constitution had been gone through prior to the Royal Assent. The explanation of the proviso is really in the Australian case of *Attorney-General for New South, Wales v. Trethowan*.8

The members of the Bribery Tribunal appointed under the Act as amended to 1958 are not "judicial officers" within the meaning of section 55 of the Constitution. That is put under two heads: (i) section 55 applies only to the office of judge of the subordinate courts forming part of the existing system for the general administration of justice in the Island, that is to say, District Judges, commissioners of requests, magistrates and presidents of rural courts. That submission is directly in line with the Soulbury Commission Report, and so limited also links up with the provisions of the Courts Ordinance, s. 3. The context in which the words "judicial officer" appear is the context of Part VI, which is headed and deals with "The Judiciary." Section 55 is intended to deal with the broad structure of judicial officers within the judicature. As to "judicature," see s. 2 of c. 12 of the 1956 Revision of the Legislative Enactments (Adoption of Roman-Dutch law). The final point on the first branch of this submission is that reliance is placed on the pre-independence group of ordinances referred to above and their continuance after independence and their publication in the Revised Laws of 1956.

The second branch of this submission is that members of the Bribery Tribunal do not hold paid judicial office. No definition of "office" is given in the interpretation section; it is submitted that "office" means something which exists apart from the holder and which has a permanency apart from the holder; see the dicta in *Great Western Railway Co. v. Bater*.9 In section 55 the impression is created very strongly that what is being thought about are posts which have a permanent existence apart from the holders rather than ad hoc posts which have functions attached to them. See, also, *McMillan v. Guest*.10 If it is right that

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8 [1932] A.C. 526; 48 T.L.R. 514. P.C.

9 [1922] 2 A.C. 1, 15; 38 T.L.R. 488, H.L.(E.).

10 [1942] A.C. 561, 564, 566, 570; [1942] 1 All E.R. 606, H.L.(E.).

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"office" where used in section 55 is contemplating an office which is something existing, and which has permanency, apart from the holder, one cannot fit the position of a member of the Bribery Tribunal into that particular definition. One might be able to fit a member of the panel into that definition, because there is a panel created by section 41. It is conceded that membership of the panel is an office - he is the holder of a paid office - but it is not a judicial office. Payment does not attach to membership of the tribunal, but to membership of the panel. Admittedly this is a very fine point, but it has considerable force.

The second main submission is that under the power to make laws for the peace, order and good government the Ceylon Parliament can set up tribunals, including Bribery Tribunals, for special cases, outside the courts established by law for the ordinary administration of justice. The first point on this is that the Ceylon Constitution has no supreme law clause. Importance is attached to this because it has two implications; (1) it enables one to say that, subject to certain qualifications, the legislative competence of the Ceylon Parliament is sovereign. The limitation on the sovereign legislative competence is section 29 (2) - apart from that there are no supreme law clauses in the Ceylon Constitution. (2) With the exception of the powers of disallowance in section 39 there is no body of persons and no persons outside Parliament who can control the exercise of the legislative power, subject only to section 29 (2) and (3). Therefore it is not right to say that the Constitution of Ceylon falls into the category of a controlled constitution. It is an uncontrolled constitution subject only to section 29 (2). This matter was discussed in *McCawley v. The King*.11 The point is that with the qualification of section 29 (2) and (3) the legislative power of the Ceylon Parliament is a sovereign power; that the fetters which formerly existed were swept away so far as competence was concerned. [Reference was made to *Krause v. Commissioner for Inland Revenue*.12] *Trethowan's case*13 has an impact on this matter; there are two points on that case, first, it was on section 1 of the Colonial Laws Validity Act, the legislature of New South Wales being a subordinate legislature; and secondly, the effect of the 1929 amendment in section 7A was to introduce an outside body as a constitutional element in the legislative process. That case is basically distinguished on the ground that at that time the

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11 [1920] A.C. 691, 703, 704-714, P.C.

12 [1929] S.A.L.R., A.D. 286, 290.

13 [1932] A.C. 526, 534 et seq.; 48 T.L.R. 514, P.C.

---------- *[1965] A.C. 172 at 180*

legislature of New South Wales was still subject to the Colonial Laws Validity Act, and that, of course, prevented the subordinate legislature from passing a law for the amendment of its own Constitution. Section 29 (4) of the Ceylon Constitution was drafted as it is because the draftsman obviously had in contemplation the *Trethowan case*.13

In *Harris v. Minister of the Interior*14 - the unanimous decision of a very strong court there are very important questions; (1) the Act as passed shows on its face that it had not been passed in accordance with the provisions of section 152; (2) the court there were concerned with the aspect that section 35 was designed for the purpose of protecting minority rights - one can see a parallel with section 29 (2) of the Ceylon Constitution; (3) the court was concerned to consider what effect the Statute of Westminster had on the South African Act of 1909. The basis of that decision is quite clearly that the passing of the Statute of Westminster in 1931 had no effect on the entrenching clauses of the South Africa Act. That conclusion, it is submitted, is wrong.

The next point on this head is that there is no question of vesting of judicial power by the Constitution, nor by the Ceylon Constitution is any judicial system established. In *Attorney-General for Australia v. The Queen*15 the point was that the Federal Parliament could establish a court with judicial powers, but could not establish, what it purported to do, a court vested with partly judicial powers and partly non-judicial powers. That case raises quite a different sort of problem from the present.

The next submission is that section 29 (4) of the Constitution does not constitute a limitation on the legislative powers of Parliament; and secondly, the courts in Ceylon cannot examine every Act of the Ceylon Parliament beneath the magnifying glass of the Constitution. Section 29 (4) in itself is limited to certain categories of *Bills. Thambiayah v. Kulasingham*16 is authority for the proposition that if a Ceylon Act is in conflict with a provision of the Constitution then, according to that decision, it is a void law unless presumably it has the sanction of section 29 (4) behind it; that is not accepted as a valid decision. For the purpose of this argument the court can go behind the Royal Assent.

The "pith and substance" test is a useful test to determine

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13 [1932] A.C. 526.

14 [1952] 2 S.A.L.R. 428, 455 et seq.

15 [1957] A.C. 288, 313, 315; [1957] 2 W.L.R. 607; [1957] 2 All E.R. 45, P.C.

16 (1948) 50 N.L.R. 25.

whether or not a Bill falls within the expression "for the amendment or repeal." In *Gallagher v. Lynn*17 the impugned law was held to be one for the peace, order and good government. If it can be said that the intention of the Bribery Act was to make an amendment of the Constitution that would be a case of a direct conflict. But, assuming that the intention behind the Act was not to make a constitutional amendment, but the effect on the Constitution is an indirect consequence, then the test to apply is, was the real object of the Bill to effect a constitutional amendment under the guise of something else, or was the Constitution changed as a result of the Bill? If the "pith and substance" test is applied, it can be seen that the legislature in 1958

were not intending to treat the tribunal as a court, but merely as a special tribunal having certain powers analogous to those of a court. The legislature by the Courts Ordinance was contemplating legislation under which special officers or tribunal could be legally constituted for special purposes or to try special cases or classes of cases outside the framework of the ordinary courts of justice. The Bribery Tribunal was something which came within the proviso to section 3 of the Courts Ordinance.

The next point on section 29 (4) is that the proviso is so drawn with an eye on the *Trethowan* decision.18 Lastly on this point of the construction of section 29 (4), if it had been the intention of he legislature that a law which did not comply with the proviso to section 29 (4) should be void one would have expected the subsection to say so - the legislature knew quite clearly what had to be done if it wanted to strike down a law for confliction with the Constitutional provisions: s. 29 (3). It is submitted that the sort of restriction contained in the proviso to section 29 (4), however appropriate it was when the Colonial Laws Validity Act had effect, ceased to impose any fetter on the legislative competence of the Ceylon Parliament. Had it been the intention of the legislature to entrench on the safeguards of the Constitution then that would have been done either by using a supreme law clause or by using a clause which would say that no Act for the amendment or repeal of the provisions of this order shall be valid unless, and so on, and would have said that any Act which had not gone through this process shall be void.

In summary on this point: (1) The Ceylon Parliament is a sovereign Parliament, the only limitation on whose competence is section 29 (2). (2) The courts, except in the case provided for

17 [1937] A.C. 863; 53 T.L.R. 929; [1937] 3 All E.R. 598, H.L. (N.I.).

18 [1932] A.C. 526.

in section 29 (3), cannot inquire into the validity of an Act of the Ceylon Parliament. (3) Qualified by section 29 (2) and (3), the Constitution of Ceylon, since the abolition of the application of the Colonial Laws Validity Act to Ceylon, is to be looked at as an ordinary legislative Act which can in fact be affected by any subsequent legislative Act. *[Ibralebbe v. The Queen*19 was referred to.]

The third main submission is that in any case the Ceylon courts cannot inquire into the validity of the Bribery Act as amended, and for three reasons: (1) There is no provision of the Constitution which directly or indirectly enables the court to inquire into the validity of an Act, unless it is a section 29 (3) case. (2) Once the Royal Assent is given and the law is enacted, the court cannot go behind it but must take it as a law: *Harris v. Minister of the Interior*20; *Edinburgh Railway Co. v. Wauchope*.21 Those cases are illustrative of the general proposition. Also as part of the argument on this point, see Halsbury's Laws of England, 3rd ed., Vol. 36, p. 378, para. 560. See also Craies on Statute Law, 6th ed., p. 38; 5th ed., pp. 33 and 527; 6th ed., p. 559. *[P. S. Bus Co. Ltd. v. Members and Secretary of Ceylon Transport Board*22 was also referred to.] (3) The

Act of 1954 having been certified carried the Act of 1958 on its back. The appellant is entitled to rely on the maxim omnia praesumuntur rite esse acta. It is of course appreciated that if the court cannot go behind the Act of 1958 it cannot take notice of the fact that the Act of 1954 was in fact certified. The question of the court going behind an Act of Parliament is referred to in *Ellen Street Estates Ltd. v. Minister of Health*,23 which also impinges on the power of Parliament to bind its successors. The principle that one cannot go behind an Act of Parliament does not apply to cases where there is a supreme law clause, or to cases in Ceylon where entrenchment on section 29 (2) is invalid. Further, the principle does not apply where, as in the Australian Constitution, there is a vesting of judicial power clause. And it does not apply where the legislative competence is vested in a body other than Parliament normally constituted: *Harris's case*.24

On an appeal to the Supreme Court brought under section 69A of the Bribery Act of 1958 it is not competent for the appellant to object and/or for the Supreme Court to entertain, or suo motu

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19 [1964] A.C. 900; [1964] 2 W.L.R. 76, 88; [1964] 1 All E.R. 251, P.C.

20 [1952] 2 S.A.L.R. 428, 469.

21 (1842) 8 Cl. & F. 710, 725.

22 (1958) 61 N.L.R. 491, 493.

23 [1934] 1 K.B. 590, 595, 597, C.A.

24 [1952] 2 S.A.L.R. 428.

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raise, the objection that the provisions of the Act under which members of the Bribery Tribunal have purported to exercise judicial powers are unlawful, being in contravention of section 55 (1) of the Constitution, and the conviction therefore void; for the statutory right of appeal given exclusively by section 69A is concerned only with the correctness or otherwise of the conviction by a tribunal constituted under the Bribery Act and cannot be extended to include the competency of its members to adjudicate. See *Senadhira v. Bribery Commissioner*,25 *Don Anthony v. Bribery Commissioner*,26 *Piyadasa v. Bribery Commissioner*27 and *Jailabdeen v. Danina Umma*.28 [Reference was also made to *King-Emperor v. Benoari Lal Sarma*.29] The courts below have disregarded the language of section 69A which gives a right of appeal based on specific matters; they have ignored the fact that this right of appeal is given against a conviction by the Bribery Tribunal, which presupposes that the tribunal is a body having jurisdiction to convict; and they have taken the view that the members are invalidly appointed, and if that is a valid objection it goes to the root.

In summary: the first main submission is that the fact of being selected to make up a Bribery Tribunal for the trial of a specific case does not constitute the persons selected as having judicial office under section 55 of the Constitution - Part VI of the Constitution really relates only to subordinate courts forming part of the ordinary system of the administration of justice in Ceylon;

and membership of a Bribery Tribunal is not a paid office. The second main submission is that, subject to section 29 (2) and (3) of the Constitution, the Ceylon Parliament can enact laws, first, setting up special tribunals, including Bribery Tribunals, appointment to which is not by the Judicial Service Commission, in the exercise of their power under section 29 (1); and secondly, laws in fact conflicting, otherwise than under section 29 (2), with the provisions of the Ceylon Constitution. The third main submission is that the Ceylon courts cannot go behind the Bribery Act of 1958 to examine a section 29 (4) question, and for two reasons, (i) because the courts in Ceylon cannot, except under section 29 (3), examine the constitutional validity of any Act of the Ceylon Parliament, and (ii) the Act of 1958, being an amending Act, is carried by the Act of 1954.

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25 63 N.L.R. 313, 314-315.

26 64 N.L.R. 93, 94.

27 64 N.L.R. 385, 386, 394.

28 64 N.L.R. 419.

29 [1945] A.C. 14, 20, 27; 61 T.L.R. 54; [1945] 1 All E.R. 210, P.C.

Applying the pith and substance test, is the change any more than a change in degree of something which was authorised by the Act of 1954? Lastly, it was not competent for this point to be raised on appeal.

E. F. N. Gratiaen Q.C., ***Montague Solomon*** and ***E. Cotram*** for the respondent. On the main question, it is submitted that the chairman and the two members of the tribunal who purported to try, convict and sentence the respondent were paid judicial officers within the meaning of section 55 of the Constitution, and having been appointed by some executive officer other than the Judicial Service Commission their orders were nullities, and, indeed, the amending Act of 1958, in so far as it purported to empower the Governor-General on the advice of the Minister of Justice to appoint members of the Panel for the purpose of exercising strictly judicial functions under the Act, was ultra vires. The relevant provisions of the amended Act were correctly summarised by Sansoni J. in *Senadhira v. Bribery Commissioner*.30 An examination of the provisions of the Bribery Act as amended shows that Bribery Tribunals have so many of the attributes which one would normally associate with a court of record, and really lack none of those attributes, that it should not be sought to distinguish them from ordinary courts of criminal jurisdiction by the mere fact that they deal only with bribery offences. Here, in the place of an established court of criminal judicature, is a new institution with a permanent existence and paid judges with power to sentence to seven years' imprisonment and to fine up to Rs.5,000, and it is linked with the highest Court of Appeal by section 69, which gives the accused person the right to appeal from a conviction. There are not only the traditional attributes of a court of criminal jurisdiction, but the members of the tribunal are paid because they are members of a Panel, and they hold "office" - there are many sections which expressly say that they are paid so long as

they hold "office." They are paid for exercising the powers of a criminal court and for nothing else. That complies with the test in *Great Western Railway Co. v. Bater*,31 which was followed in *McMillan v. Guest*.32 Prima facie, the words "judicial officer" in section 55 of the Constitution cover these new institutions as well as the persons who are vested from time to time with strictly judicial functions in relation to the powers conferred by Parliament on

30 63 N.L.R. 313, 316.

31 [1922] 2 A.C. 1; 38 T.L.R. 448, H.L.(E.).

32 [1942] A.C. 561; [1942] 1 All E.R. 606, H.L.(E.).

new judicial bodies. The only limitation on the words "judicial officer" is the requirement in the interpretation section, section 3, for payment. There is no warrant for limiting the meaning of "judicial officer" or "judicial appointment" to cases which come in under the main section 3 of the Courts Ordinance and not the proviso. There is nothing in the language of the Constitution which limits "judicial officer." So long as section 55 of the Constitution remained unrepealed or unamended, there can be no doubt that when the Parliament of Ceylon decided in 1958 to vest jurisdiction of a strictly criminal nature in these tribunals, then section 55 was the proper provision regulating methods of appointment.

It is conceded that Parliament had power to establish Bribery Tribunals. It is also conceded that the Constitution does not by any express separate formula declare that the Constitution is the paramount law, and that as the Colonial Laws Validity Act did not apply to Ceylon at the relevant time it was not therefore available by itself to control the legislative power. The power to pass the Bribery Act was, it is submitted, derived from the Constitution itself; the true position is that the legislative power of the Ceylon Parliament is restricted within a certain area, although outside that area it is unrestricted. Section 29 (1) of the Constitution provides that the legislative power is expressly made "Subject to the provisions of this Order." Section 18 makes it clear that in matters invoked by section 29 (4) Parliament's legislative power is quite unrestricted by that majority and the exception is in regard to amendments of the Constitution itself. It is conceded that generally in any case where Parliament's competence is to make laws by a bare majority the mere fact that the Royal Assent has been granted would preclude a court of law from exercising a jurisdiction in regard to matters of parliamentary procedure, for instance, whether there was a majority or not. It is conceded also that in so far as there are no fetters, other than under section 29 (4), on the legislative power to pass an Act by a bare majority, then one can necessarily have repeal by implication of that Parliament's former laws because there is nothing in the Constitution which empowers a bare majority of Parliament to fetter future bare majorities in regard to the same subject-matter.

The type of limitation imposed by the proviso to section 29 (4), however, is not a mere matter of the internal machinery of Parliament, but is intended to give substantive rights to the people of Ceylon, and the courts, without in any way seeking to

investigate matters of mere internal machinery, have not only the power but a duty to see whether the conditions precedent laid down by the Constitution for a valid enactment in a particular limited area of legislation have been satisfied or not. Looking at section 29 (4) and section 18, in every case affecting an amendment of the Constitution the conditions must be satisfied as laid down in the Constitution. The only kind of Bill which can become an Act under section 29 (4) is a Bill with an indorsement on it showing that the limitation laid down in section 18 has been borne in mind and that the condition in section 29 (4) has been satisfied. Section 18 clearly says in effect that a bare majority is sufficient for ordinary legislation, but a two-thirds majority, taking into account those not present, is essential for a valid amendment or repeal of the Constitution. It is not a mere question of procedure. A Royal Assent can only be validly given to a duly indorsed Bill. It was said in *McCawley v. The King*33 that "confronted with the objections by which they are met in this appeal, they would have no difficulty in pointing to specific articles in the legislative instrument or instruments which created the Constitution, prescribing with meticulous precision the methods by which, and by which alone, it could be altered." That applies completely to the present case; what was true of section 9 in Queensland is true of all the provisions of the Constitution in this case.

The words in section 29 (1) of the Ceylon Constitution, "Subject to the provisions of this order," mean not merely subject to the provisions of section 29 (2) and (3), but to all relevant provisions of the Order relevant to the legislative function, and therefore they catch up limitations which appear in sections 18 and 29 (4). In *Thambiayah v. Kulasingham*34 it was expressly ruled that no amendment to the Constitution could be validly made unless there was a two-thirds majority, and that decision has never been challenged in Ceylon, nor was it the basis of any argument on behalf of the Crown in the four bribery cases cited by Mr. Lawson.35 This matter, which raises a pure question of law, is of vital importance to all the people of Ceylon, and this Board would hesitate long before taking a view different from that in *Thambiayah's case*36 on so fundamental a matter unless driven to the conclusion that Parliament now has power, notwithstanding section 29 (4), to amend any part of the Constitution

33 [1920] A.C. 691, 705, P.C.

34 (1948) 50 N.L.R. 25.

35 Ante, p. 177.

36 50 N.L.R. 25.

by a bare majority. There is no limitation at the moment on the right of amendment or repeal except the requirement of the requisite majority. There is nothing to prevent by an appropriate enactment a deletion of the words in section 18 "Save as otherwise provided in subsection (4) of section 29," which would then empower Parliament in future to decide any matter and pass any

legislation by a bare majority. If the indorsement appears it is conclusive, so far as the court is concerned, that the two-thirds majority did operate in the House.

*Thambiayah's case*36 receives complete confirmation from the judgment in the South African case of *Harris v. Minister of the Interior*37; and applying the principles of that decision to the language of the Ceylon Constitution the position is that where a Bill receives the Royal Assent without an indorsement on the face of it it must be treated as a Bill passed by a bare majority; but if a certificate is a condition precedent to the valid passing of a section 29 (4) Bill and there is no such certificate then an essential condition to the validity of legislation amending or repealing the Constitution is lacking. [Reference was also made to *Minister of the Interior v. Harris*.38] It was said in *Attorney-General for New South Wales v. Trethowan*39 that "A Bill, within the scope of subsection (6) of section 7A, which received the Royal Assent without having been approved by the electors in accordance with that section, would not be a valid Act of the legislature." Similarly here, if without compliance with the essential requirements of the proviso to section 29 (4) a Bill does receive the Royal Assent, it would not be a valid Act of the legislature. There was nothing in the Bribery Act of 1954 which required a section 29 (4) certificate. Where the Interpretation Act says that the amending Act must be read as one with the principal Act, that presupposes that the former was a valid Act and that life has been breathed into it by a proper and valid legislative enactment.

As to the "pith and substance" argument, the pith and substance of the 1958 amending Act, in so far as it is sought to have it declared invalid, is that section 41 in terms provides for a method of appointment which is the direct opposite of what is required in section 55 of the Constitution; that is the pith and substance of a fundamental feature of the personnel whom Parliament intended to exercise purely judicial functions in this very

36 50 N.L.R. 25.

37 [1952] 2 S.A.L.R. 428.

38 [1952] 4 S.A.L.R. 769.

39 [1932] A.C. 526, 540, P.C.

important field of criminal jurisdiction. *[Attorney-General for Ontario v. Attorney-General for Canada*40 was referred to.]

H. N. G. Fernando J. was right in this case in saying that there was severability and that all that was really invalidated was the appointing power.

Assuming that the Board is of opinion that the appointing power in section 41 of the Act of 1958 was a violation of the Constitution and that the grant of the Royal Assent did not give validity to what is in fact invalid legislation, the appeal should be dismissed whether or not there was a technical question as to the right of appeal. It is clear that under the Courts Ordinance the court

has a very wide supervisory jurisdiction under section 42 by which, if there was a question of a technical objection to the a right of appeal, the court would have power and, indeed, the duty, to stay the proceedings and see that all the matters were before the court.

Lawson Q.C. in reply. It is wrong to suggest that the effect of the Bribery Act as amended is to exclude the jurisdiction of the ordinary courts in bribery cases. It does no such thing. The Act as amended is setting up special tribunals having concurrent jurisdiction - there is a sort of parallel procedure. As to the first main point - whether or not the members of the tribunal hold "office" within the meaning of section 55 of the Constitution - one gets guidance as to the true meaning of "judicial office" in section 55 by bearing in mind that the expression is used in the context of Part VI of the Constitution Order in Council; if Mr. Gratiaen is right there seems to be no limitation placed on the words "judicial office" in section 55. In the context of Part VI of the Constitution a special tribunal established for special purposes is not a judicial office. The right to remuneration attaches not to membership of the Bribery Tribunal but to membership of the Panel; membership of the latter may be an "office," but not of the former - admittedly that is a fine point.

On the broad constitutional point, the submission Mr. Gratiaen makes is very wide; he said that an uncertified Bill which in fact passed into law which repeals any provision of the Constitution is a mere nullity. If that is correct it would seem to follow that in the case of any Act of the Ceylon Parliament passed since independence the court can at any time examine the purpose of the legislation, and if it comes to the conclusion that there is something in it which in fact impinges on the Constitution then, unless whoever is seeking to support the legislation produces the

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40 [1925] A.C. 750, P.C.

Speaker's certificate, it seems to follow that the whole legislation is struck down, not merely that part which impinges on the Constitution. That is a very far-reaching contention. *Thambiayah's case*41 is distinguishable, because there was there something which amounted to a direct amendment of the provisions of the Constitution order in Council. It is further submitted that *Thambiayah's case*41 was in fact wrongly decided, because the question whether or not section 29 (4) had imposed a limitation on the competence of the Ceylon Parliament was never discussed in that case, nor was the point that one cannot go behind the enacting words once a law has been passed to determine what procedural steps have been taken. *P.S. Bus Company Ltd. v. Ceylon Transport Board*42 does support the appellant here to the extent that it shows that the courts in Ceylon themselves have recognised that there are certain procedural matters which the courts will not investigate, and one of them is the constitution of the House of Representatives itself. [*McCawley's case*43 was referred to.] The *Trethowan case*44 is very important from the appellant's point of view, because it does explain the meaning and purpose of section 29 (4) - the answer is to give an opportunity to attack a Bill before it is passed into law. *Trethowan*44 has a substantial link up with the *Harris cases*45 in *South Africa.* [*Attorney-General for Ontario v. Attorney-General for Canada*46 was also referred to.] Section 29 (4) is

clearly only a procedural requirement in relation to the exercise of the legislative power. It is not a requirement which affects legislative competence. Once a Bill has received the Royal Assent it is no longer competent to the courts - it not being a section 29 (2) or (3) case - to go behind the question of the assent given.

May 5. The judgment of their Lordships was delivered by LORD PEARCE. The appellant is the Bribery Commissioner of Ceylon on whom lies the duty of bringing prosecutions before the Bribery Tribunal which was created by the Bribery Amendment Act, 1958. The respondent was prosecuted for a bribery offence before that tribunal. It convicted and sentenced him to a term of imprisonment and a fine. On appeal the Supreme Court declared the conviction and orders made against him null and inoperative on the ground that the persons composing the Bribery

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41 50 N.L.R. 25.

42 (1958) 61 N.L.R. 491.

43 [1920] A.C. 691.

44 [1932] A.C. 526.

45 [1952] 2 S.A.L.R. 428; [1952] 4 S.A.L.R. 769.

46 [1925] A.C. 750.

Tribunal which tried him were not lawfully appointed to the tribunal. In the present case, as in some earlier reported cases, the court took the view that the method of appointing persons to the panel from which the tribunal is drawn offends against an important safeguard in the Constitution of Ceylon.

The Constitution is contained in the Ceylon (Constitution) Orders in Council, 1946 and 1947. There is no need to refer in detail to the various Acts and Orders that established the independence of Ceylon. Viscount Radcliffe in *Attorney-General of Ceylon v. de Livera*1 said of the Constitution, "although there are many variations in matters of detail, its general conceptions are seen at once to be those of a parliamentary democracy founded on the pattern of the constitutional system of the United Kingdom."

The Constitution does not specifically deal with the judicial system which was established in Ceylon by the Charter of Justice of 1833 and is dealt with in certain Ordinances, the principal being the Courts Ordinance, cap. 6. The power and jurisdiction of the courts are therefore not expressly protected by the Constitution. But the importance of securing the independence of judges and of maintaining the dividing line between the judiciary and the executive was appreciated by those who framed the Constitution. See the Ceylon Report of the Soulbury Commission on Constitutional Reform, Appendix I (I), paragraphs 27 and 28, and Appendix I (II), sections 68 and 69. Part 5 of the Constitution is headed "The Executive" and Part 6 "The Judicature." Part 6 deals with the appointment and dismissal of judges. The judges of the

Supreme Court are not removable except by the Governor-General on an address of the Senate and the House of Representatives (section 52). So far as concerns the judges of lesser rank, section 55 provided that "The appointment, transfer, dismissal and disciplinary control of judicial officers is hereby vested in the Judicial Service Commission." The Commission consists of the Chief Justice as chairman and a judge of the Supreme Court and "one other person who shall be, or shall have been, a Judge of the Supreme Court" (section 53 (1)), and no Senator or Member of Parliament shall be appointed. Thus there is secured a freedom from political control, and it is a punishable offence to attempt directly or indirectly to influence any decision of the Commission (section 56).

The questions before their Lordships are whether the statutory provisions for the appointment of members of the panel of the

1 [1963] A.C. 103, 118; [1962] 3 W.L.R. 1413; [1962] 3 All E.R. 1066, P.C.

Bribery Tribunal otherwise than by the Judicial Service Commission conflict with section 55 of the Constitution, and, if so, whether those provisions are valid.

In 1954 the Bribery Act was passed in order to meet a social need. It gave to the Attorney-General or officers authorised by him power to direct and conduct the investigation of any allegation of bribery, and certain powers for securing information and assistance. If there was a prima facie case, he was empowered to indict offenders who were not public servants before the ordinary courts. Offenders who were public servants might either be so indicted or be arraigned before a Board of Inquiry constituted from certain panels to which members were appointed by the Governor-General on the advice of the Prime Minister. It had to decide whether the accused was guilty and it could order the guilty to pay the amount of the bribe as a penalty. A finding of guilt resulted in automatic dismissal and certain disqualifications and incapacities.

The Bribery Act of 1954 was treated by the legislature as coming within section 29 (4) of the Constitution, which deals with any amendments to the Constitution, and there was endorsed on the bill, when it was presented for the Royal Assent, the necessary certificate of the Speaker. That Act also contained a section as follows: "2. (1) Every provision of this Act which may be in conflict or inconsistent with anything in the Ceylon (Constitution) Order in Council, 1946, shall for all purposes and in all respects be as valid and effectual as though that provision were in an Act for the amendment of that order in Council enacted by Parliament after compliance with the requirement imposed by the proviso of subsection (4) of section 29 of that order in Council. (2) Where the provisions of this Act are in conflict or are inconsistent with any other written law, this Act shall prevail."

In 1958 radical changes were made. The Bribery Amendment Act, 1958, swept away the Boards of Inquiry which dealt with public servants and created Bribery Tribunals for the trial of persons prosecuted for bribery with power to hear, try, and determine any prosecution for bribery made

against any person before the tribunal. The Bribery Commissioner was brought into being and was empowered to prosecute persons before the tribunal. All the offences of bribery specified in Part II of the Act, punishable with rigorous imprisonment for a term not exceeding seven years or a fine not exceeding Rs.5000 or both became triable by the tribunal. Whether the effect was that the offences of

bribery under Part 2 of the Act "were no longer triable by the courts" as was said by Sansoni J. in *Senadhira v. Bribery Commissioner*2 or that, as is contended by Mr. Lawson on behalf of the Bribery Commissioner, the courts and the tribunal have concurrent powers, is immaterial. No doubt, even if Mr. Lawson's contention on his behalf be correct, the practical effect would be to supersede the court's jurisdiction in bribery cases to a large extent.

A bribery tribunal, of which there may be any number, is composed of three members selected from a panel (section 42). The panel is composed of not more than 15 persons who are appointed by the Governor-General on the advice of the Minister of Justice (section 41). The members of the panel are paid remuneration (section 45).

Mr. Lawson on behalf of the Bribery Commissioner argues that the members of the tribunal are not "judicial officers" and that therefore their appointment by the executive does not conflict with the constitutional provision that the appointment of judicial officers is vested in the Judicial Service Commission. He bases the contention on two main grounds.

First he argues that the words "judicial officers" only apply to judges of the ordinary courts referred to in the Courts Ordinance, Cap. 6, section 3, and do not apply to those excluded from the operation of the section by the proviso which sets out various other or lesser tribunals, ending with the words "or of any special officer or tribunal legally constituted to try any special case or class of eases." If that argument were sound it might be open to the executive to appoint whom they chose to sit on any number of newly created tribunals which might deal with various aspects of the jurisdiction of the ordinary courts and thus, by eroding the courts' jurisdiction, render section 55 valueless.

Section 55 (subsection 5) defines the expression "judicial officer" as meaning "the holder of any judicial office but does not include a Judge of the Supreme Court or a Commissioner of Assize." By section 3 (1) of the Constitution "judicial office" means any paid judicial office. Membership of the panels from which the Bribery Tribunals are constituted is expressly referred to in section 41 of the Bribery Amendment Act, 1958, as an "office." "Each member of the panel shall, unless he vacates office earlier …" [Section 41 (2).] Vacating "office" is also referred to in subsections 41 (4) and 41 (6).

2 (1961) 63 N.L.R. 313, 314.

Both according to the ordinary meaning of words and according to the more precise tests applied by the House of Lords in *Great Western Railway Co. v. Bater*3 membership of the panel is an office. Their Lordships are unable to draw any inferences from the Courts Ordinance which would affect the plain meaning of section 55 of the Constitution.

Mr. Lawson's second argument is that although membership of the panel is an office, it is not a "judicial" office, since the members are paid to be on the panel and are not paid as members of the tribunal. The Supreme Court rightly rejected this distinction. Clearly the members have the paid office of being on the panel, the functions of the office being the performance of the judicial duties of the Bribery Tribunal as and when they are asked to sit.

There is, therefore, a plain conflict between section 55 of the Constitution and section 41 of the Bribery Amendment Act under which the panel is appointed. What is the effect of this conflict? The Supreme Court has held that it renders section 41 invalid. Mr. Lawson, however, contends on behalf of the Bribery Commissioner that, since the Act has been passed by both Houses and received the Royal Assent, it is a valid enactment and has the full force of law, amending the Constitution if and in so far as necessary. If, he argues, there has been a defect in procedure, that does not make the Act invalid, since the Ceylon Parliament is sovereign and had the power to pass it. Nor are the courts able to look behind the Act to see if it was validly passed.

The voting and legislative power of the Ceylon Parliament are dealt with in sections 18 and 29 of the Constitution.

> "18. Save as otherwise provided in subsection (4) of section 29, any question proposed for decision by either Chamber shall be determined by a majority of votes of the Senators or Members, as the case may be, present and voting. …"
>
> "29 - (1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island.
>
> "(2) No such law shall - (*a*) prohibit or restrict the free exercise of any religion;"

There follow (*b*), (*c*) and (*d*), which set out further entrenched religious and racial matters, which shall not be the subject of legislation. They represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter

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3 [1922] 2 A.C. 1, 15; 38 T.L.R. 448, H.L.(E.).

se they accepted the Constitution; and these are therefore unalterable under the Constitution.

> "(3) Any law made in contravention of subsection (2) of this section shall, to the extent of such contravention, be void.
>
> "(4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of Her Majesty in Council in its application to the Island:
>
> "Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal

> Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of Members of the House (including those not present).
>
> "Every certificate of the Speaker under this subsection shall be conclusive for all purposes and shall not be questioned in any court of law."

The Bribery Amendment Act, 1958, contained no section similar to section 2 of the Act of 1954, nor did the Bill bear a certificate of the Speaker. There is nothing to show that it was passed by the necessary two-thirds majority. If the presence of the certificate is conclusive in favour of such a majority, there is force in the argument that its absence is conclusive against such a majority. Moreover, where an Act involves a conflict with the Constitution, the certificate is a necessary part of the Act-making process and its existence must be made apparent.

The fact that the 1958 Bill did not have a certificate and was not passed by the necessary majority was not really disputed in the Supreme Court or before their Lordships' Board, but it has been argued that the court, when faced with an official copy of an Act of Parliament, cannot inquire into any procedural matter and cannot now properly consider whether a certificate was endorsed on the Bill. That argument seems to their Lordships unsubstantial, and it was rightly rejected by the Supreme Court. Once it is shown that an Act conflicts with a provision in the Constitution, the certificate is an essential part of the legislative process. The court has a duty to see that the Constitution is not infringed and to preserve it inviolate. Unless, therefore, there is some very cogent reason for doing so, the court must not decline to open its eyes to the truth. Their Lordships were informed by counsel that there were two duplicate original Bills and that after the Royal Assent was added one original was filed

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in the Registry where it was available to the court. It was therefore easy for the court, without seeking to invade the mysteries of parliamentary practice, to ascertain that the Bill was not endorsed with the Speaker's certificate.

The English authorities have taken a narrow view of the court's power to look behind an authentic copy of the Act. But in the Constitution of the United Kingdom there is no governing instrument which prescribes the law-making powers and the forms which are essential to those powers. There was, therefore, never such a necessity as arises in the present case for the court to take any close cognisance of the process of law-making. In *Edinburgh Railway Co. v. Wauchope*,4 however, Lord Campbell said: "All that a court of justice can do is to look to the Parliamentary roll." There seems no reason to doubt that in early times, if such a point could have arisen as arises in the present case, the court would have taken the sensible step of inspecting the original.

In the South African case of *Harris v. Minister of the Interior*,5 where a similar point arose, it appears that the court itself looked at the Bill. "The original," said Centlivres C.J., "which was signed by the Governor-General and filed with the Registrar of this Court bears the following endorsement by the Speaker: 'certified correct as passed by the joint sitting of both Houses of Parliament' …" Moreover, the point on which Fernando J. relied in the Supreme Court seems to their Lordships unanswerable. When the Constitution lays down that the Speaker's certificate shall be conclusive for all purposes and shall not be questioned in any court of law, it is clearly intending that courts of law shall look to the certificate but shall look no further. The courts

therefore have a duty to look for the certificate in order to ascertain whether the Constitution has been validly amended. Where the certificate is not apparent, there is lacking an essential part of the process necessary for amendment.

The argument that by virtue of certain statutory provisions the subsequent reprint of an Act can validate an invalid Act cannot be sound. If Parliament could not make a bill valid by purporting to enact it, it certainly could not do so by reprinting it, however august the blessing that it gives to the reprint.

Mr. Lawson further contended that since the original Bribery Act of 1954 had on it a certificate, any amendment of that Act was automatically franked and did not need a certificate. The

4 (1842) 8 Cl. & F. 710, 725.

5 [1952] 2 S.A.L.R. 428, 469.

effect of that argument would be that serious inroads into the Constitution could be made without the necessary majority provided that they were framed as amendments to some quite innocuous Act which had borne a certificate. No authority was cited on this point. Their Lordships feel no doubt that every amendment of the Constitution, in whatever form it may be presented, needs a certificate under section 29 (4).

There remains the point which is the real substance of this appeal. When a sovereign Parliament has purported to enact a bill and it has received the Royal Assent, is it a valid Act in the course of whose passing there was a procedural defect, or is it an invalid Act which Parliament had no power to pass in that manner?

The strongest argument in favour of the appellant's contention is the fact that section 29 (3) expressly makes void any act passed in respect of the matters entrenched on and prohibited by section 29 (2), whereas section 29 (4) makes no such provision, but merely couches the prohibition in procedural terms.

The appellant's argument placed much reliance on the opinion of this Board in *McCawley v. The King*.6 Just as in that case the legislature of the then Colony of Queensland was held to have power by a mere majority vote to pass an Act that was inconsistent with the provisions of the existing Constitution of the Colony as to the tenure of judicial office, so, it was said, the legislature of Ceylon had no less a power to depart from the requirements of a section such as section 55 of the Order in Council, notwithstanding the wording of section 18 and section 29 (4). Their Lordships are satisfied that the attempted analogy between the two cases is delusive and that *McCawley's case*,6 so far as it is material, is in fact opposed to the appellant's reasoning. In view of the importance of the matter it is desirable to deal with this argument in some detail.

In 1859 Queensland had been granted a Constitution in the terms of an Order in Council made on June 6 of that year under powers derived by Her Majesty from the Imperial Statute, 18 & 19 Vict. c. 54. The Order in Council had set up a legislature for the territory, consisting of the Queen, a Legislative Council and a Legislative Assembly, and the law-making power was vested in Her Majesty acting with the advice and consent of the Council and Assembly. Any laws could be made for the "peace, welfare and good government of the Colony," the phrase habitually employed to denote the plenitude of sovereign legislative power,

6 [1920] A.C. 691; 36 T.L.R. 387, P.C.

even though that power be confined to certain subjects or within certain reservations. The Constitution thus established placed no restrictions on the manner in which or the extent to which the law-making power could be exercised, either generally or for particular purposes, except for the provisions then customary as to reservation and disallowance of bills and a special provision as to the reservation of any bill which proposed the introduction of the elective principle into the make-up of the Legislative Council. Subject to this the legislature was expressly given full power and authority to alter or repeal the provisions of the Order in Council "in the same manner as any other laws for the good government of the Colony."

The legislature exercised this power in 1867 and passed what was called the Constitution Act of that year. By section 2 of the Act the legislative body, again the Queen acting with the advice and consent of the Council and Assembly, was given or declared to have power to make laws for the peace, welfare and good government of the Colony in all cases whatsoever. The only express restriction on this comprehensive power was contained in a later section, section 9, which required a two-thirds majority of the Council and of the Assembly as a condition precedent to the validity of legislation altering the constitution of the Council. As to this Lord Birkenhead L.C., delivering the Board's opinion, remarked7: "We observe, therefore, the Legislature in this isolated instance carefully selecting one special and individual case in which limitations are imposed upon the power of the Parliament of Queensland to express and carry out its purpose in the ordinary way, by a bare majority." This observation was coupled with the summary statement8: "The Legislature of Queensland is the master of its own household, except in so far as its powers have in special cases been restricted. No such restriction has been established, and none in fact exists, in such a case as is raised in the issues now under appeal."

These passages show clearly that the Board in *McCawley's case*9 took the view, which commends itself to the Board in the present case, that a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law. This restriction exists independently of the question whether the legislature is sovereign, as is the legislature of Ceylon, or whether the Constitution is "uncontrolled," as the Board held the Constitution of

7 [1920] A.C. 691, 712.

8 Ibid. 714.

9 [1920] A.C. 691.

Queensland to be. Such a Constitution can, indeed, be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with: and the alteration or amendment may include the change or abolition of those very provisions. But the proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process. And this is the proposition which is in reality involved in the argument.

It is possible now to state summarily what is the essential difference between the *McCawley case*9 and this case. There the legislature, having full power to make laws by a majority, except upon one subject that was not in question, passed a law which conflicted with one of the existing terms of its Constitution Act. It was held that this was valid legislation, since it must be treated as pro tanto an alteration of the Constitution, which was neither fundamental in the sense of being beyond change nor so constructed as to require any special legislative process to pass upon the topic dealt with. In the present case, on the other hand, the legislature has purported to pass a law which, being in conflict with section 55 of the Order in Council, must be treated, if it is to be valid, as an implied alteration of the Constitutional provisions about the appointment of judicial officers. Since such alterations, even if express, can only be made by laws which comply with the special legislative procedure laid down in section 29 (4), the Ceylon legislature has not got the general power to legislate so as to amend its Constitution by ordinary majority resolutions, such as the Queensland legislature was found to have under section 2 of its Constitution Act, but is rather in the position, for effecting such amendments, that that legislature was held to be in by virtue of its section 9, namely, compelled to operate a special procedure in order to achieve the desired result.

The case of *The Attorney-General for New South Wales v. Trethowan*10 also needs to be considered. The Constitution Act, 1902, of New South Wales was amended in 1929 by adding section 7A to the effect that no bill for abolishing the Legislative Council (or repealing section 7A) should be presented for the Royal Assent until it had been approved by a majority of electors voting on a

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9 [1920] A.C. 691.

10 [1932] A.C. 526; 48 T.L.R. 514, P.C.

submission to them made in accordance with the section. Since both the Acts of 1902 and 1929 were Acts of the local legislature they were confined, so far as legislative power was concerned, by the Colonial Laws Validity Act, 1865. Without complying with the requirements of section 7A both Houses passed Bills respectively repealing section 7A and abolishing the Legislative Council. The appeal was limited to the questions11 "whether the Parliament of New South Wales has power to abolish the Legislative Council of the State, or to alter its constitution or powers, or to repeal section 7A of the Constitution Act, 1902, except in the manner provided by the said section 7A." In holding that Bills could not lawfully be presented until the requirements of section 7A had been complied with, the Board relied on section 5 of the Colonial Laws Validity Act, 1865. That section provided that "every representative legislature shall, in respect of the colony under its jurisdiction, have … full power to make laws respecting the constitution, powers and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony." The effect of section 5 of the Colonial Laws Validity Act, which is framed in a manner somewhat similar to section 29 (4) of the Ceylon Constitution was that where a legislative power is given subject to certain manner and form, that power does not exist unless and until the manner and form is complied with. Lord Sankey L.C. said12: "A Bill, within the scope of subsection (6) of section 7A, which received the Royal Assent without having been approved by the electors in accordance with that section, would not be a valid Act of the legislature. It would be ultra vires section 5 of the Act of 1865."

The careful judgment of Centlivres C.J., with which the four other members of the Appellate Division of South Africa concurred, in the case of *Harris v. Minister of the Interior*13 expresses the same point of view.

The legislative power of the Ceylon Parliament is derived from section 18 and section 29 of its Constitution. Section 18 expressly says "save as otherwise ordered in subsection (4) of section 29." Section 29 (1) is expressed to be "subject to the provisions of this order." And any power under section 29 (4) is expressly subject to its proviso. Therefore in the case of

11 [1932] A.C. 526, 528.

12 Ibid. 541.

13 [1952] 2 S.A.L.R. 428.

amendment and repeal of the Constitution the Speaker's certificate is a necessary part of the

legislative process and any Bill which does not comply with the condition precedent of the proviso, is and remains, even though it receives the Royal Assent, invalid and ultra vires.

No question of sovereignty arises. A Parliament does not cease to be sovereign whenever its component members fail to produce among themselves a requisite majority, e.g., when in the case of ordinary legislation the voting is evenly divided or when in the case of legislation to amend the Constitution there is only a bare majority if the Constitution requires something more. The minority are entitled under the Constitution of Ceylon to have no amendment of it which is not passed by a two-thirds majority. The limitation thus imposed on some lesser majority of members does not limit the sovereign powers of Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority.

The case of *Thambiayah v. Kulasingham*14 is authority for the view that where invalid parts of the statute which are ultra vires can be severed from the rest which is intra vires it is they alone which should be held invalid.

Their Lordships therefore are in accord with the view so clearly expressed by the Supreme Court "that the orders made against the respondent are null and inoperative on the grounds that the persons composing the Bribery Tribunal which tried him were not lawfully appointed to the Tribunal." They will accordingly humbly advise Her Majesty to dismiss this appeal. In accordance with the agreement between the parties the appellant will pay the costs of the respondent.

Solicitors: T. L. Wilson & Co.; Hatchett Jones & Co.

C. C.

14 (1948) 50 N.L.R. 25, 37.

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