32, 1970

IN THE PRIVY COUNCIL

No. 18 of 1969

ON APPEAL FROM

THE SUPREME COURT OF THE ISLAND OF CEYLON
(CRIMINAL JURISDICTION)

B E T W E E N:

EDGAR MAHINDA FERNANDO Appellant

- and -

THE QUEEN Respondent

CASE FOR THE APPELLANT

1. This is an Appeal in forma pauperis from the Judgment of the Supreme Court of Ceylon (Alles, J. and De Kretser, J.) dated the 14th day of March 1969, whereby the said Court dismissed the Appellant's appeal against his conviction on a charge of bribery by the District Court, Colombo, which Court sentenced him to three years' rigorous imprisonment and a fine of Rs.1000/- and in default one year's rigorous imprisonment. pp. 9-16 l.7 p.5

2. The Appellant was indicted before the District Court of Colombo on three charges as follows:- pp. 1-2

1. That on or about the 14th day of June, 1963 at Narahenpita in the division of Colombo within the jurisdiction of this Court, you being a public servant, to wit, Internal Audit Officer, Ceylon Transport Board, did solicit from one Malalagama Badalge Ariyasena a gratification of a sum of Rs. 250/-, which you were not authorised by law or the terms of your employment to receive, and that you have thereby committed an offence punishable under Section 19 of the Bribery Act.

2. That on or about the 16th day of July, 1963, at Narahenpita in the course of the same transaction, you being a public servant, to wit, Internal Audit Officer, Ceylon Transport Board, did accept from Malalagama Badalge Ariyasena a gratification of a sum of Rs. 100/-,

which you were not authorised by law or the terms of your employment to receive and that you have thereby committed an offence under Section 19 of the Bribery Act.

3. That on the 16th day of July, 1963, at Narahenpita in the course of the same transaction, you did accept from the said Malalagama Badalge Ariyasena a gratification of a sum of Rs. 1000/- as an inducement for procuring employment for the said Malalagama Badalge Ariyasena as a driver in an establishment of the Government, to wit, the Ceylon Transport Board, and that you have thereby committed an offence punishable under Section 20 of the Bribery Act.

p.2. l.27-28 3. The District Court acquitted the Appellant on Counts 1 and 2 but convicted him on Count 3.

p.9. l.32 4. At the hearing of the Appeal before the Supreme Court, the only ground relied on by the Appellant was that the employees of the Ceylon Transport Board were not liable to be convicted of bribery under the provisions of the Bribery Act since the Ceylon Transport Board is not a Scheduled Institution under the Bribery Act. It was further p.10 l.2 submitted that Section 11 of the Motor Transport Act (No. 48 of 1957) which declared that the Ceylon Transport Board was "deemed to be a scheduled institution within the meaning of the Bribery Act" had no legal effect since it was passed by a simple and not a two-thirds majority of Parliament.

pp. 9-16 5. The learned Judges of the Supreme Court, Alles, J. and De Kretser J., both rejected these submissions and held that Section 11 of the Motor Transport Act was capable of being passed by a simple majority and was good in law.

6. Certain provisions of the Bribery Act, the Constitution of Ceylon, and Section 11 of the Motor Transport Act are relevant to this Appeal and are reproduced in an Annexure herein.

7. The Appellant respectfully submits that the Judgment of the Supreme Court is wrong, and ought to be reversed. The Bribery Act 1954 contains provisions which affect the Constitution of Ceylon, (The Ceylon (Constitution) Order in Council 1946). The said Act was passed as an indivisible whole by a two-thirds majority of Parliament as provided in Section 29(4) of the said Constitution. Section 2(1) of the Bribery Act reaffirms that any provision of the Act which is in conflict or inconsistent with the Constitution of Ceylon can only be valid if it complies with the requirement of Section 29(4) of the Constitution i.e., is passed with a two-thirds majority. By virtue of Section 2 of the Bribery Act, it is not competent for the Executive or Legislature of Ceylon to amend

the Schedule of the Bribery Act (which contains the Scheduled Institutions) otherwise than by the procedure laid down in Section 84 of the Bribery Act i.e., by the Governor-General, on the advice of the Minister of Justice, by Proclamation in the Gazette; and provided always that the said amendment does not affect the Constitution. Consequently, an amendment to the said Schedule by any other way e.g. by Section 11 of the Motor Transport Act is ineffective. If contrary to this submission, it is possible to amend the said Schedule by Section 11 of the Motor Transport Act, such amendment, if it affects the Constitution, can only be passed by a two-thirds majority. It is respectfully submitted that the amendment sought to be introduced by Section 11 of the Motor Transport Act was one which affects the Constitution in that the class of persons who can be found guilty of bribery has been enlarged. By Section 29 of the Bribery Act persons found guilty of bribery are automatically disqualified from certain privileges and rights which they have under the Constitution of Ceylon. It is therefore submitted that the amendment of the Schedule by Section 11 of the Motor Transport Act was an amendment which was in conflict or inconsistent with the Constitution of Ceylon and hence required a two-thirds majority to be valid. The Appellant finally submits that the doctrine of severability to which the learned Judges of the Supreme Court referred can have no application in this case since there is in fact nothing to sever.

8. The Appellant submits that this appeal should be allowed and the conviction and sentence against him should be quashed for the following among other

REASONS

1. BECAUSE the Ceylon Transport Board is not a scheduled institution under the Bribery Act.

2. BECAUSE Section 11 of the Motor Transport Act has no legal effect for the reasons given in paragraph 7 above

3. BECAUSE the doctrine of severability cannot be applied in this case.

4. BECAUSE the Judgments of the learned Judges of the Supreme Court are wrong.

5. BECAUSE even if the Ceylon Transport Board was a "scheduled institution" within the meaning of the Bribery Act, it is not an "establishment of the Government" within the meaning of Section 20 of the Act. Although Section 87 of the Act provides that every reference in the Act to the Government includes a reference to every "scheduled institution", Section 20 (a) (iv) does not refer to the Government but to an establishment of the Government. The conviction of the Appellant under Count 3 of the Indictment cannot therefore stand.

EUGENE COTRAN.

ANNEXURE

Bribery Act (No. 11 of 1954) as amended by Acts No. 40 of 1958 and 2 of 1965

Section 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 sub-section (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.

Section 20

A person -

(a) Who offers any gratification to any person as an inducement or a reward for -

(i) his procuring from the Government the payment of the whole or a part of any claim, or

(ii) his procuring or furthering the appointment of the first mentioned person or of any other person to any office, or

(iii) his preventing the appointment of any other person to any office, or

(iv) his procuring, or furthering the securing of, any employment for the first mentioned person or for any other person in any department, office or establishment of the Government, or

(v) his preventing the securing of any employment for any other person in any department, office or establishment of the Government, or

(vi) his procuring, or furthering the securing of, any grant, lease or other benefit from the Government for the first mentioned person or for any other person, or

(vii) his preventing the securing of any such grant, lease or benefit for any other person, or

(b) who solicits or accepts any gratification as an inducement or a reward for his doing any of the acts specified in sub-paragraphs (i), (ii), (iii), (iv), (v), (vi) and (vii) of paragraph (a) of this section,

shall be guilty of an offence punishable with rigorous imprisonment for a term of not more than seven years and a fine not exceeding Five thousand rupees.

Section 29

Where a person is convicted or found guilty of bribery by a District Court or a Commission of Inquiry, then, by reason of such conviction or finding -

(a) he shall become incapable for a period of seven years from the date of such conviction or finding of being registered as an elector or of voting at any election under the Ceylon (Parliamentary Elections) Order in Council, 1946, or for a period of five years under the Local Authorities Elections Ordinance, (No. 53 of 1946) or of being elected or appointed as a Senator or Member of Parliament or as member of a local authority, and, if at that date he has been elected or appointed as a Senator or Member of Parliament or as member of a local authority, his election or appointment shall be vacated from that date;

(b) he shall be disqualified for all time from being employed as a public servant and from being elected or appointed to a scheduled institution or to the governing body of a scheduled institution;

(c) he shall, if he is a member of a scheduled institution or of the governing body of a scheduled institution, cease to be such member from the date of such conviction or finding; and

(d) he shall, if he is a public servant, cease to be a public servant from the date of such conviction or finding and, notwithstanding anything to the contrary in any other written law, be deemed to have been dismissed on that date by the authority empowered by law to dismiss him.

Section 84

The Governor-General may, on the advice of the Minister of Justice, amend the Schedule to this Act by Proclamation published in the Gazette.

Section 87

Every reference in this Act to the Government shall be construed as including a reference to a local authority and to every scheduled institution.

Section 90

In this Act, unless the context otherwise requires -

"scheduled institution" means any such board, institution, corporation or other body as is for the time being specified in the Schedule to this Act.

CEYLON (CONSTITUTION) ORDER IN COUNCIL
(Cap. 379)

Section 29

(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 sub-section shall be conclusive for all purposes and shall not be questioned in any court of law.

Section 13

(3) A person shall be disqualified for being elected or appointed as a Senator or a Member of the House of Representatives or for sitting or voting in the Senate or in the House of Representatives -

(f) if he is serving or has, during the period of seven years immediately preceding, completed the serving of a sentence of imprisonment (by whatever name called) for a term of three months or longer imposed by any court in any part of Her Majesty's dominions or in any territory under Her Majesty's protection or in any territory in which Her Majesty has from time to time jurisdiction, for an offence punishable with imprisonment for a term exceeding twelve months, or is under

sentence of death imposed by any such court, or is serving, or has during the period of seven years immediately preceding, completed the serving of a sentence of imprisonment for a term of three months or longer awarded in lieu of execution of any such sentence:

Provided that, if any person disqualified under this paragraph is granted a free pardon, such disqualification shall cease from the date on which the pardon is granted; or

.....

.....

(k) if during the preceding seven years he has been adjudged by a competent court or by Commission appointed with the approval of the Senate or the House of Representatives or by a Committee thereof to have accepted a bribe or gratification offered with a view to influencing his judgment as a Senator or as a Member of Parliament.

MOTOR TRANSPORT ACT (No. 48 of 1957)

Section 11

The Ceylon Transport Board shall be deemed to be a scheduled institution within the meaning of the Bribery Act, No. 11 of 1954, and the provisions of that Act shall be construed accordingly.

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- and -

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CASE FOR THE APPELLANT

LODGED the 2nd JULY, 1970

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