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39, 1965

39/1965

IN THE PRIVY COUNCIL

No. 25 of 1965

ON APPEAL FROM

THE SUPREME COURT OF CEYLON

B E T W E E N

1. DON JOHN FRANCIS DOUGLAS LIYANAGE
2. MAURICE ANN GERARD DE MEL
3. FREDERICK CECIL DE SARAM
4. CYRIL CYRUS DISSANAYAKE
5. SIDNEY GODFREY DE ZOYSA
6. GERARD ROYCE MAXWELL DE MEL
7. NOEL VIVYAN MATTHYSZ
8. BASIL RAJANDIRAM JESUDASON
9. TERENCE VICTOR WIJESINGHA
10. LIONEL CHRISTOPHER STANLEY JIRASINGHE
11. VITHANAGE ELSTER PERERA

Appellants

- and -

T H E Q U E E N

Respondent

C A S E FOR THE APPELLANTS (PART I)

1. This is an appeal against the Judgment and Sentence of the Supreme Court of Ceylon (sitting without a jury) dated the 6th April 1965 whereby the Appellants were each convicted of 3 offences and sentenced to 10 years rigorous imprisonment and forfeiture of all their property.

2. The issues arising in this Appeal are inter alia -

(a) Whether under the Constitution of Ceylon, the Criminal Law (Special Provisions) Act No.1 of 1962 and/or the Criminal Law Act No. 31 of 1962 or parts thereof are ultra vires the Ceylon Parliament; and

(b) whether the Criminal Law Act No. 31 of 1962 operated retrospectively to deprive the Appellants of their right to trial by jury: if it did not so operate it is submitted that the trial Court had no jurisdiction to try the Appellants.

Special leave to appeal was granted on the 14th July 1965 with a direction that argument on the above issues should be heard first upon separate Cases to be lodged for the purpose.

3. The Appellants were tried together with 13 other Defendants on three charges namely that they conspired to wage war against the Queen, that they conspired to overawe by means of criminal force or the show of criminal force the Government of Ceylon and that they conspired to overthrow otherwise than by lawful means the Government of Ceylon by law established. All three offences were alleged to have been committed on or about the 27th January 1962 and were punishable under Section 115 of the Penal Code (as amended in some respects after that date). The other 13 Defendants referred to, except for one who died in the course of the trial, were acquitted.

4. On the 13th February 1962 the Government of Ceylon issued a White Paper setting out details of an alleged coup planned to be carried out against the Government on the 27th January 1962. (Exhibit 4D1). This listed 30 persons who were alleged to have participated in the coup, the list including all of the Appellants. The White Paper purported to describe what these persons planned to do and to catalogue the events of the coup. An interrogation of the 3rd Appellant on the 28th January 1962 was referred to in some detail and a number of things alleged to have been said by him were quoted. In the last paragraphs of the White Paper the Government stated that it took a serious view of "the abortive Coup d'Etat on the 27th January 1962" and it concluded by emphasising that deterrent punishment of a severe character must be imposed on all who were guilty of the attempted coup and that the people of Ceylon might rest assured that the Government would do its duty by them.

5. On the 16th March 1962 the Criminal Law Special Provisions Act No. 1 of 1962 received the Royal Assent. The Act was expressed to operate retrospectively from the 1st January 1962 (S. 19) and to be confined in its operation to those accused of implication in the offences against the state on or about the 27th January 1962 (S. 21). It provided for special powers of arrest and detention and the suspension in the case of these

accused of certain provisions of the Prisons Ordinance and rules made thereunder (S. 2). It established a new offence for these accused by way of amendment of Section 115 of the Penal Code and altered the punishment for these accused to provide for a discretionary sentence of death, a minimum period of rigorous imprisonment of 10 years and compulsory confiscation of property (ss. 4, 5 and 6). It provided that, where the Minister of Justice issued a directive under S.440A of the Criminal Procedure Code they should be tried before the Supreme Court at Bar without a jury, the three judges should be nominated by the Minister of Justice (S.9). It provided that the Attorney General might before or at any stage during the trial pardon any accomplice with a view to obtaining his evidence (S.11). It altered the rules of evidence for the purposes of the trial of these accused, so as to make admissible confessions to certain public officers which were otherwise inadmissible under S.25 of the Evidence Ordinance or S.122(3) of the Criminal Procedure Code; it moreover made such confessions admissible against persons charged together with the maker of the confession (S.12), and further, (by the same section), reversed a vital rule of the general law by providing that the burden of proving that any such statement was caused by an inducement, threat or promise, should lie on the person asserting it to be so caused, and this even though such person might not be the maker of the statement and might accordingly be wholly ignorant of the circumstances in which the statement thus made admissible as against him came into existence. It deprived these accused of the protection of Chapter XII of the Criminal Procedure Code relating to the investigation of offences by the police (S.13). Lastly it deprived the accused of the right of appeal to the Court of Criminal Appeal (S.15).

6. On the 3rd October 1962 the three judges nominated by the Minister of Justice in accordance with S.9 of Act No. 1 of 1962 upheld a preliminary objection, made on behalf of the accused, that they had no jurisdiction to try the case. They held inter alia that S.9 of Act No. 1 of 1962 was ultra vires the Ceylon Constitution because (a) the power of nomination conferred on the Minister was an interference with the exercise by the judges of the Supreme Court of the strict judicial power vested in them by virtue of their appointment

in terms of S.52 of the Constitution, or was in derogation thereof; and (b) the power of nomination was one which had hitherto been invariably exercised by the Judicature as being part of the exercise of the judicial power of the State and could not be reposed in any one outside the Judicature. In the course of their judgment the Court stated that Ceylon did not have a sovereign Parliament in the sense in which that expression was used in reference to the Parliament of the United Kingdom and stated that the Attorney General appearing for the Crown had conceded that a division of the three main functions of Government was recognized in the Ceylon Constitution. The order and judgment of the Court are reported in 64 C.N.L.R. 313.

7. After the said judgment, the Criminal Law Act No. 31 of 1962 was passed. This Act provided inter alia that the trial of any person for any offence punishable under S.115 of the Penal Code should be held before the Supreme Court at Bar by three judges without a jury (S.3(1)); that such a trial might be held either upon indictment or upon information exhibited by the Attorney General and that persons so tried should not be admitted to bail except with the consent of the Attorney General (S.(6) & (7)). S.9 of Act No.1 of 1962 was repealed (S.2(1)). The information in the case of the proceedings before the Court nominated by the Minister of Justice was to be deemed to have had no force or effect in law and any action or proceeding instituted by such information was to be deemed never to have been instituted, commenced or initiated (S.6).

8. The Appellants and the other accused raised further preliminary objections before the new court constituted under Act No. 31 of 1962. On the 25th February 1963 the court held inter alia that the retroactive amendment of S.115 of the Penal Code by sections 6 and 19 of Act No. 1 of 1962 was not invalid and that the Ceylon Parliament had power to enact ex post facto legislation, but expressed their aversion to such legislation, particularly where an offence was retrospectively created under a law applicable only to an alleged conspiracy in January 1962. (See 65 C.N.L.R. 73 at p.84). The Court further held on the 28th February 1963 that before the Defendants tendered their general plea and prior to the commencement

of the trial proper, they were entitled to lists of prosecution witnesses and documents, copies of statements made to investigating officers by prosecution witnesses and Defendants which the Attorney General intended to produce in evidence, and copies of the documents on which the prosecution relied. They rejected the Defendants' contention that Acts No. 1 and 31 of 1962 were bad because they were enacted particularly against these Defendants and because the Ceylon Parliament had no power to make such laws. The Court held that this plea raised no matters which they had not already dealt with in their order of the 25th February on the plea to jurisdiction. (65 C.N.L.R. 337).

9. The Appellants respectfully submit that for the different reasons set out below, the powers of the Ceylon Parliament to pass "laws" under Section 29 (1) of the Ceylon Constitution do not extend to passing laws which are not general laws, but are directed against individuals only, and which purport to provide for a special mode of trial, special rules of evidence, special offences and special punishments for particular individuals contrary to the general law of the land.

10. Firstly it is submitted that the Roman-Dutch Law operated to prevent the Ceylon Parliament from passing laws directed against individuals only. Ceylon was originally a conquered and ceded colony. It is submitted that in accordance with the principles laid down in Campbell v. Hall 1774 1 Cowp. 204 (which decision was applied to Ceylon in Abeysekera v. Jayatilleke 1932 A.C. 260) the laws in force in Ceylon continued in force except in so far as they were altered by the Crown. The law in force was Roman-Dutch Law and the Proclamation of 1797 expressly declared that (subject to amendment by appropriate legislation) the administration of justice would be in accordance with the laws and institutions of the Dutch Government established in Ceylon.

11. Under the Roman-Dutch Law laws must bind the citizens equally and rights should be defined generally and not for individuals (Voet Commentary in the Pandects, Gane's translation Bk. I Title 3 Section 5, at p.34). See also idem Section 11 at p.39; Nathan's Common Law of South Africa Vol. 1 p.35; Pereira's Laws of Ceylon p.135).

12. Secondly it is submitted that the legislative powers of the Ceylon Parliament are derived from, and cannot exceed, the powers of the Royal Prerogative. The powers granted to the Ceylon Parliament under the 1946 Constitution were granted by Order in Council. The plenary powers of the Imperial Parliament were not transferred to the Ceylon Parliament by the Ceylon Independence Act 1947, since the removal of obstacles to the legislative powers of the Ceylon Parliament effected by Section 1 and the First Schedule of that Act did not enlarge the powers which the King in Council could bestow on the Ceylon Parliament. Accordingly, the decision of Hodge v. Queen 9 A.C. 117 at 132 on which the Supreme Court relied in 65 C.N.L.R. 73 at p.83 does not apply.

13. The powers of the Royal Prerogative were limited in that the King in Council had no power to legislate contrary to certain fundamental principles. Thus in Campbell v. Hall 1774 1 Cowp at p.209 Lord Mansfield said:-

> "If the King (and when I say the King, I always mean the King without the concurrence of Parliament) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from power of Parliament, or give him privileges exclusive of his other subjects, and so in many other instances which might be put."

14. It is respectfully submitted that the fundamental principles referred to by Lord Mansfield in Campbell v. Hall (supra) are found expressed in Lord Coke's opinion on the construction of Magna Carta in 2 Co. Inst. 51, where he says that the term "law of the land" was used so that the law might extend to all; and in Blackstone's Commentaries where he states "And first it (i.e. law) is a rule: not a transient order from a superior to or concerning a particular person, but something permanent, uniform and universal. Therefore a particular act of the legislature to confiscate the goods of Titius ... is rather a sentence than a law."

(1 Bl. Com. 44). The passing of laws against individuals is accordingly contrary to the fundamental principles referred to.

15. Further it is respectfully submitted that the passing of ex post facto laws is contrary to such fundamental principles. The Appellants adopt the explanation of the phrase ex post facto laws (as distinguished from mere retrospective legislation) given in the American case of Calder v. Bull 3 Dallas 386 and accepted by Willis J. in Phillips v. Eyre L.R 6 Q.B. at 26 as meaning those laws "that create or aggravate the crime or increase the punishment or change the rules of evidence for the purpose of conviction".

16. Thirdly the Appellants respectfully submit the Supreme Court rightly held in 64 C.N.L.R. 313 that the Ceylon Constitution recognizes the separation of powers and that the powers of the Ceylon Parliament are accordingly limited. It is submitted that some guidance can be derived from American decisions, where it has been repeatedly laid down that it is the peculiar province of "legislation" to prescribe general rules for the government of society. "The application of the rules to individuals in society, would seem to be the duty of other departments" (per Marshall C.J. in Fletcher v. Peek 6 Cranch 135). It is further submitted that the prohibition against the passing of laws limited in their operation to individuals does not depend on express prohibitions in the American constitution, but derives from the doctrine of separation of powers (see Schwartz "American Constitutional Law" at p.13 and "A Commentary on the Constitution of the United States" by the same author Volume I at p.117).

17. Fourthly, the Appellants submit that the express prohibitions in Section 29(2) of the Ceylon Constitution indicate that the Ceylon Parliament has no power to pass laws discriminating against individuals. It is not conceivable that the Constitution intended to prohibit discrimination against communities whilst permitting discrimination against individuals. Further the prohibition against discrimination contained in S.29(2) could be evaded if legislation discriminating against individuals were intra vires.

18. For the above reasons the Appellants submit that they were wrongly tried under the provisions

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of an invalid enactment which gave invalid directions to the judges to ignore the law of the land in their particular case.

19. The provisions of the special legislation passed against them operated to the detriment of the Appellants in the following ways:-

(a) The investigation which extended over a period of about six months prior to trial and which continued during the trial was not, as it normally would have been, supervised by a Magistrates' Court under Chapter 12 of the Criminal Procedure Code. Instead, it was conducted by the police under the direction of a Minister who was an interested party in that he had been accused in Parliament and elsewhere of planning a dictatorship and in that the defence of some of the Appellants was that the plan that they had organised was for the purpose of countering a Coup d'Etat planned by this Minister. The fact that there was no supervision by a Magistrates' Court made possible what the Court held to be the "cruel" and "disgraceful" treatment of the Appellants. This was calculated to break down their will to defend themselves. During the two months of solitary confinement to which they were subjected, they were not allowed to see their lawyers; and even thereafter this right was accorded to them only perfunctorily until the Judges at the abortive trial ordered the Appellants to be placed in fiscal's custody to which they would have been normally committed had they been brought before a Magistrate under Chapter 12.

p.103, l.16
p.227, l. 9
p.219, l.24
p. 9, l. 4
p.217, l. 4
p.229, l. 2
p.126, ll.18, 20.
pp.125-6
/65 C.N.L.R. 290/7

(b) The special legislation deprived the Appellants of the advantage of an Inquiry under Chapter 16 of the Criminal Procedure Code preliminary to the trial. The absence of a preliminary inquiry contributed to the unsatisfactory conduct of the trial whereby the Appellants were substantially deprived of a fair opportunity of defending themselves. In particular, the Appellants would have had the advantage of an explanation, at an early stage, of the true nature of the charges and of the

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evidence that would be led against them at the trial; and, in addition, they would have had the advantage of cross-examining the prosecution witnesses prior to the trial, and of submitting to the Magistrate that they ought not to be committed for trial.

(c) The special legislation precluded objection to the prosecution proving confessional statements made by some Defendants (and in particular the 3rd Appellant) at a time when the general law (Section 25 of the Evidence Ordinance) prohibited the use of such statements at a trial. Thus the 3rd Appellant was convicted very largely upon the strength of such a statement (P.159) which the Court described as "the most damning piece of evidence produced by the prosecution against him". Moreover, although the Court indicated that it did not intend to use this statement in evidence against the other accused, in the result it did use the statement against them as showing "what the conspiracy was for" and "the object they intended to achieve by the various steps they took". Further the special legislation removed the safeguard provided by Section 122(3) of the Criminal Procedure Code that statements made in the course of a Police investigation should not be used at a trial except for proving that a witness, including an accused person, giving evidence at a trial, had made a contradictory statement during the investigation. Again, persons under interrogation, including the Defendants, were made to sign their statements in breach of Section 122 of the Criminal Procedure Code in force at the time the statements were made. This illegality was retrospectively validated for the Defendants' trial by the special legislation. At the trial the prosecution tendered in evidence and the Court acted upon statements made in the course of the investigation by persons who gave evidence and who were found to be accomplices or participants in the alleged conspiracy. The Court found corroboration of or support

p.261, 1.22
p.15, 1.18
p.261, 1.24
p.256, 1.29
p.260, l. 7
p. 272, ll. 27,32
p.352, ll.3-12
p.368, 1.16
p.383, l. 1
p.415, 1.22

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for the evidence of these persons in their statements and, in some cases, where a witness had made contradictory statements, accepted, as providing corroboration of his evidence, that statement which was consistent with his evidence while rejecting the other statement which was not. Lionel Senanayake, Stanley Senanayake, Ratnasingham, Arumugam, Jayatilleke and Rajapakse were witnesses whose statements, although not admissible for this purpose at the time they were made, were relied upon by the Court as corroborating or supporting their testimony. The Appellants' complaint in regard to statements made at the investigation is aggravated by the fact that under the special provisions made for their trial a statement made by one Defendant was, contrary to the general law and natural justice, declared to be admissible against all the Defendants.

p.120, l. 6
p.373, l.38-
p.374, l. 7
p.408, ll.4-14
p.303, l.10
p.330, l.22
p.105, ll.12-24
p.329, l. 33

(d) The discretion vested in the Court under the general law to fix an appropriate sentence of imprisonment was (to the regret of the learned Judges) taken away in the case of the Appellants. The Court in its Judgment thus expressed its view of the removal of its discretion as to punishment -

p.441, l.12

"But we must draw attention to the fact that the Act of 1962 radically altered ex post facto the punishment to which the Defendants are rendered liable. The Act removed the discretion of the Court as to the period of sentence to be imposed and compels the Court to impose a term of 10 years' imprisonment, although we would have wished to differentiate in the matter of sentence between those who organized the conspiracy and those who were induced to join it. It also imposes a compulsory forfeiture of property. These amendments were not merely retroactive: they were also ad hoc. Applicable only to the conspiracy which was the subject of the charges we have tried. We are unable to understand this discrimination",

(e) Finally, the deprivation of the Appellants' right of appeal to the Court of Criminal Appeal from the judgment of a Court after a trial prescribed by the special provisions prevented the Appellants from seeking the normal redress the Appellants would have had under the provisions of the Court of Criminal Appeal Ordinance (Chapter 7 of the 1956 Edition of the Legislative Enactments).

20. In regard to the issue raised in paragraph 2(b) above, namely whether the trial Court had jurisdiction to try the Appellants without a jury, it is humbly submitted that section 3 of the Criminal Law Act No.31 of 1962 which provided that "the trial of any person for any offence punishable under sections 114, 115 and 116 of The Penal Code shall be held before The Supreme Court by three judges without a jury" and under which the Supreme Court purported to try the Appellants, repealed, but not retrospectively, the provisions of the Criminal Procedure Code prescribing trial by jury for such offences, with the result that the Appellants continued even after the Act came into force to enjoy the right to a trial by jury upon indictment after an order of committal by a magistrate.

21. The provisions of the Interpretation Ordinance (Chapter 2 of the Legislative Enactments of Ceylon 1956 Edition) relevant to the construction of the Criminal Law Act are as follows:-

"6. (3) Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of an express provision to that effect, affect or be deemed to have affected -

(a) the past operation of or anything duly done or suffered under the repealed written law;

(b) any offence committed, any right, liberty, or penalty acquired or incurred under the repealed written law;

(c) any action, proceeding, or thing pending or incompleted when the

repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal."

22. It is submitted that the right or privilege not to be punished for certain grave crimes except upon a verdict of a jury is a substantive right and not a mere matter of procedure. This right or privilege was granted to the inhabitants of Ceylon by Royal Charter of 1810 and reaffirmed in the Royal Charter of Justice of 1833. The Proclamation of 1811 which proclaimed the Royal Charter of 1810 in Ceylon refers to the right of trial by jury in the following terms:

"His Majesty's Charter having been received containing various important provisions for the better administration of justice in these Settlements, especially the introduction of a Trial by Jury in criminal cases ..... , the Lieutenant Governor cannot refrain from expressing his congratulations to the Dutch and native inhabitants upon the gracious act of Royal Munificence by which His Majesty had been pleased to admit them to a participation of privileges with His natural subjects".

Ever since, the inhabitants of Ceylon, no less than the people of the United Kingdom, have regarded Trial by Jury in cases of grave crime as a right ensuring the liberty of the subject; and such a fundamental right cannot be taken away except by a clear and (in Ceylon) "express" statutory provision.

23. The right of trial by jury so granted was confirmed, re-enacted and regulated by sections 10 and 216 of the Criminal Procedure Code /Chapter 20 of the 1956 Edition of the Legislative Enactments/. Section 10 of the Criminal Procedure Code reads:

"10. Subject to the other provisions of this Code any offence under the Penal Code may be tried by the Supreme Court or by any other court by which such offence is shown in the eighth column of the First Schedule to be triable."

The First Schedule makes offences under

sections 114 and 115 triable only by the Supreme Court.

Section 216 of the Criminal Procedure Code reads:

> "216. (1) All trials before the Supreme Court shall be by jury before a Judge or a Commissioner of Assize, provided always that the Chief Justice may in his discretion order that any trial shall be a trial at Bar and thereupon such trial shall be held at Colombo by jury before three judges.
>
> (2) In every trial before the Supreme Court the prosecution shall be conducted by the Attorney-General or the Solicitor-General or a Crown Counsel or by some advocate generally or specially authorized by the Attorney-General in that behalf."

24. In the circumstances set out below, it is submitted that the Appellants had acquired before the 4th November, 1962, (the date of commencement of the Criminal Law Act No.31 of 1962), the right not to be punished for the offences which they are alleged to have previously committed except upon the verdict of a jury:

(i) Upon the accusation that the Appellants had on or about January 27th 1962 conspired to overthrow the Government, they were arrested on various dates between the 27th January and the 12th February 1962 (except the 6th Defendant who was arrested on the 18th July 1962 on his surrendering to Court after an order for his arrest had been issued). The Appellants since their arrest, were in continuous custody, substantially upon the same charges, until the date of their convictions.

(ii) The White Paper prepared by Felix Dias Bandaranayake, Parliamentary Secretary of the Ministry of External Affairs, and read before the House of Representatives on the 13th February 1962 (Exhibit 4D1), as hereinbefore mentioned, named the Appellants as persons who had been arrested and detained for their alleged participation in an attempted "coup" and stressed that deterrent punishment of a

severe character should be imposed upon those guilty.

(iii) The Criminal Law (Special Provisions) Act No. 1 of 1962, passed on the 6th March, 1962, purported to make express provision for the trial of the Appellants for the offences against the State alleged to have been committed on the 27th of January 1962. It purported to provide for a direction to be given by the Minister of Justice to the Attorney-General (which direction was to be final and conclusive and not to be called in question in any Court) to bring the Appellants to be tried at Bar, without jury, by three Judges of the Supreme Court to be nominated by the Minister of Justice.

(iv) On the 23rd June 1962, the Minister of Justice gave the direction contemplated by the Criminal Law (Special Provisions) Act No.1 of 1962 and the Attorney-General exhibited an information dated the 23rd June 1962 against the Appellants before the Court nominated by the Minister of Justice. Of the three charges in the said information, two were identical with and the other substantially the same as the charges on which the Appellants were convicted in the present case.

(v) At the trial on the said information, objection was taken, on behalf of the Appellants, to the jurisdiction of the Judges on the ground that the provisions of the Criminal Law (Special Provisions) Act No.1 of 1962 authorising the Minister of Justice to nominate Judges to try the Appellants without jury was unconstitutional. The Judges upheld the objection by their Judgment dated the 3rd October 1962 (reported at 64 Ceylon New Law Reports at page 313); but, rejecting an objection by the defence, upheld a contention on behalf of the Crown that the Appellants should be retained in fiscal's custody as accused persons.

(vi) The Criminal Law (Special Provisions) Act No.1 of 1962, while purporting to provide a special procedure for the trial of the Appellants for the alleged offences, had not taken away the procedure of Trial by Jury; and

at the end of the abortive trial three matters were clear; firstly, that the Attorney-General intended to take further proceedings against the Appellants for the alleged offences; secondly, that the only course open to the Attorney-General under the law as it stood on October 3rd 1962 was to indict the Appellants to stand their trial for the alleged offences before a Judge and Jury (after committal by a Magistrate); and thirdly, that the Appellants had acquired the right to a Trial by Jury at this stage, if they had not acquired it earlier, in respect of the offences for which they had been committed to custody pending trial.

25. As to the time when the right of trial by jury is acquired, within the meaning of Section 6(3)(b) of the Interpretation Ordinance /Chapter 2 of the Legislative Enactments of Ceylon 1956 Edition/, it is more specifically submitted -

(a) that the right or immunity not to be punished except upon the verdict of a jury is a substantive right of a constitutional character and is a vested or acquired right in respect of acts which have been or which may be alleged to have been already committed. The Appellants had acquired, prior to the date of the commencement of the Criminal Law Amendment Act 31 of 1962, the said right in respect of the offences alleged to have been committed on or about the 27th January 1962.

(b) Alternatively, that the said right was acquired by the Appellants when it was made clear to the Appellants that they were held, and were to be tried, for offences connected with an attempted overthrow of the Government. It is submitted that by reason of their prolonged interrogation by the police, the publication of the White Paper, their being in fact charged at the abortive trial and their continued detention thereafter, all of which events took place before the date of commencement of the Criminal Law Amendment Act No.31 of 1962, it was made clear to the Appellants that they were to be so held and so tried.

(c) That in any event the said right was acquired when the Appellants were charged before

the Court specially created by the Criminal Special Laws Act No.1 of 1962 and that the provisions of the Criminal Law Amendment Act No.31 of 1962 deeming the charges not to have been made are ineffective in law as being ad hominem legislation ultra vires the Parliament of Ceylon for the reasons already submitted.

26. The Criminal Law Amendment Act No.31 of 1962 does not contain any express provision for the retrospective operation of the Act so as to take away the right which the Appellants had acquired before the commencement of the Act. It is submitted that had this been the intention of the legislature it would have been quite simple to have included a provision similar for example to that which is to be found in the Federation of Malaysia in Regulation 4 of the Emergency (Criminal Trials) Regulations, 1964 made under the Emergency (Essential Powers) Act, 1964, which Regulation provides -

> "Where a person is charged with any offence against any written law (whether committed before or after the commencement of these Regulations) and the Public Prosecutor certifies in writing that the case is a proper one for trial under these Regulations, such case shall be tried by a Judge without the aid of assessors and disposed of in accordance with the provisions of these Regulations."

In the words of Best C.J. in Looker v. Halcomb (130 E.R. 738 at 740) "an Act of Parliament which takes away the right of trial by jury, and abridges the liberty of the subject, ought to receive the strictest construction: nothing should be holden to come under its operation that is not expressly within the letter and spirit of the act."

27. The Appellants humbly submit that this Appeal should be allowed, and their convictions quashed for the following amongst other

R E A S O N S

1. BECAUSE the Ceylon Parliament had no power to pass the Criminal Law (Special Provisions) Act No. 1 of 1962 or the Criminal Law Act No. 31 of 1962.

2. BECAUSE the Constitution of Ceylon recognises and is based upon a separation of powers, and the purported provisions of the said "Acts" constituted an interference with the judicial power under the guise of legislation.

3. BECAUSE the powers of the Ceylon Parliament under the Constitution are strictly legislative powers and do not extend to penal provisions directed against individuals and providing for a particular case.

4. BECAUSE the Ceylon Parliament has no power to pass penal laws discriminating against individuals.

5. BECAUSE under the Roman-Dutch Law, which continues in Ceylon, laws must apply generally and may not be made expressly to operate to the detriment of particular individuals.

6. BECAUSE the powers of the Ceylon Parliament to make laws are limited by the principles laid down in Campbell v. Hall.

7. BECAUSE in the absence of any express provision for its retrospective operation, Section 3 of the Criminal Law Amendment Act No. 31 of 1962 did not take away the right which the Appellants had acquired before the Act to be tried by jury.

8. BECAUSE the trial Court had no jurisdiction to try the Appellants without a jury.

E.F.N. GRATIAEN

DICK TAVERNE

WALTER JAYAWARDENA

MONTAGUE SOLOMON

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APPELLANTS

- and -

T H E Q U E E N

RESPONDENT

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