1963 *Present :* **Sansoni, J. (President), H. N. G. Fernando, J., and L. B. de Silva, J..**

THE QUEEN *v.* D. J. F. D. LIYANAGE and others

Trial at Bar No. 2 of 1962

Trial at Bar—Criminal Law (Special Provisions) Act, No. 1 of 1962, ss. 6, 9, 17, 18, 19, 21—Criminal Law Act, No. 31 of 1962, s. 6—Bench constituted under Act No. 1 of 1962—Lack of jurisdiction to hear information—Second information filed by virtue of Act No. 31 of 1962—Jurisdiction of Court to hold trial thereon—Invalidity of plea in the nature of autrefois arraign*—Validity of* ex post facto *legislation—Validity of legislation enacted in English language after 1st January 1961—Penal Code, ss. 69, 72, 114, 115, 116—Criminal Procedure Code, ss. 440A (1), 440B—Courts Ordinance, s. 19—Ceylon (Constitution) Order in Council, 1946, ss. 29 (4), 36, 38—Declaration of Human Rights (United Nations Organisation), Article 11—Official Language Act, No. 33 of 1956, s. 2 —Revised Edition of the Legislative Enactments Act, No. 2 of 1956, s. 12 (3).*

On 23rd June 1962 the Attorney-General filed in the Supreme Court an information against the defendants under the provisions of the Criminal Law (Special Provisions) Act No. 1 of 1962. Summons was issued on the defendants under the hand of the Registrar of the Supreme Court and was served on each of them. The order for the issue of summons was made by the three Judges who were nominated by the Minister of Justice to constitute the Bench. On 3rd October 1962 the Bench made order that it had no jurisdiction to hold the trial for the reason that the Minister's power to nominate the Judges was *ultra vires* the Constitution. The Bench did not make any order of discharge of the defendants, and the defendants were thereafter held in custody in pursuance of detention orders made under the Emergency Regulations.

On 21st November 1962 the Attorney-General filed a second information against the defendants by virtue of the provisions of the Criminal Law Act, No. 31 of 1962, which was enacted by Parliament on 14th November 1962 in order, partly, to meet the difficulties created by reason of the order made by the Bench on 3rd October 1962. Section 6 of Act No. 31 of 1962 enacted *inter alia* that the first information of 23rd June 1962 should be deemed, for all purposes, to have had, and to have, no force or effect in law.

It was contended on behalf of the defendants (1) that the first information of 23rd June 1962 was still pending before the Supreme Court, and that the Court, or the present Bench of that Court, must hold trial on that information and had no jurisdiction to hold trial on the second information of 21st November 1962, (2) that the retroactive amendment of section 115 of the Penal Code by sections 6 and 19 of Act No. 1 of 1962 was invalid, and (3) that Acts No. 1 of 1962 and No. 31 of 1962 were invalid because they were not framed in Sinhala.

Held, (i) that, inasmuch as the Minister's nomination of the Judges of the first Bench was *ultra vires,* that Bench had not the legal power to order summons. There was therefore no exercise of the judicial power of the Supreme Court on the first information of 23rd June 1962. It followed that there was no judicial act with which Parliament could be said to have unconstitutionally interfered in enacting Act No. 31 of 1962.

(ii) that, in any event, the Attorney-General had the power to amend the first information. Thus the position existing by reason of section 6 of Act No. 31 of 1962, that the defendants were called upon to answer new or altered charges framed in the second information, could substantially have arisen upon action taken unilaterally by the Attorney-General.

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(iii) that, even assuming that the Legislature could not validly nullify, by Act No. 31 of 1962, the first information, the defendants had no right to rely on any plea in the nature of *autrefois arraign*. A second indictment or information is not inherently bad by reason of the pendency of an earlier one against the same person on the same matter.

(iv) that the provisions of section 19 of the Courts Ordinance, sections 2, 69 and 72 of the Penal Code, section 36 of the Constitution Order in Council and Article 11 of United Nations Organisation's Declaration of Human Rights do not bar the trial and punishment, in Ceylon, of offences retroactively created by statute. Accordingly, section 19, read with sections 18 and 21, of the Criminal Law (Special Provisions) Act No. 1 of 1962 manifests Parliament's intention that the new offences stated in section 115 of the Penal Code, as amended by section 6 of the Act, should be offences *ex post facto* as from 1st January 1962.

(v) that, in the absence of clear provision in the Official Language Act No. 33 of 1956 requiring all legislation to be enacted in Sinhala, it is not imperative that all Acts of Parliament enacted after 1st January 1961 must be written in Sinhala. And even if it can be said that section 2 of the Official Language Act manifests some intention that Acts of Parliament must be written in Sinhala, Parliament has the undoubted power to legislate inconsistently with the provisions of pre-existing legislation. In the case, therefore, of Acts No. 1 of 1962 and No. 31 of 1962 and all other Acts enacted after 1st January 1961, Parliament has merely exercised its right to override any such intention as to the language of the law which may have been entertained at the time of the passing of the Official Language Act.

ORDER made in respect of certain preliminary objections taken to a Trial at Bar held under the provisions of the Criminal Law (Special Provisions) Act, No. 1 of 1962, and the Criminal Law Act, No. 31 of 1962.

Counsel heard: For the Defence :—*G. G. Ponnambalam, Q.C., H. W. Jayewardene, Q.C., A. H. C. de Silva, Q.C.*

For the Crown :—*D. St. C. B. Jansze, Q.C.,* Attorney-General, *V. Tennekoon,* Deputy Solicitor-General.

Cur. adv. vult.

ORDER

February 25, 1963. [*Read by* H. N. G. FERNANDO, J.]—

Each of the 24 Defendants has tendered in writing a plea to the jurisdiction of the Court in the following terms :—

> " That this Court cannot take cognizance of the information laid against me and it has no jurisdiction to try me or hold a trial at bar upon the said information ."

In support of this plea, three different arguments were submitted by three of the Queen's Counsel representing some of the Defendants, but we shall consider all the submissions as having been made on behalf of each one of the Defendants.

Before stating the substance of Mr. Ponnambalam's argument it is necessary to refer to certain legislation affecting the trial of the Defendants and to certain proceedings had prior to the tender to us of the plea under consideration. Parliament on 16th March 1962 enacted the Criminal Law (Special Provisions) Act, No. 1 of 1962. This Act purported *inter alia* to make the following provisions :—

(1) To amend section 440A (1) of the Criminal Procedure Code in order to enable the Minister of Justice to direct the holding of a trial at Bar in the case of any offence under Chapter VI of the Penal Code, and thus to make such a direction for a trial at Bar in the case of an offence under section 115 of the Penal Code :

(2) To empower the Minister, upon issuing a direction for a trial at Bar, to nominate three Judges of the Supreme Court to hold the trial.

On 23rd June 1962, the Attorney-General filed in the Supreme Court an information charging these Defendants on three counts of offences alleged to have been committed by them in contravention of sections 114 (Count 1) and 115 (Counts 2 and 3) of the Penal Code, and prayed that due process of law be awarded against the Defendants to make them answer to the charges. (That information of 23rd June 1962 will be referred to in this Order as " the first information ".) On the same day, the Minister of Justice addressed to the Chief Justice a direction in terms of the amended section 440A (1) that the trial of the Defendants upon those charges shall be held at Bar, together with a nomination, in terms of section 9 of the Act No. 1 of 1962, of three Judges of this Court to preside over the trial at Bar. (We will in this Order refer to those Judges as " the first Bench ".) Summons was issued on the Defendants under the hand of the Registrar of the Supreme Court and was served on each of them, and they appeared before the nominated Judges in July 1962 in answer to the summons. Although there is no record of any order for the issue of summons, the statement by one member of the present Bench (who was also a member of the first Bench), a statement which is not now contradicted, is that the order for the issue of summons was in fact made by the three Judges who were nominated to constitute the first Bench.

Several objections were taken by counsel for the Defendants as to the jurisdiction of the first Bench to hold the trial, and on 3rd October 1962, that Bench made order that it had no jurisdiction for the reason that the Act No. 1 of 1962 was *ultra vires* the Constitution in so far as it purported to empower the Minister to nominate Judges to hold the trial. That Bench thereafter released the Defendants from the remand to the Fiscal previously ordered by itself, and the Defendants were thereafter held in custody in pursuance of detention orders made under the Emergency Regulations. The first Bench did not make any order of discharge of the Defendants in respect of the first information filed by the

Attorney-General. In fact, no further action has up to this date been taken either by the Attorney-General or by the Supreme Court upon the first information.

On November 14th 1962 Parliament enacted the Criminal Law Act, No. 31 of 1962, which in part was clearly designed to meet the difficulties arising by reason of the order of 3rd October 1962 made by the first Bench. The provision of the earlier Act No. 1 (section 9) which empowered the Minister of Justice to nominate the Judges for a trial at Bar was revoked ; section 440A of the Criminal Procedure Code was completely re-enacted with additional provisions, including one that any offence under sections 114, 115 or 116 of the Penal Code shall be tried at Bar, thus rendering unnecessary a direction of the Minister for the holding of such a trial ; and a new section 440B was added to the Criminal Procedure Code empowering the Chief Justice to name the Judges by whom any trial at Bar under section 440A shall be held. Section 6 of the Act contains *inter alia* provision that the former direction (of the Minister) for a trial at Bar, and the first information, and the nomination of the first Bench " shall be deemed for all purposes to have had, and to have, no force or effect in law ".

On November 21st 1962 the Attorney-General filed a second information containing two of the charges framed in his first information and one new charge not originally so framed. For present purposes, it suffices to state that it was after the enactment of Act No. 31, and after the filing of the Attorney-General's second information, that the Chief Justice nominated the members of the present Bench to hold at Bar the trial of the Defendants. It was after that nomination that we made order for summons on the Defendants to answer the second information. It is to the trial by us of the charges framed in the second information that the plea to jurisdiction is taken.

The substance of the objection taken by Mr. Ponnambalam is that the first Information is still pending before the Supreme Court, and that the Court, or the present nominated Bench of that Court, must hold trial on that information and has no jurisdiction to hold trial on the second information of 21st November 1962. In order to lead up to his substantial objection, Mr. Ponnambalam made several preliminary submissions :

(*a*) That a criminal proceeding was instituted in the Supreme Court by the filing of the first information. This proposition is so manifestly correct that it calls for no comment.

(*b*) That the exercise of the judicial power of the Supreme Court commenced with the filing, and the acceptance by the Registrar, of the first information, or else commenced when summons issued under the hand of the Registrar upon that first information.

(*c*) That, therefore and thereafter, the Supreme Court alone had power to permit withdrawal or amendment of the first informations ; and accordingly, that Parliament could not validly (in Mr. Ponnambalam's words) " snuff out " the first information,

and that section 6 of Act No. 31 purported to do that which could only have been done by the Court and was for that reason a purported exercise of judicial power and as such *ultra vires* the powers of Parliament.

(*d*) That in the alternative to submission (*c*), the language of section 6 of Act No. 31 was not sufficiently comprehensive or not so absolute in its terms as to achieve the purpose of nullifying the first information.

With respect, we are quite unable to accept any of these preliminary submissions lettered (*b*), (*c*) and (*d*) above. As will presently appear, our rejection of them does not form the basis of our decision upon the substantial objection, but since these submissions were argued at length we shall state briefly the grounds of rejection.

Mr. Ponnambalam relied upon the definition of " judicial power " so often cited and so often approved by Courts of the Commonwealth countries, that of Griffiths, C.J., of the Supreme Court of Australia in *Huddart Parker & Co. v. Moorhead*[1] and upon the dictum that the " exercise of this (judicial) power does not begin until some tribunal is called upon to take action ". This observation means only that judicial power does not commence to be exercised until a prosecution is duly instituted. It cannot mean, as counsel would have it, that judicial power was exercised so soon as the first information was filed with the Registrar. A combination of an act of the Attorney-General on the one side, and of an act of the Registrar on the other, without the intervention of a Judge surely cannot constitute the exercise of the judicial power of the Supreme Court.

In the case of the first information, moreover, the Supreme Court as such was not called upon to take action, for under the law as it then stood (as amended by Act No. 1 of 1962) the power to order summons in the case was vested by sub-section (5) of section 440A of the Criminal Procedure Code in the Court nominated by the Minister of Justice. We do not accept the submission that sub-section (5) becomes operative only after an actual trial has commenced. Mr. Ponnambalam was forced to concede that an order for the issue of summons is an exercise of judicial power and can only be made by a Court, and we are aware that in fact the power was exercised by the three Judges nominated by the Minister and acting by virtue of that nomination. In providing for the issue of summons by the nominated Court, sub-section (5) clearly conferred *on that Court* the power to commence judicial proceedings by ordering the appearance of the Defendants. Agreeing as we do with the order made in *The Queen v. Liyanage and others*[2] that the Minister's nomination of the Judges of the first Bench was ultra vires, we must hold that the Bench had not the legal power to order the summons ; it is only if the first Bench had such legal power that its order would have been an order of the Supreme Court as

[1] *20 Commonwealth L. R. 330 at 357.* [2] *(1962) 64 N. L. R. 345.*

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Such. There was therefore no exercise of the judicial power of the Supreme Court on the first information. It follows that there has been no judicial act with which Parliament can be said to have interfered in enacting Act No. 31. Accordingly we have no occasion to consider in this context the arguments of counsel which were based on the doctrine of the separation of powers and on decisions of Courts in other jurisdictions concerning legislation impugned as being usurpations of, or interferences with, the exercise of judicial power. In any event, the first information could have been amended as of right by the Attorney General, for in our opinion he enjoys the same right of amendment as the Attorney General had in England prior to the enactment of the Indictments Act of 1915 (*Archbold* 33rd edition, page 116). Thus in effect the position now existing by reason of section 6 of Act No. 31 of 1962, that the Defendants are called upon to answer new or altered charges framed in the second information, could substantially have arisen upon action taken unilaterally by the Attorney General. That section was designed to achieve a purpose the achievement of which does not call for the exercise of the judicial power of the Supreme Court. For these reasons we are of opinion that Mr. Ponnambalam's preliminary submissions do not provide a foundation for his substantial objection that the first information is still pending before the Supreme Court.

But in any event, the substantial objection must fail, even if it be correct that the Legislature could not validly, or did not successfully, nullify the first information. The Attorney General, though not called upon to reply to Mr. Ponnambalam's arguments, rightly drew our attention to a recent decision of the Privy Council fully confirming our opinion that even if two separate indictments are pending against the same Defendant on identical charges, the only plea open to the defendant would be one of protection against double jeopardy, that is a plea of *autrefois acquit* or of *autrefois convict*. Such a plea, manifestly, lies only after conviction or acquittal upon one of the two indictments. Their Lordships in the case of *Peter Harold Richard Poole v. The Queen* [1] deny emphatically the right of a Defendant to rely on any plea in the nature of *Autrefois arraign*.

In that case, a Magistrate had after the requisite inquiry committed the accused for trial before the Supreme Court of Kenya on a charge of murder, and an information dated 13th November 1959 was thereafter filed by the Attorney General. The trial upon that information commenced on November 30th 1959, when the accused was arraigned and pleaded not guilty. After Crown Counsel had opened the case for the Crown, a question as to the eligibility of one juror was raised, and in view of this Crown Counsel entered a *nolle prosequi*, and at the same time handed in a second information dated 30th November upon the same charge. The Judge therefore discharged the accused in respect of the charge for which the *nolle prosequi* was entered. The accused was subsequently tried and convicted upon the second information.

[1] *(1961) A. C. 223.*

One of the objections taken in appeal to the Privy Council was that "there could not be in existence at the same time two informations against the same man for the same offence on the same facts." In dealing with this objection, their Lordships referred to a very early English case :

"In *Rex v. John Swan and Elizabeth Jeffreys* the prisoners were indicted for murder. They pleaded Not Guilty at the Chelmsford summer assizes and their trial was postponed to the next assizes. In the meantime the Attorney-General preferred another bill against them charging Swan with petty treason and Jeffreys with murder, and at the next assize a true bill was found and the prisoners arraigned upon it. The prisoners pleaded in abatement *ore tenus* that another indictment was depending for the same offence and pleaded over to the treason and felony. Counsel for the prisoners contended they should not have been arraigned on the new bill pending the former indictment on which issue had been joined. They asked that the trial on the first indictment should proceed before the prisoners were called upon to plead to the second. The court (Wright J., with whom Foster J. was sitting at the request of the former) was of opinion that the charge in the bill last found must be answered notwithstanding the pendency of the former, for *autrefois arraign* was no plea in the case, but that the court must take care that the prisoners be not exposed to the inconvenience of undergoing two trials for one and the same fact. The court proposed that the first indictment should be quashed for consent, to which counsel agreed, and the trial on the second indictment proceeded."

In *Regina v. Mitchel* [1] Blackstone, J., posed the question whether the plea of an indictment pending is a bar to another information on the same matter, and answered the question as follows :—

"In support of the affirmative, that it is, there is neither precedent, the authority of any case, the dictum of any judge, or even the opinion of any text-writer ; but, on the other hand, there are authorities that such a plea is utterly invalid." (From page 244.)

Following these decisions, their Lordships concluded by being "satisfied that a second indictment or information is not inherently bad by reason of the pendency of an earlier one for the same offence against the same person on the same facts." (From page 244.) The decision in *Poole v. The Queen* is a complete answer to Mr. Ponnambalam's substantial objection.

The objection argued by Mr. H. W. Jayewardene raises only the question of jurisdiction to try the third count of the information before us :

"(3) At the time and places aforesaid and in the course of the same transaction the defendants abovenamed with others did conspire to overthrow otherwise than by lawful means the Government of Ceylon by law established and did thereby commit an offence punishable under Section 115 of the Penal Code."

[1] *(1848) 3 Cox C. C.*

The acts attributed to the Defendants in this count were not mentioned in section 115 of the Penal Code as it stood prior to 1st January 1962. But section 6 of the Act No. 1 of 1962, enacted on 16th March 1962, amended section 115 by inserting therein new provisions having prima facie the effect of rendering such acts punishable under the section. Section 19 of the Act further declared that "the provisions of this Act, other than the provisions of section 17, shall be deemed for all purposes to have come into operation on January 1, 1962". Count (3) of the information was presumably framed on the basis that section 6 of Act No. 1 of 1962 had, by virtue of section 19, retroactive effect, and that accordingly a person who committed on or about January 27, 1962, the acts mentioned in the amended section 115 of the Penal Code is guilty of an offence punishable under section 115.

Mr. Jayewardene with customary patience and devotion to the pleaded cause submitted two distinct arguments to support his objection that the Court has no jurisdiction to try the Defendants on the charges framed in the 3rd count. He referred firstly to section 19 of the Courts Ordinance, more particularly to the provision that the Supreme Court shall have "an original criminal jurisdiction for the inquiry into all crimes and offences . . . . and for the hearing, trying and determining . . . . indictments and informations which shall be presented against any person or in respect of any such crime or offence or alleged crime or offence." He showed that this section is only a re-enactment of similar provision earlier made in the Charter of 1833 and argued that the existing criminal jurisdiction of the Court can be no different from the jurisdictions intended to be conferred in the Charter. Relying on the definition in Blackstone's Commentaries of a crime or misdemeanour as being "an act committed or omitted in violation of a public law either forbidding it or demanding it" and other definitions or expositions to a similar effect, he argued that at the time of the enactment of the Charter of 1833 *ex post facto* legislation, as opposed to merely retrospective legislation, was abhorrent to the prevailing principles of criminal jurisprudence, and that accordingly since the professed object of those responsible for framing the Ceylon Charter was to render punishable in Ceylon only acts punishable at the time in England, there could have been no intention to confer a jurisdiction to punish acts prohibited only by *ex post facto* laws. At other stages of his argument Mr. Jayewardene referred to other provisions of our statute law which in his submission support the contention that our criminal law is so framed as to render punishable only acts done in breach of pre-existing law. Thus, it was said, section 2 of the Penal Code in rendering liable to punishment "every act or omission contrary to the provisions thereof" contemplated that the provisions of law referred to in the section must exist antecedently to the doing of the act in question. So also the definition of an offence in the Penal Code as "any act or omission made punishable by any law for the time being in force in the Island" showed that what is punishable is an act specified in a law in force at the time of the commission of the act. Again it was argued that sections 69 and 72 of the Penal Code, in so far as they recognised the principle *ignorantia*

juris haud neminem excusat, carry with them the implication that a person should be able to know at the time when he does an act that it is punishable by law and that such knowledge can be acquired or presumed to have been acquired only if the category of offences is predetermined by law.

To deal first and separately with the construction sought to be placed on the meaning of the words " crimes and offences " in section 19 of the Courts Ordinance, the argument is at first sight attractive, particularly in view of the abhorrent nature of *ex post facto* criminal legislation, but anxious consideration of the purpose of the enactment of what was at first section 31 of the Charter of 1833 satisfies us that there is no warrant for presuming any underlying intention to restrict the jurisdiction of the Supreme Court to the trial and punishment of acts punishable under pre-existing law. There was quite obviously an intention to create a jurisdiction over all crimes and offences punishable under the Common Law in England. But the jurisdiction actually conferred also included the jurisdiction to try offences created by statute law as well. As early as 1835 there were Ordinances enacted by the Governor with the advice and consent of the Legislative Council and there was power for His Majesty himself to legislate for Ceylon by Order-in-Council. Offences thus created must surely have fallen within the jurisdiction conferred by section 31 of the Charter for, but for it, the statute law would have been unenforceable. The British Parliament itself undoubtedly had, as it has today, the power to enact retroactive laws : " the British Parliament admittedly has power to make its laws retroactive ; and I know of no instance in which a Legislature created by the British Parliament has been held to have overstepped its powers by making legislation retroactive. " (Higgins, J., in *The King v Kidman* [1].) At the time of the enactment of section 31 of the Charter there must surely have been in contemplation the possibility, however remote or deplorable, that the Legislature of Ceylon or the King in Council might be compelled to utilise this admitted power to legislate, and it is therefore unreasonable to read into section 31 which dealt only with trial and punishment an implication that the law-making authorities would and should refrain from enacting retroactive penal laws. Similarly in our opinion the argument based upon section 19 of the Courts Ordinance must fail. That section was enacted at a time when the Penal Code, the Criminal Procedure Code and other penal laws were already in force, and unless there arises from the Codes or any other law any presumption against the trial and punishment of offences retroactively created, section 19 by itself does not bear the restrictive meaning sought to be assigned to it.

The arguments of Mr. Jayewardene based upon certain provisions in the Penal Code and in the Criminal Procedure Code are met we think by considerations which apply to his second substantial objection, which we will now discuss. His submission was that the whole of Act No. 1 of 1962 save section 17 is unconstitutional insofar as it purports to operate prior to the date of its enactment. One argument in support of this

[1] *20 Commonwealth L. R. 425 at 451.*

objection had reference to certain principles and provisions affecting the construction of legislation by Parliament. Mr. Jayewardene referred to the former rule of the English Common Law, which has been referred to as a " flatly absurd and unjust rule ", that every statute, unless another date was fixed for its operation, takes effect from the first day of the sessions in which it was passed. Thereafter in 1793 the British Parliament enacted that a statute comes into operation when it receives the Royal Assent ; and by section 9 of the Interpretation Act of 1889 the Courts take judicial notice of an Act. Mr. Jayewardene's argument has been that the Constitution of Ceylon contains similar provisions. This is undoubtedly correct for it is clear from section 36 of the Constitution that a Bill only becomes law and only comes into operation upon the Royal Assent being given. But the further contention has been that by necessary implication Parliament is denied the power to enact a provision like section 19 of Act No. 1 of 1962 whereby it is declared that the provisions of the Act shall be deemed to have come into operation on a date prior to the date of assent.

An inconsistency in this contention is immediately apparent. That the British Parliament had power to make *ex post facto* law is beyond argument, notwithstanding that the Act of 1793 provides that a statute should come into operation upon receiving the Royal Assent. If then the British Act of 1793 was not intended to and did not affect that undoubted power of Parliament, how can it be said that our Constitution by enacting provision similar to that in the Act of 1793 intended to impose a ban on *ex post facto* legislation which the Act of 1793 was certainly not intended to impose? The general principle of the English Common Law has always been that a statute will not be construed to have retroactive effect unless its terms necessarily lead to that construction. But a rule of construction obtaining under the Common Law prior to 1793 was that a statute came into operation not upon receiving the Royal Assent but from an earlier date, that is, the first day of the sessions in which it was passed by Parliament. This rule of construction derogated from the general principle against construction in favour of retroactive operation. All that was intended by the Act of 1793 was to abolish this inconsistent rule of construction, but there was certainly no intention in 1793 to prohibit the enactment by the British Parliament in express words or by necessary implication of retroactive statutes. If then Mr. Jayewardene's contention is correct that the provisions of section 36 of the Constitution were borrowed from the Act of 1793, it would be unreasonable to attribute to the borrower any intention of effecting a purpose more comprehensive and fundamental than the limited purpose for which the Act of 1793 was itself enacted. The general principle of British law, that a statute has retroactive operation if the intention in that behalf is clearly manifested, is not in our opinion affected by the provision in section 36 of the Constitution that no Bill becomes law until it receives the Royal Assent.

Another of Mr. Jayewardene's submissions against the efficacy of section 19 of Act No. 1 of 1962, was that Ceylon's membership of the United Nations Organisation has the effect that the Legislature of Ceylon cannot

enact *ex post facto* laws because Article 11 of the Declaration of Human Rights contains an undertaking that a member of the United Nations Organisation will not enact such laws. Reference was made to an answer read in the House of Representatives to the effect that Ceylon accepts the principles of the Declaration. That answer affords no satisfactory proof that Ceylon has formally made any requisite act of adherence to the Declaration. But even if we assume that Ceylon has become a party to the Declaration, and further assume, without so deciding, that the enactment of *ex post facto* laws may constitute a breach of the Declaration, there is in our opinion *no law properly so called* and applicable by the Courts of Ceylon which would justify a decision that the Parliament of Ceylon cannot now validly enact an *ex post facto* law.

The principle of British law regarding the powers of Parliament are stated thus by Allen (Law in the Making, page 444) :

> " There is, in English law, no *constitutional* restraint upon retroactive legislation, and if an enactment is unequivocally expressed to operate retrospectively, there is no power in the courts to derogate from it . . . . Whether or not Parliament chooses to legislate retroactively is therefore a question not of the validity of statute law, but of policy and statesmanship ; and consequently the only *de facto* restraints which exist upon this kind of law are those which apply to all legislation —namely, wise government and public opinion. "

The opinion of the Judicial Committee in *Hodge v. Regina* [1] was that the British North America Act 1867 conferred on the Legislature of Ontario *authority as plenary and as ample*, within the limits prescribed by section 92, *as the Imperial Parliament in the plenitude of its power possessed and could bestow.* Similarly in Ceylon the power of Parliament to enact laws "for the peace, order and good government of Ceylon", is plenary, subject only to any restrictions expressed in the Constitution itself or arising by necessary implication from its express provisions. If upon considerations of what may appear to be unjust or inexpedient, we were to read into the Constitution a restriction against *ex post facto* law which is not expressed therein either directly or by necessary implication, we would be adding to our Constitution a limitation directly stated in the Constitutions of India, France and the United States, which for good reasons or bad was not stated in our Constitution. That would be to arrogate to the Court the power to legislate. One of the earliest decisions of the Supreme Court of India after Independence, *Gopalan v. State of Madras* [2], emphasised the principle that the Court must hold legislation to be good and valid unless it clearly transgresses Constitutional limitations. The Court cannot declare it to be void merely on the ground that it is unjust or oppressive, or that it is violative of supposed natural rights not specified in the Constitution. This important limitation of its own functions is consistently recognised in succeeding years by the Court in India. The same principle applies in Ceylon and it prevents us from holding legislation to be invalid on the ground of conflict with the Declaration of Human Rights.

[1] *9 A. C. 117 at 132.* [2] *1950 A. I. R., S. C. 27.*

In terms of the rule of construction which we must apply, we are satisfied that section 19 of Act No. 1 of 1962 manifests Parliament's intention that the new offences stated in section 115 of the Penal Code, as amended by the Act, should be offences *ex post facto* as from 1st January 1962. The language of section 19, though not as comprehensive as that which has sometimes been employed to effect a similar purpose, is similar to corresponding language of the Australian Crimes Act 1915, which was held to have created retroactively the offence of " conspiracy to defraud the Commonwealth " (*The King v. Kidman* [1]). The intention of Parliament is apparent, not only from section 19, but also from the provisions in section 21. Indeed the latter section, as well as the proviso to section 19, show that Parliament intended many of the provisions of the Act, including the amendment of section 115 of the Penal Code, to be applicable only to " any offence against the State committed on or about the 27th January, 1962, " that is to say, only to the very acts now alleged to have been done by these Defendants. The only effect, therefore, which Parliament intended for the amendment of section 115 was its retroactive effect.

That amendment then must by this Court " be deemed to have come into operation on January 1, 1962 ", so that the additional words upon which the third count of the information are based must be held by the Court to have been on the Statute Book, and incorporated in section 115, from that date. Accordingly, even if, as Mr. Jayewardene has contended, certain provisions of the Code contemplate that an act is punishable only if it has been pre-determined to be an offence, section 19 of Act No. 1 of 1962 compels us to " deem " the new offences to have been pre-determined for all purposes. Any slight doubt which might otherwise have existed is dispelled by section 18 of the Act, which overrides " anything to the contrary in any other written law ".

We share the intense and almost universal aversion to *ex post facto* laws in the strict sense, that is laws which render unlawful and punishable acts which, at the time of their commission, had not actually been declared to be offences. And we cannot deny that in this instance we have to apply such a law. Indeed, it is remarkable that this particular law has *only* a retroactive effect ; that it is applicable *only* to an alleged conspiracy in January 1962 ; and that Parliament has not thought it necessary to provide that a similar conspiracy against the State which may be planned in the future will be punishable by law. Nevertheless it is not for us to judge the necessity for such a law :

" Allowing for the general inexpediency of retrospective legislation, it cannot be pronounced naturally or necessarily unjust. There may be occasions and circumstances involving the safety of the state, or even the conduct of individual subjects, the justice of which prospective laws made for ordinary occasions and the usual exigencies of society

[1] *20 Commonwealth L. R. 425.*

for want of provision fail to meet, and in which the execution of the law as it stood at the time may involve practical public inconvenience and wrong—*summum jus summa injuria*. This is a matter of policy and discretion fit for debate and decision in Parliament, as to which a Court of ordinary municipal law is not commissioned to inquire or adjudicate." (per Willes, J., in *Phillips v. Eyre*[1]—from pages 444-5 of Allen, Law in the Making.)

Quite recently in the case of *The Queen v. Buddharakkita Thera et al.*[2] a bench of five judges of the Court of Criminal Appeal upheld a sentence of death passed upon a conviction for a murder committed at a time when under law the death penalty did not attach to the offence of murder. The penalty of death attached only by reason of legislation enacted with retroactive effect. An appeal to the Privy Council against the sentence was not successful. The observations of Willes, J., cited above satisfy us of the correctness of the opinion, which was effective in *The Queen v. Buddharakkita Thera et al.*, that under the Constitution of Ceylon the Supreme Court has no power to declare invalid, as such, an *ex post facto* law.

The arguments of Mr. A. H. C. de Silva if upheld would have the drastic consequence not only that the two Acts of Parliament applicable to the trial of the offences charged in the information, but also all Acts of Parliament enacted on and after 1st January 1961 are of no effect as law. The Official Language Act No. 33 of 1956 declares by section 2 that "the Sinhala language shall be the one official language of Ceylon." Having regard to certain matters dealt with in the proviso to section 2 and to a suspensory notification issued by the appropriate Minister in terms of the proviso, Mr. de Silva argues that the declaration became completely effective as from 1st January 1961 and requires that all Acts of Parliament enacted thereafter must be framed in Sinhala.

In the absence of clear provision in that Act directly requiring legislation to be enacted in Sinhala, we are unable to assign to it the peremptory effect which counsel seeks to give to the Act. Let us take for example the amendment of section 115 of the Penal Code effected by section 6 of Act No. 1 of 1962. The Penal Code itself is in the English language and has the force of law as expressed in that language. Section 12 (3) of the Revised Edition of the Legislative Enactments Act No. 2 of 1956 provides that the Revised Edition shall be deemed to be and be without question in all Courts of Justice and for all purposes whatsoever the sole authentic edition of the Legislative Enactments of Ceylon; and the Penal Code just like every other statute is published in the Revised Edition in the English language. If and when this situation is to be changed, that change can only be brought about by requisite means and not merely by a declaration of the nature contained in section 2 of the Official Language Act. Unitl such a change is brought about it would lead to absurdity if the declaration is construed to require that a new enactment

[1] *L. R. 6 Q. B. 1 at 27.*

[2] *(1962) 63 N. L. R. 433.*

to amend existing statutes having effect in the English language must be framed in Sinhala. Could the Legislature for instance have provided by Act No. 1 of 1962 that some words in the Sinhala language creating new offences are to be inserted in section 115 of the Penal Code ?

The only express provision in the Constitution which touches the matter of the language of our statutes is section 38. That section requires that the enacting clause of every Act of Parliament shall be in the following words which are specified between quotation marks :

> " Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Representatives of Ceylon in this present Parliament assembled, and by the authority of the same, as follows :— "

If then it is decided that laws must be enacted in Sinhala it may well be that a Constitutional amendment passed in accordance with section 29 (4) will be necessary. But even if the provisions of section 38 are not so fundamental, there are other reasons why we reach the conclusion that the Official Language Act does not bind the Parliament of Ceylon.

The power conferred on Parliament by section 29 of the Constitution to make laws is, as already stated, plenary and subject only to limitations expressed or arising by necessary implication. In the absence of any specific direction in the Constitution as to the language of a statute (other than section 38 relating to enacting clauses) it would be open in our opinion for Parliament to pass laws in any language which Parliament may choose. And even if it can be said that section 2 of the Official Language Act manifests some intention that Acts of Parliament must be written in Sinhala, Parliament has the undoubted power to legislate inconsistently with the provisions of pre-existing legislation. We must hold therefore that at the very least in the case of all Acts enacted after 1st January 1961 in English, Parliament has merely exercised its right to override any such intention as to the language of the law which may have been entertained at the time of the passing of the Official Language Act.

For the reasons stated we make order rejecting the pleas tendered by all the Defendants.

(Sgd.) M. C. SANSONI,
Puisne Justice.

(Sgd.) H. N. G. FERNANDO,
Puisne Justice.

(Sgd.) L. B. DE SILVA,
Puisne Justice.

Pleas tendered by all the defendants as to the jurisdiction of the Court rejected.