1962 *Present:* **H. N. G. Fernando, J., and L. B. de Silva, J.**

P. RANASINGHE, Appellant, *and* THE BRIBERY COMMISSIONER, Respondent

S. C. 4/62—Bribery Tribunal Case 35/I, 172/60

Bribery Tribunal—Constitutional invalidity of such Tribunal—Right of appeal against a conviction—" Judicial power " —Amendment of a provision in the Constitution Order in Council—Power of Court to question its validity—Importance of Speaker's Certificate—Bribery Act No. 11 of 1954, as amended by Act No. 40 of 1958, s. 41—Ceylon (Constitution) Order in Council, 1946, ss. 29 (3) (4), 55.

The conviction of a person by a Bribery Tribunal, as distinct from the imposition of a sentence, is an exercise of judicial power.

A challenge of the jurisdiction of a Bribery Tribunal to convict a person can be made in the exercise of a right of appeal conferred by the Bribery Act itself. In such a case, there is no question of the wholesale challenge of the entire Bribery Act. The objection which lies against a conviction by a Bribery Tribunal is that the judicial power validly vested in the special tribunal cannot be lawfully exercised by persons who are appointed to the Tribunal by the Governor-General, and not by the Judicial Service Commission.

Section 55 of the Ceylon (Constitution) Order in Council, 1946, vests in the Judicial Service Commission the exclusive power to appoint to judicial office whether the appointment is made *by name* or whether it is made *by office*.

Under Section 29 (4) of the Constitution Order in Council, an Act of Parliament which conflicts with any of the provisions of the Constitution Order in Council is invalid unless passed by a two-thirds majority in the House of Representatives. The fact that the Act has received the Royal Assent cannot prevent the Court from holding it to be invalid unless, as provided by Section 29 (4), the Act has endorsed on it a certificate of the Speaker that it was passed by the requisite majority.

Section 29 (4) of the Constitution Order in Council is applicable to a Bill which, though not in form an amending Bill, contains provision which is in conflict with some constitutional provision. Accordingly, in the absence of the Speaker's Certificate endorsed upon the Bribery Act, validity cannot be claimed for any provision in that Act which is inconsistent with Section 55 of the Constitution Order in Council.

APPEAL under the Bribery Act.

Nimal Senanayake, for the Appellant.

R. S. Wanasundera, Crown Counsel, for the Respondent.

Cur. adv. vult.

December 20, 1962. H. N. G. FERNANDO, J.—

The recent decision of this Court in *Piyadasa's* case [1], if followed, would compel us to hold on the present appeal that " a Bribery Tribunal has no jurisdiction to try and find the Accused guilty of the offence of

[1] *Piyadasa v. The Bribery Commissioner (1962) 64 N.L.R. 385.*

bribery " (per Tambiah J.), and accordingly to quash the conviction of the appellant and the sentence passed against him. But learned Crown Counsel argued that the question should be re-considered and relied on two grounds ;

(1) That a conviction by a Bribery Tribunal, as distinct from the imposition of a sentence, is not an exercise of judicial power, a proposition which is supported by the observations of Sansoni J., in the case of *Senadhira* [1], to the effect that the power to adjudicate is only an arbitral power.

(2) That a challenge of the jurisdiction to convict is fundamentalt and amounts to a challenge of the validity of the entire Act, and canno, therefore be made in the exercise of a right of appeal conferred by the Act itself.

Both these matters have been dealt with in my own unreported judgment in *Kader Saibo Seyed Jailabdeen v. Abdul Rahaman Janina Umma* [2]. I there state that I no longer adhere to the opinion I had formed when *Don Antony's* case [3] was decided. On the contrary, I express my agreement with Tambiah and Sri Skanda Rajah JJ., that, in the context of the relevant provisions of the Act, a Bribery Tribunal does exercise judicial power when it *tries* a person on a charge of bribery. As to Crown Counsel's second argument, my opinion as stated in the unreported judgment is that there is no question of a wholesale challenge of the entire Act, that the Legislature can validly confer judicial power on specially created tribunals, and that the objection which lies against a conviction by a particular Bribery Tribunal is that the judicial power validly vested in the special tribunals cannot be lawfully exercised by persons who are appointed to the Tribunal by the Governor-General, and not by the Judicial Service Commission. I will not here repeat my reasons, but would like to add one further observation. In examining an enactment with reference to any alleged Constitutional invalidity, a Court must strive to reach a conclusion which will render the will of the Legislature effective, or as effective as possible. The conclusion I reach with reference to the Bribery Act is in accord with this principle, for in my opinion the primary intention of Parliament was to establish the special tribunals and to assign to them the jurisdiction to try charges of bribery, The intention that the Governor-General should have power to appoint judges to these tribunals, however important, is ancillary to the primary intention, which latter intention is impaired only in a slight degree, and not materially, by a decision that the power of appointment alone is *ultra vires*.

Crown Counsel has in this appeal raised what is perhaps a new point for consideration. His contention was that the " office " established by the Bribery Act is the office of membership of the panel constituted

[1] *Senadhira v. The Bribery Commissioner (1961) 63 N. L. R. 313.*

[2] *Jailabdeen v. Janina Umma S. C. 2/1962 Quazi Court No. 626 Colombo South S. C. M. 17.12.62.* [*Sec 64 N. L R. 419.*]

[3] *Don Antony v. The Bribery Commissioner (1962) 64 N. L. R. 93.*

under Section 41 of the Act. This office he concedes to be a paid office, but it is not a judicial office, for the panel does not as such try charges of bribery. He argued that even if a Bribery Tribunal does exercise judicial power, the Governor-General appoints only to the panel, and not to the Tribunal itself. But is a Court to notice only the mere act of appointment to the panel, and to ignore the purpose for which the panel is created, namely the purpose that Bribery Tribunals shall be constituted by selection from the panel ?

Let me take the case of a statute which provides that Crown Counsel shall in specified circumstance function as Magistrates. The same argument may be advanced, namely that the original appointment of a person to be a Crown Counsel was not to a judicial office, and that when a Crown Counsel thus functions as a Magistrate in pursuance of the statute he does so by virtue of his appointment to the non-judicial office of Crown Counsel, and does not, when so functioning hold a paid judicial office. The answer to this argument is that Section 55 of the Constitution vests in the Judicial Service Commission the exclusive power to appoint to judicial office, whether the appointment is made *by name* or whether it is made *by office*. The hypothetical statute would conflict with Section 55 in that the Statute itself, that is Parliament itself, would purport to appoint Crown Counsel *by office* to be Magistrates. Although a Crown Counsel so functioning may be paid only the salary of his primary office, the payment for the period when he functions as Magistrate would be in respect of the judicial office to which the statute appoints him.

Similarly, the legal effect of the Bribery Act is that it purports to appoint to a Bribery Tribunal such persons from a panel appointed by the Governor-General as the Chairman may select. The Act designates, *by office*, persons holding office on the panel to be judges of Bribery Tribunals. But that power of designation belongs exclusively to the Commission. Crown Counsel's argument is in defiance of the important constitutional principle that " you cannot do indirectly that which you cannot do directly ".

Although Section 29 (4) was not expressly mentioned in the Judgment in *Senadhira's case*, the Court assumed that a provision of an Act of Parliament which conflicts with Section 55 of the Constitution is invalid unless passed by a two-thirds majority in the House of Representatives. The point is expressly mentioned in the *Piyadasa judgment*. Section 29 (4) provides—

> " In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order . . . .
>
> Provided that no Bill for the amendment or repeal of this Order shall be presented for the Royal Assent unless it has endorsed upon 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 total number of members of the House

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 ".

In the present appeal, Crown Counsel made two important and interesting submissions with regard to this subsection :—

(*a*) That because there is no express provision in subsection (4) declaring an amending or repealing Act to be null and void if not passed by a two-thirds majority, the Court has no power to declare such an Act to be void.

(*b*) That once a Bill has received the Royal Assent, the Court has no power to inquire whether it was passed by the requisite majority, and must hold it to have been duly enacted.

In regard to the first of these submissions, Counsel pointed to the express provision for nullity which is made in sub-section (3), and urged that the absence of similar provision in sub-section (4) was deliberate and is decisive. For the general submission, he relied on three decisions, one from Australia and two from South Africa.

In *McCawley v. the King*[1], the alleged conflict was between an imperial Act of 1867 establishing the Constitution of Queensland and an Act of 1916 enacted by the Queensland Parliament. Section 16 of the Constitution Act had provided that the Commissions of Judges of the Supreme Court of Queensland " shall remain in full force during good behaviour ". The 1916 Act set up an Industrial Arbitration Court, and sub-section (6) of section 6 of this Act provided as follows :—

" The Governor may appoint the President or any Judge of the Industrial Court to be a judge of the Supreme Court. . . . .The President and each Judge of the Industrial Court shall hold office for seven years from the date of appointment."

The Supreme Court of Queensland held the provision to be inconsistent with the Constitution Act, because of the limitation of the term of office to seven years, and on this ground held that the provision was void and and inoperative. The High Court of Australia was of opinion that the Constitution " is a fundamental and organic law which can only be repealed or modified with special formality ". That opinion was however rejected by the Privy Council. Lord Birkenhead drew a distinction between what he termed a " controlled " and an " uncontrolled " Constitution, the former of which he described as one in which the constitution framers " have created obstacles of varying difficulty in the path of those who would lay rash hands on the Constitution ". His examination of various constitutional statutes and instruments affecting Queensland showed that " *the Legislature of Queensland is master of its own house, except in so far as its powers have in special cases been restricted* ". In the absence of any special provision to the contrary in the Constitution, he held that the Legislature was fully entitled to vary the tenure of the judicial office.

[1] *1920 A. C. 691.*

I readily accept for Ceylon the principle as stated by Lord Birkenhead which is italicised above. But that principle does not entitle the Crown to maintain that ours is an " uncontrolled " Constitution ; for in addition to the special control imposed by sub-section (3) of Section 29, we have the general control which sub-section (4) imposes in the case of any Bill to amend any provision of the Constitution. There was not, in the Constitution of Queensland, any provision resembling our Section 29 (4).

The next case is that of *Krause v. The Commissioner of Inland Revenue* [1], where the Supreme Court of South Africa considered the validity of the levy of income tax on the salary of a judge of the Supreme Court of Transvaal. The objection to the levy was founded on a provision in the Constitution Act that the salaries of judges should not be diminished during their term of office. What is relevant for present purposes is the statement of Wessels J. A. that " except in the cases mentioned in Section 152 of the South Africa Act, the Courts of this country cannot declare a portion of an Act of Parliament unconstitutional ". Section 152 expressly authorised amendments of the Constitution, but in regard to Bills *affecting certain specified sections of the Constitution*, it provided that they must be passed by both Houses of Parliament sitting together. A law to diminish the salaries of Judges clearly did not fall within the narrow and specific enumeration set out in Section 152. I need to observe only that, unlike Section 152 of the South Africa Act, our Section 29 (4) applies to *every* Bill to amend any provision of the Constitution.

The other South African case cited by Crown Counsel, *Harris v. Minister of the Interior* [2], virtually defeats his own argument. Five Judges of the Supreme Court of South Africa there held invalid an Act of 1951 which purported to establish separate electorates for " whites " and for "coloureds ". The ground of invalidity was that Section 35 of the Constitution Act gave equal rights of representation to all voters irrespective of race, and that the right could not be altered by an amending law unless passed by both Houses of Parliament sitting together. To reach this conclusion, the Court relied on the simple fact that Section 152 of the Constitution expressly provided for such a sitting in the case of a Bill to amend Section 35. In the case of the Constitution of Ceylon, there is the simple fact that Section 29 (4) contains express provision applicable to all constitutional Bills.

The South African judgment is of interest in another connection. The Act which was impugned did not purport to amend or repeal Section 35, but only enacted a new law which the Court held to be in conflict with that Section. The judgment accordingly supports the opinion that our Section 29 (4) is applicable to a Bill which, though not in form an amending Bill, contains provision which is in conflict with some constitutional provision.

The second submission regarding Section 29 (4) requires some preliminary explanation. The Proviso provides that no amending Bill shall be presented for the Royal Assent unless it has endorsed on it a certificate of the Speaker that it was passed by a two-thirds majority of

[1] *1929 A. D. 286.* [2] *1952, 2 S. A. L. R. 423.*

the House of Representatives. The submission is that the Royal Assent to an amending Bill establishes conclusively its due passage into law, that the Proviso deals only with a matter of Parliamentary procedure, and that, even though the Bill is not endorsed with the certificate, a Court must nevertheless regard it as having been validly enacted, and cannot inquire into the question of compliance with the terms of the Proviso.

Of course, if the intention of which the Proviso is the expression is in accordance with this submission, the matter ends there. But is that the intention ? In my opinion, the language clearly manifests an intention that no Bill to amend any provision of the Constitution shall pass into law unless it had received the requisite majority in the House of Representatives. The passage by such a majority is made a condition precedent for enactment. Ordinarily, the question of fact, whether such a condition has been satisfied, is determinable by judicial inquiry. But in this context, where the question relates to proceedings in Parliament, the possibility of a judicial inquiry is very properly avoided. Instead, the proviso prescribes the sole means by which the question is to be determined, namely the Certificate of the Speaker endorsed upon a Bill that it was passed by the requisite majority. The Certificate " is conclusive for all purposes and shall not be questioned in any court of law." These words indicate the function which a Court is intended to perform in the case of a constitutional amendment, that is, to ascertain whether the Bill bears the Speaker's Certificate, for it is upon proof or production of the Certificate that the Court becomes bound by its conclusive effect. The very proposition that a Court cannot " look behind " the Certificate implies that in the first instance the Court must " look for " the Certificate. The absence of the Certificate is as conclusive as its presence ; and in the absence of a Certificate the Court cannot be invited to inquire and determine whether, nevertheless, the condition precedent was satisfied, for it is just such an inquiry that the subsection intended to prevent. It follows that, in the absence of the Speaker's Certificate endorsed upon the Bribery Amendment Act of 1958, validity cannot be claimed for any provision which is inconsistent with Section 55 of the Constitution.

Crown Counsel thought that his argument derived some support from the observations upon Section 29 (4) made by Sir Ivor Jennings in *The Constitution of Ceylon* (at page 56), but may not have been aware of the note in the Preface that the learned author was not attempting a legal exposition. These observations I have only examined after forming my own opinion as to the intention and effect of the Proviso. They do not refer to the situation I have here to consider, namely the case of a Bill which conflicts with the Constitution, but which does not bear the Speaker's Certificate.

I would hold for these reasons that the conviction of the appellant in this case and the orders made against him are null and inoperative, on the ground that the persons composing the Bribery Tribunal which tried him were not lawfully appointed to the Tribunal.

Appeal allowed.