1973 *Present:* **G. P. A. Silva, S.P.J., and Walgampaya, J.**

M. KARUNARATNE, Appellant, *and* THE QUEEN, Respondent

S.C. 2/68 (Bribery)—D. C. Colombo, B/7

Bribery Act (Cap. 26)—Jurisdiction thereunder of District Courts to try offences committed prior to 29th July, 1965—Procedure and punishment applicable to offences—Power of Legislature to alter them retrospectively.

The prosecution for an offence defined by a statute may be instituted for the first time before a Court which is conferred jurisdiction by a later statute to try and determine such offences. Accordingly, an offence of bribery committed prior to 29th July 1965 may be tried by a District Court under the Bribery Act, No. 2 of 1965, which was passed on 29th July 1965.

It is open to the Legislature to alter retrospectively the procedure and punishment applicable to certain offences at any time either before or after the commission of an offence.

APPEAL from a judgment of the District Court, Colombo.

Nimal Senanayake, with *Bala Nadarajah and Melvin Silva,* for the accused-appellant.

D. S. Wijesinghe, State Counsel, for the Attorney-General.

Cur. adv. vult.

February 27, 1973. G. P. A. SILVA, S.P.J.—

The appellant was convicted on an indictment containing two charges of bribery before the District Court of Colombo and was sentenced to 1 year's rigorous imprisonment, a fine of Rs. 1,000 and a penalty of Rs. 350 on each count. He appealed both on the facts and on certain grounds of law but did not pursue any of those grounds before this Court. Instead the counsel for the appellant relied on certain other grounds of law alone not taken up in the petition of appeal as he perhaps took the view that no useful purpose would be served in contesting the facts in view of the oral and documentary evidence which was placed by the prosecution.

The ground of law relied upon may be summarised as follows:—The offence was alleged to have been committed on the 9th September, 1960 and the indictment was presented on the 8th February, 1966 before the District Court during which period certain amendments had been effected in the Bribery Act which altered the jurisdiction and the mode of trial

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pertaining to offences of bribery. In consequence of the relevant amendments the District Court had no jurisdiction to try and determine the charges and to pass the sentence that it did. The convictions were therefore bad in law.

More specifically, the submission was that by Act No. 2 of 1965, District Courts were empowered to punish persons committing bribery after 1965 but did not specify the tribunal which could punish persons for bribery committed before 29th July 1965. Even if one assumes that there was a tribunal which before the Act 2 of 1965 could impose the punishment prescribed by Act No. 11 of 1954, namely, the Bribery Tribunal, such Tribunal ceased to exist after the passing of Act No. 2 of 1965. Thereupon in 1966 when the indictment was presented against the appellant there was no tribunal empowered by the Bribery Act to punish offenders who committed the offence before 29th July 1965 on which date the Act was passed.

This submission was based on two premises. The first was that by the term offence was meant not only the act or several ingredients of an act which constituted the wrong, in this case the acceptance of a certain gratification as an inducement for procuring employment in a Government establishment, but also the fact that the act was made punishable with a certain penalty under the law. Counsel relied for this submission on the definition of the word offence in Section 2 of the Criminal Procedure Code. It followed from that contention that if the same act was made punishable with imprisonment only at any particular time and with imprisonment and/or a fine or whipping, for instance, at another time the two offences were different. In other words, the sameness of the act was immaterial if the mode of punishment was different. The second premise was that, at the time of the commission of the offence complained of, there was no Court or a body of persons that could validly have taken cognizance of that offence and enforced a legally enforceable penalty.

I do not find it possible to agree with either of these contentions. I do not think that the quantum or the mode of punishment has any bearing on the act that constitutes the offence. I shall endeavour to demonstrate what I say. If one is asked, for instance, what the offence of murder is under our law one would explain it by reference to Section 294 of the Penal Code. It is not an answer to the question if a reference is made to Section 296 which sets out the punishment. This is made clear by the fact that both during the period when the death penalty was suspended and before or after one could only have explained the offence by reference to Section 294. The fact that the penalty was death at one stage and life imprisonment at another made no difference to the definition of the offence of murder. Similarly if

a person wished to know what the offence of rape in this country meant he had to be referred to Section 363 and not Section 364 of the Penal Code. Apart from the Penal Code, there are various other Acts and Ordinances in which offences are set out in various sections without reference to any penalties and much later in such Act or Ordinance, there is a section which sets out the same punishment for any of the offences previously defined. I find a very good example of this in Section 221 of the Motor Traffic Act (Chapter 203), which sets out the punishment of a fine not exceeding Rs. 250 for the first offence and a fine of Rs. 500 and/or imprisonment of either description for a term not exceeding three months for a subsequent offence in respect of various acts of commission and omission. It is also interesting to note that the wording of this section itself contradicts the submission made by counsel for the appellant regarding the connotation of the word offence, namely, that it is the act taken together with the punishment. For, the section reads: Any person (*a*) who is guilty of the *offence* of using any hiring car, private coach.....etc., in contravention of any provision of Part IV or Part V or (*b*) who is guilty of the *offence* of failing to comply with any condition attached to a permit granted under any such Part, shall, on conviction after summary trial .....be liable to.....imprisonment. These words clearly show that the various acts or omissions, set out in Part IV or Part V in which punishments are not even mentioned constitute *offences* and those guilty of these offences under (*a*) and (*b*) of the section are made liable to certain punishments. In order to ascertain whether an act or omission referred to constitutes an offence under the Motor Traffic Act one has to look at a series of sections in Parts IV and V of the Act and not at the section which imposes the penalty.

The second premise which also seems to me to be unsound is that, there being no legally valid machinery to enforce the penalty to which offenders were made liable, the act in question was not an offence. It would not be correct to say that because Bribery Tribunals under the existing law of 1958 were not validly constituted, there was no Court which could take cognizance of any offence of bribery at the time of the alleged act of the appellant. To my mind, an error of the executive in interpreting the constitutional provision regarding judicial power at the time and vesting the power of appointment of a panel from which a Bribery Tribunal was to be constituted in the Governor-General would not lead to the result that there was no Court or Tribunal to try the offence of bribery. The provision that offences were to be tried before a tribunal could well have been implemented if the tribunal was appointed by the

proper authority in terms of the Constitution. There was therefore in law a Court or Tribunal which could validly take cognizance of the offence of Bribery if only it had been properly appointed. In the circumstances, even if counsel's premise was sound that there could be no offence without a tribunal to try it, the answer to that is that there was a tribunal although the mode of appointment was misconceived.

In this view of the matter which I am inclined to take, it is unnecessary for me to consider the allied submission that the Supreme Court had the power to try the offence in terms of Section 11 of the Criminal Procedure Code.

Our attention has been drawn to the decision in *Karunaratne v. the Queen* [1], 69 N.L.R. 10 in which almost the identical question arose. T. S. Fernando, J. in an illuminating judgment with which Sri Skandarajah, J., agreed, made the following observations in regard to this point at page 14 of the judgment :—

> " It was apparent through out that counsel's entire argument on the point above outlined depended on the validity of a proposition he put forward, viz., that an offence is something which is prohibited on pain of a legally valid enforceable penalty or sanction. According to the argument, if there was not at the time (2.10.1961) the alleged offence was committed a person or body of persons that could have validly taken cognizance of the offence and imposed an enforceable penalty, there was really no offence punishable under the Bribery Act which the appellant could have been charged with or of which he could have been convicted. I am unable to agree that the argument so advanced is sound. By an offence is meant an act or omission made punishable by law. This much is the substantive part of the law and must not be confused with its procedural part. That the machinery devised for trial and punishment is illegal, unconstitutional or otherwise defective cannot have the effect of rendering such act or omission not an offence. If the argument is valid, where a new offence is created by an Act of Parliament which also prescribes a new tribunal to be established under that very Act for trial and punishment of that offence, then, inasmuch as some time must necessarily elapse between the Act coming into force and the establishment of the new tribunal, no offence under that Act would be committed by anyone until such time as the tribunal is validly established. A proposition of that nature would be entirely unmaintainable. The true position in law would be that the commission, at any time after the Act has come into force, of the act or omission prohibited constitutes an offence, but trial in respect of it and punishment therefor must await the constitution of the

[1] *(1966) 69 N. L. R. 10.*

valid tribunal. The argument that there was no offence in contravention of section 19 (c) before the coming into operation of Act No. 2 of 1965 fails."

We are respectfully in entire agreement with these observations which apply with equal force to the argument of counsel for the appellant in the instant case.

The crux of the matter seems to me to be whether an offence of receiving an illegal gratification as defined in the Bribery Act was committed by the appellant. It is to be noted that this offence, as I understand the word, was defined in section 20 of the original Bribery Act No. 11 of 1954 and, despite subsequent amendment of this Act by Act No. 40 of 1958 and Act No. 2 of 1965, the offence remains the same. The procedure for trial of a person committing an act of bribery or accepting an illegal gratification has, of course, been altered by the two aforesaid amendments. While a Court would not ordinarily apply an Act involving a penal offence with retrospective operation and will do so only if the wording of the Act warrants such construction either *ex facie* or by necessary implication, the same principle does not operate in the case of procedure applicable to the trial of an offence. Counsel for the State contended with considerable force that an accused person had no vested right to any procedure and that it was open to the legislature to alter the procedure applicable to certain offences at any time either before or after the commission of an offence. This is a contention with which I agree. To take the opposite view will lead to serious anomalies and will not accord with reason. It is the invariable experience both in this country and elsewhere that there is a time lag between the commission of an offence and its trial. Depending on the complicated nature of certain offences and the difficulties of investigations there will be unavoidable delay in bringing an offender to Court for trial in many cases. If it can be successfully contended that procedures will not apply with retrospective operation, whenever the legislature, having regard to the frequency or the gravity of certain offences, decides to introduce a law to arraign accused before a Court superior to the one before which offenders were tried before or to introduce enhanced penalties, it will be found that all persons who committed offences immediately prior and for some time before the new legislation and who could not be brought to trial will enjoy an amnesty, quite contrary to the intention of the legislature. This, among other considerations, makes the following principle laid down by Maxwell in "The Interpretation of Statutes" (11th Ed. p. 216) so apposite in this case :—

"Although to make a law punish that which, at a time when it was done, was not punishable, is contrary to sound

principle, a law which merely alters the procedure may, with perfect propriety, be made applicable to past as well as future transactions, and no secondary meaning is to be sought for an enactment of such kind. No person has any vested right in any course of procedure."

I might add that it is one of the occupational hazards of crimes or offences that those committing them may find themselves being made liable at the time of the trial for more severe penalties than what the law had already prescribed at the time they were committed and also that the procedure for bringing them to trial may be altered by the legislature from time to time. This situation arises even without such changes of procedure or punishment in indictable offences where the same offence might attract heavier penalties depending on the decision of the Attorney-General to send an indictment to the Supreme Court or the District Court.

This appeal must therefore fail. Counsel for the appellant contended that whereas under the old procedure the accused, if found guilty, was liable to a sentence of imprisonment or fine or both, the new procedure introduced by Act No. 2 of 1965 made it obligatory on a Court to impose both imprisonment and a fine. He used this fact more for the purpose of showing that the two offences were different and that the District Court had no jurisdiction to try the case rather than to urge a reduction of the sentence. In view of what I have stated earlier, and the rejection of Counsel's argument, I need say no more on this aspect. I have however given my anxious consideration to the sentence imposed by the learned District Judge. I find that he has taken into account the submissions of Counsel for the defence made in mitigation of sentence and given his reasons for the sentence imposed. Even if one considers the sentence prescribed for the offence by the original Act before amendment, the sentence of 7 years or a fine of Rs. 5,000 or both mentioned therein is indicative of the intention of the legislature to impose condign punishment for the offence. In the circumstances I cannot say that a period of one year's imprisonment and a fine of one thousand Rupees on each count is an excessive sentence.

The appeal is accordingly dismissed.

WALGAMPAYA, J.—I agree.

Appeal dismissed.