

T. N. FERNANDO,
ASSISTANT COMMISSIONER OF EXCISE, KALUTARA

v.

NELUM GAMAGE, BRIBERY COMMISSIONER AND ANOTHER

SUPREME COURT,
G. P. S. DE SILVA, C.J.
KULATUNGA, J. AND
RAMANATHAN, J.
S.C. APPEAL NO. 70/92
C.A. 381/92
SEPTEMBER 20 AND NOVEMBER 24 1993.

Writ of Certiorari – Bribery – Notice by authorised officer of Bribery Commissioner's Department to attend the Bribery Commissioner's Department to answer an allegation of bribery and to be produced for an identification parade – Sections 3(2) and 6 of the Bribery Act – Sections 5 and 124 of the Code of Criminal Procedure Act, No. 15 of 1979.

Held:

Section 3(2) of the Bribery Act authorises the Bribery Commissioner or any officer authorized by the Commissioner to direct in writing any person acquainted with the facts under investigation, *inter alia*, to answer an allegation of bribery but does not empower them to direct such person to submit to an identification parade.

In terms of Section 5 of the Code of Criminal Procedure Act and S. 6 of the Bribery Act, recourse may be had to S. 124 of the Code for holding an identification parade in respect of a person suspected of the offence of bribery. The decision to invoke the jurisdiction of a Magistrate under S. 124 of the Code of Criminal Procedure Act does not involve the exercise of a power by the respondents and hence does not attract the remedy of certiorari. Any objection to the exercise of such jurisdiction or the manner of its exercise must be taken before the Magistrate.

Cases referred to:

1. *R. v. Electricity Commissioner* (1924) 1 KB 171.
2. *R. v. Criminal Injuries Compensation Board* (1967) 2 Q B 864, 892.
3. *R. v. Inland Revenue Commissioners ex p. Rossminister Ltd.*, (1980) AC 452, 1013.

APPEAL from judgment of Court of Appeal.

R. Waerakoon with **K. Subasinghe** for petitioner.

K. C. Kamalasabayson D.S.G. with **Kolitha Dharmawardena S.S.C.** for respondents.

Cur adv vult.

December 05, 1993.

KULATUNGA, J.

This is an appeal against the judgment of the Court of Appeal dismissing an application for a writ of certiorari to quash the notice dated 23.04.91 marked 'A' sent by the 2nd respondent (Authorised Officer, Bribery Commissioner's Department) to the appellant (an Assistant Commissioner of Excise) directing him to attend the Bribery Commissioner's Department to answer an allegation of bribery and to be produced for an identification parade. The notice 'A' was sent in terms of S. 3(2) of the Bribery Act. That section authorises the Bribery Commissioner or any officer authorised by the Commissioner to direct in writing any person acquainted with the facts under investigation *inter alia* to answer an allegation of bribery but does not empower them to direct such person to submit to an identification parade.

Learned Counsel for the appellant informed us that as it appears from the objections of the 1st respondent (Bribery Commissioner) in the Court below, the respondents had decided to make an application to the Magistrate for an order for the holding of an identification parade (under S. 124 of the Code of Criminal Procedure Act.) Counsel said that the practice in such a situation was to arrest the suspect when he attends the Bribery Commissioner's Department (bribery being a cognizable offence under S. 30 of the Act) and to produce him before the Magistrate who invariably remands him prior to the holding of the identification parade for which he would thereafter be brought from remand in a covered vehicle.

Counsel drew our attention to part V Chapter XI of the Code of Criminal Procedure Act under the heading "Investigation of offences"

and submitted that in the light of sections such as 115, 116, 120 and 124 such investigations are under the complete control of a Magistrate. He also drew our attention to S.5 of the Code in terms of which offences which shall be investigated under the Code include all the offences –

- (a) under the Penal Code,
- (b) under any other law **unless otherwise specifically provided for** in that law or any other law.

Counsel next argued that the Bribery Commissioner is empowered by S. 3 (1) of the Bribery Act, notwithstanding anything in any other law to the contrary, to direct and conduct investigation of all allegations of bribery which are made to or come to the knowledge of the Bribery Commissioner; that this would include the power to hold an identification parade; that such investigations may culminate in an indictment before the High Court or a prosecution before a Magistrate's Court (S.5); that the situations where recourse is permitted to the general provisions of the Code during investigations are spelled out in the Bribery Act. e.g. S.7 (search of place or premises on a warrant from a Magistrate) S. 30 which makes bribery a cognizable offence, which would permit a suspect to be arrested without warrant under S.32 of the Code. In such a case Sections 33-39 of the Code would also apply. S.30A empowers an Authorised Officer to arrest a person who is detected accepting an illegal gratification and to produce him before a Magistrate to be bailed out or to be remanded.

It was submitted that in the context of the scheme of the Bribery Act as so set out recourse cannot be had to S.124 of the Code to obtain the authorization of the Magistrate for an identification parade before a Magistrate except perhaps after proceedings are instituted in a Magistrate's Court, viz. by filing a plaint under *S. 136 Tunnaya v. O.I.C. Police Pahalagedera.*"

In support of this contention the appellant relies on S. 6 of the Bribery Act, which reads –

"6 (1) such of the provisions of the Code of Criminal Procedure Act as are not excluded by sub section (2) or are not inconsistent with the

provisions of this Act shall apply to proceedings instituted in a Court for offences under this Act.

(2) Section 306 of the Code of Criminal Procedure Act shall not apply to proceedings in the Magistrate's Court for offences under this Act".

Learned Deputy Solicitor-General making his submissions on a preliminary question raised by this Court viz. whether the decision in the instant case attracts certiorari, argued that the notice 'A' involves no decision affecting rights; nor has the 2nd respondent purported thereby to exercise any statutory power but only indicated that an application will be made to a Magistrate to order an identification parade. This is no more than the invocation of the jurisdiction of the Magistrate. Such invocation cannot be quashed by certiorari; and that if the appellant's case is that the Magistrate has no jurisdiction to order such parade, the objection has to be taken before the Magistrate.

On the merits of the appellant's case, the D.S.G. argued that the Bribery Act is not self-contained and that the provisions set out therein for investigation of bribery are in addition to the provisions under the Code; that special provisions such as Sections 7, 30 and 30A have been enacted to empower Authorised Officers to exercise certain powers which are otherwise allowed only to police officers, noting that an Authorised Officers under the Bribery Act need not necessarily be a police officer; that the Bribery Act contains no provision for holding an identification parade; and as such in terms of S. 5 of the Code, recourse may be had to S.124 of the Code for holding an identification parade in respect of a person suspected of the offence of bribery.

The Court of Appeal in its judgment also pointed out to the absence of provision in the Bribery Act to obtain an order from a Magistrate directing a person to give specimen handwriting for purposes of comparison. Having discussed the various situations in which recourse may become necessary to the provisions of the Code for the effective investigation of an allegation of bribery, the Court proceeded to express the following opinion as regards S. 6 of the Act –

"Provisions of the Code if inconsistent with the Act cannot be applied to proceedings instituted in a Court for an offence of bribery (Section 6). In other words, proceedings of the Code if inconsistent with the provisions of the Act cannot be applied after the institution of proceedings in a Court for an offence of bribery. But application for holding an identification parade is a step taken before institution of proceedings, and it is a step taken during the investigation stage of an offence. Under such circumstances, S. 5 of the Code read with S. 2 (2) of the Act empowers the authorised officer to make an application for an identification parade, and the Court to hold such parade.

In the circumstances, this Court is of the view that Section 6 (1), more particularly, the 2nd limb of the said section has not taken away the application or operation of Section 5 of the Code for matters prior to the institution of proceedings in a Court for an offence of bribery".

The question whether the decision to produce the appellant for an identification parade attracts certiorari can be decided by applying the basic principles of certiorari. This is a remedy whereby decisions and orders of inferior tribunals are examined to determine whether they are within their "jurisdiction or powers" – Wade "Administrative Law" 6th Edt. p. 625. "Jurisdiction" has become synonymous with "power" and certiorari is used to control all kinds of irregular administrative acts – Wade 631. The scope of certiorari has expanded considerably and is now much wider than laid down in *R. v. Electricity Commissioner*⁽¹⁾. In terms of that decision the existence of a decision affecting the right of subjects was a precondition to the issue of the writ. in *R. v. Criminal Injuries Compensation Board*⁽²⁾ "affecting rights of subject" meant no more than "affecting subjects". Now the emphasis is on the exercise of a power, e.g. power of a tax officer to seize anything reasonably believed to be required as evidence of tax fraud *R. v. Inland Revenue Commissioners ex p. Rossmaster Ltd.*⁽³⁾ "... many cases of judicial review necessarily turn upon the legality of acts, as opposed to decisions" Wade 639.

In the light of the above principles, I am of the view that the decision to invoke the jurisdiction of a Magistrate under S. 124 does

not involve the exercise of a power by the respondents and hence does not attract the remedy of *certiorari*. I agree that any objection to the exercise of such jurisdiction or the manner of its exercise must be taken before the Magistrate.

Although what I have decided on the availability of the writ of certiorari would suffice to dispose of this appeal, I wish to advert to the appellant's case on its merits in deference to the keen arguments presented by learned counsel. I am in agreement with the submissions of the learned D.S.G. and the views of the Court of Appeal which I have set out elsewhere in this judgment. I wish to add that the powers of the Bribery Commissioner under S. 3 of the Bribery Act – wide as they are – will not permit a person to be subjected to an identification parade. The Commissioner cannot compel a person to participate in an identification parade, unless the Commissioner is clearly empowered to do so by statute. In the absence of such provision, compelling a person to participate in an identification parade would impinge on the liberty of the subject. This is why powers are expressly conferred on a Magistrate to authorities a person to be medically examined (S. 122 of the Code) to order the giving of finger impressions, specimens of hair or handwriting (S. 123).

I agree that the provisions of the Bribery Act do not preclude a person suspected of bribery being subjected to an identification parade under S. 124 of the Code at the stage of investigations prior to the institution of proceedings in a Court.

For the foregoing reasons, I dismiss the appeal and affirm the judgment of the Court of Appeal. No costs.

G. P. S. DE SILVA. C.J. – I agree.

RAMANATHAN, J. – I agree.

Appeal dismissed.