32, 1970

No.18 of 1969

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON

BETWEEN

EDGAR MAHINDA FERNANDO Appellant

AND

T H E Q U E E N Respondent

CASE FOR RESPONDENT

1. This is an Appeal by Special Leave from a 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 by the District Court of Colombo (C.V. Udalagama, A.D.J.) on the 28th day of November 1967 on a charge of bribery and against a sentence of three years' rigorous imprisonment and a fine of Rs. 1000/- and in default one year's rigorous imprisonment imposed by the said Court for such offence on the 5th day of December 1967. p.16 p. 9 p. 2 p. 5

2. The Appellant was charged in the District Court 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 Narehenpita in the course of 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 3. The District Court acquitted the Appellant on the first two Counts and convicted him on the third.

4. The sole issues which arise in this Appeal are

(a) whether the employees of the Ceylon Transport Board are liable to be convicted of bribery under the provisions of the Bribery Act.

(b) whether Section 11 of the Motor Transport Act No.48 of 1957 which provides that the Ceylon Transport Board is "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" has any legal effect, having regard to

(i) the provisions of S.29(4) of the Ceylon (Constitution) Order in Council.

(ii) Section 90 of the Bribery Act, which defines "scheduled institution" as a body for the time being specified in the Schedule to the Act

(iii) Section 84 of the Bribery Act, which provides that the Governor-General may on the advice of the Minister of Justice, amend the Schedule by Proclamation published in the Gazette.

5. The following statutory provisions are relevant to this Appeal:-

Bribery Act (No.11 of 1954)

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 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 Bribery Tribunal 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 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 a member of a local authority, and, if at that date he has been elected or appointed as a Senator or Member of Parliament or 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.739)

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.

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.

6. The District Court held that the

pp.2-5 Appellant accepted Rs.100/- from one Ariyasena as a bribe to get him employment as a driver with the Ceylon Transport Board, and accordingly, convicted the Appellant on the third Count in the Indictment.

It was submitted by the Defence that, as the Transport Board is not mentioned in the Schedule to the Bribery Act, its employees do not come within the scope of
p.4.l.46 that Act. The learned Acting District Judge, in his reasoned Judgment delivered on the 5th day of December 1967, rejected this submission in view of Section 11 of the Motor Traffic Act No.48 of 1957.

p.6 7. By Petition of Appeal dated the 5th day of December 1967 the Appellant appealed to the Supreme Court of Ceylon upon inter alia the following grounds:-

p.7,l.34 -p.8,l.8 "(b) As the Ceylon Transport Board is not a Scheduled Institution among those institutions referred to in the S.90 of the Bribery Act itself, the accused appellant could not have been convicted under the provisions of the Bribery Act.

(c) The provisions of the Section 11 of the Motor Transport Act No.48 of 1957 is of no legal effect in as much as

(i) It is contrary to the meaning of the definition given to the word "Scheduled Institution" in Section 90 of the Bribery Act.

(ii) It amends the Section 90 of the Bribery Act.

(iii) It is repugnant to the provisions of the Section 84 of the Bribery Act."

8. At the hearing of the appeal, Counsel for the Appellant did not canvas the facts but relied solely upon the submissions that Section 11 of the Motor Transport Act No.48 of 1957 is of no legal effect and that employees of the Ceylon Transport Board are not liable to be charged or convicted under the provisions of the Bribery Act. p.9,l.32

These submissions rested upon the following propositions:-

(i) (a) that the Bribery Act, which contained provisions affecting the Constitution, was passed by Parliament as provided for by Section 29(4) of the Ceylon (Constitution) Order in Council 1946 as an "indivisible whole" and could not be affected by legislation passed with a simple majority. p.11,ll.9-28; p.12,ll.12-16; p.14,ll.20-41

(b) that it was not possible to amend any provision in it or even the Schedule attached to it other than by an Act passed with the two-thirds majority requisite whenever there is a constitutional amendment.

(c) Section 11 of the Motor Transport Act purports to make an amendment to the Schedule of the Bribery Act.

(d) since it was not passed with the requisite two-thirds majority but by a simple majority it is bad in law.

(ii) The doctrine of severability has no application because the severable portions would only apply to parts of the same statute. p.12,l.36

(iii) The offence of bribery is one that affects the Constitution. Section 11 of the Motor Transport Act purports to enlarge the class of persons who can be found guilty of bribery and such p.13,l.35; p.15,l.43

persons are necessarily subject to the disqualification in Section 29 of the Bribery Act, which is a section which clearly affects the provisions of the Constitution.

9. These submissions were rejected by the Supreme Court which held, it is submitted rightly, that

p.11,l.44 -p.12,l. 35; p.13,ll. 30-34; p.15,ll. 11-42.

(i) (a) the Bribery Act was not passed as an "indivisible whole".

(b) some of its provisions affect the Constitution, others do not in any way conflict with the Constitution or infringe on its provisions.

(c) those provisions which do not affect the Constitution do not enjoy the protection of Section 29(4) of the Constitution in regard to amendment, but may be amended by a simple majority.

(d) Section 84 (which provides for amendment of the Schedule by addition to or removal from the list of scheduled institutions by a Governor-General's Proclamation published in the Gazette) is a provision of the Act that is not in conflict or inconsistent with the Constitution. It could have been passed and can be and has been (by Act 40 of 1958) validly amended by a simple majority.

(e) Section 11 of the Motor Transport Act seeks to amend the Schedule by providing an alternative procedure to that found in Section 84. It is not in conflict or inconsistent with the provisions of the Constitution and could validly be passed by a simple majority.

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 RESPONDENT

ADDITIONAL REASON:

1A. BECAUSE whether or not the Ceylon Transport Board was a "scheduled institution" within the meaning of the Bribery Act, the said Board was at all material times an "Establishment of the Government" within the meaning of Section 20 of the Bribery Act. The conviction of the Appellant under Count 3 of the Indictment was therefore valid.

(ii) the language used in Section 11 of the Motor Transport Act shows that this section is to be read together with the provisions of the Bribery Act and the doctrine of severability applies. p.13,11 22-34

(iii) the creation of a new criminal offence by the sovereign Legislature would not have to be passed by a two-thirds majority of the Members of Parliament merely because the punishment was such that it affected the disqualifying clause of the Constitution. p.14,11. 1-9; p.15,l.43 -p.16,l.2

10. The Judgment of the Supreme Court dismissing the Appellant's appeal was delivered on the 14th day of March 1969. pp.9-16

11. By Order in Council dated the 31st day of July 1969 the Appellant was given Special Leave to Appeal in forma pauperis from the said Judgment of the Supreme Court. pp.16-18

12. The Respondent humbly submits that this Appeal should be dismissed and the said Judgment of the Supreme Court of Ceylon dated the 14th day of March 1969 should be affirmed for the following amongst other

REASONS

(1) BECAUSE

it was within the legislative powers of the Parliament of Ceylon to pass Section 11 of the Motor Transport Act by a simple majority.

(2) BECAUSE

Section 11 of the Motor Transport Act is not repugnant to Section 84 of the Bribery Act.

(3) BECAUSE

Section 84 of the Bribery Act does

not inhibit Parliament from amending the Schedule by ordinary legislative process.

(4) BECAUSE

while Section 84 of the Bribery Act permits the Schedule to be amended by the procedure therein provided for, it does not prescribe such procedure as the only way in which such amendment can be effected.

(5) BECAUSE

Section 11 of the Motor Transport Act does not amend or purport to amend the Bribery Act but only makes the provisions of that Act as to the offence of bribery and the sentence that may be imposed therefor, applicable to employees of the Ceylon Transport Board.

(6) BECAUSE

Section 11 of the Motor Transport Act is not in conflict or inconsistent with the provisions of the Ceylon (Constitution) Order in Council.

(7) BECAUSE

if, in the application of the Bribery Act to employees of the Ceylon Transport Board, any provision of that Act cannot be applied without an inconsistency or conflict with the provisions of the Ceylon (Constitution) Order in Council, the doctrine of severability applies and the applicability and validity of the rest of the Act are not affected.

(8) BECAUSE

Section 11 of the Motor Transport Act and the Bribery Act are to be taken and construed together.

(9) BECAUSE

in any event Parliament is entitled to amend the Schedule to the Bribery Act by a simple majority.

(10) BECAUSE

the Schedule to the Bribery Act does not contain any provision as to any disqualifications or disabilities which may be consequent upon a conviction for bribery.

(11) BECAUSE

the Bribery Act is not to be construed as an indivisible whole no part of which can be amended except by a two-thirds majority.

(12) BECAUSE

Section 11 of the Motor Transport Act has no reference to any constitutional disqualifications or disabilities which may be consequent upon a conviction for bribery.

(13) BECAUSE

the legislative provision as to any such constitutional disqualifications or disabilities is to be found in Section 29 of the Bribery Act, which Section 11 of the Motor Transport Act does not amend or purport to amend.

(14) BECAUSE

the question of the applicability of section 29 of the Bribery Act to the Appellant's case does not arise in the present proceedings.

(15) BECAUSE

the passing of Section 11 of the Motor Transport Act by a simple majority was of no less constitutional efficacy than would have been the amending of the Schedule to the Bribery Act by a Proclamation of the Governor-General, as contemplated by Section 84 of that Act.

(16) BECAUSE

it was within the powers of the Parliament of Ceylon to amend Section 84 itself by a simple majority.

(17) BECAUSE

if Section 84 prescribed the method by which the Schedule was to be amended, it was itself impliedly amended by Section 11 of the Motor Transport Act.

(18) BECAUSE

Parliament is entitled further to define or extend the definition of the offence of bribery by a simple majority.

(19) BECAUSE

Parliament is entitled to create a new criminal offence and impose penalties therefor by a simple majority.

(20) BECAUSE

the Judgments of the Courts below were right for the reasons stated therein.

E.F.N. GRATIAEN

MONTAGUE SOLOMON

No. 18 of 1969

IN THE PRIVY COUNCIL

ON APPEAL

from The Supreme Court of
The Island of Ceylon

BETWEEN

EDGAR MAHINDA FERNANDO
Appellant

AND

T H E Q U E E N
Respondent

CASE FOR THE RESPONDENT

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