(1965) AC 172

Privy Council Appeal No. 20 *of* 1963

The Bribery Commissioner – – – – – – – *Appellant*

v.

Pedrick Ranasinghe – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH MAY, 1964

Present at the Hearing:
VISCOUNT RADCLIFFE.
LORD EVERSHED.
LORD MORRIS OF BORTH-Y GEST.
LORD HODSON.
LORD PEARCE.
[*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 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* [1963] A.C. 103 at p.118 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 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. The Bribery Commissioner* ((1961) 63 N.L.R. 313 at 314) 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 fifteen 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 cases." 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 it 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). Both according to the ordinary meaning of words and according to the more precise tests applied by the House of Lords in *G.W.R. v. Bater* ([1922] 2 A.C.1 at 15) membership of the Panel is an office. Their Lordships are unable to draw any inferences from the Courts Act 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 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 1954 Act 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 enquire 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 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* ([1841] 8 Clark and Finnelly 710 at 725), 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* ([1952] 2 S.A.L.R. 428 at 469), 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 of 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 Speakers' 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 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 in 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 upon the opinion of this Board in *McCawley v. The King* [1920] A.C.691. 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, 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 6th June of that year under powers derived by Her Majesty from the Imperial Statute, 18 & 19 Vic. 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, even though that power be confined to certain subjects or within certain reservations. The Constitution thus established placed no restrictions upon 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, remarked " 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 " ([1920] A.C. at 712). This observation was coupled with the summary statement at page 714, " The Legislature of Queensland is the master of its own household, except 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 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 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 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* ([1932] A.C.526) 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 submission to them made in accordance with the section. Since both the Acts of 1902 and 1909 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 questions (see p.528) " 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, Orders in Council, or Colonial law for the time being in force in the 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 said (at p.541) " 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* (above) 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 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. Kalasingham* (50 N.L.R. 25 at 37) 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.

(89900) Wt. 8052/97 100 6/64 Hw.

In the Privy Council

THE BRIBERY COMMISSIONER

v.

PEDRICK RANASINGHE

DELIVERED BY
LORD PEARCE

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