1961 *Present :* **Sansoni, J., and T. S. Fernando, J.**

M. S. T. P. SENADHIRA *et al.*, Appellants, and THE BRIBERY COMMISSIONER, Respondent

S. C. 4–5 of 1960—Bribery Tribunal Case No. 19/I. 159/59

Bribery Tribunal—Members cannot exercise judicial power—Incapacity of Tribunal to convict a person and pass sentence on him—" Judicial power "—Judicial Service Commission—Power to appoint judicial officers—" Judicial officer "—Procedure in Bribery Tribunals—Joinder of charges and accused persons—Permissibility—Bribery Act, No. 11 of 1954, as amended by Bribery (Amendment) Act, No. 40 of 1958, ss. 5, 6, 19, 25 (2), 26, 28, 29, 41, 42, 45, 48 (2), 52 (1), 66, 68, 69A—Ceylon (Constitution) Order in Council, 1946, ss. 52, 55—Letters Patent, 1947, s. 9.

The power given to a Bribery Tribunal by section 66 (1) of the Bribery Act, No. 11 of 1954 (as amended by Act No. 40 of 1958) to convict, fine and imprison persons charged before it is unconstitutional inasmuch as such power, being exclusively a judicial power, can be exercised only by a judicial officer appointed by the Judicial Service Commission in terms of section 55 of the Ceylon (Constitution) Order in Council, 1946. The members of a Bribery Tribunal were not so appointed, having been appointed by the Governor-General on the advice of the Minister of Justice in terms of amended section 41 of the Bribery Act.

The right of appeal given by section 69A of the Bribery Act may be availed of by a convicted person to show that a Bribery Tribunal, although it is a valid body possessing certain powers, has assumed other powers which it could not exercise, as it was not properly constituted for that purpose.

Section 52 (1) of the Bribery Act makes a Bribery Tribunal master of its own procedure so long as it does not offend against the principles of natural justice. Joinder, therefore, of charges and accused persons in the manner it thinks best fitted to serve the ends of justice is permissible.

APPEALS against two convictions for offences specified in Part II of the Bribery Act, No. 11 of 1954.

H. V. Perera, Q.C., with *Sunil Rodrigo*, *S. S. Basnayake* and *N. S. A. Goonetilleke*, for the 1st Accused-Appellant.

Colvin R. de Silva, with *B. J. Fernando*, for the 2nd Accused-Appellant.

V. S. A. Pullenayegum, Crown Counsel, for the Respondent.

Cur. adv. vult.

November 27, 1961. SANSONI, J.—

The two appellants were prosecuted before a Bribery Tribunal constituted under the Bribery Act, No. 11 of 1954, as amended by the Bribery (Amendment) Act, No. 40 of 1958.

2—J. N. R 562—2,033 (12/61)

The first appellant, a junior assistant valuer in the Valuation Department, was charged with two offences. The first was that, being a public servant, he solicited a gratification of Rs. 20,000 as an inducement or a reward for performing an official act, to wit, reducing the valuation of properties belonging to the estate of a deceased person. The second offence was that he solicited a gratification of Rs. 20,000 which he was not authorised by law or the terms of his employment to receive. Each offence is punishable under section 19 of the Bribery Act No. 11 of 1954 with seven years rigorous imprisonment or a fine of Rs. 5,000 or both. The second appellant was charged with having abetted the offences with which the first appellant was charged, and thereby committed offences punishable under section 19 read with section 25 (2) of the Act.

After trial, both appellants were found guilty of the charges preferred against them ; the first appellant was sentenced to a term of nine months rigorous imprisonment and a fine of Rs. 1,000 on the first count and to nine months rigorous imprisonment on the other count. the sentences to run concurrently. The second appellant was sentenced to a term of six months rigorous imprisonment on each of the two counts with which he was charged, the sentences to run concurrently. Two warrants of commitment, directed to the Fiscal of the Western Province and the Superintendent of the Prison at Welikada, signed by the President of the Tribunal, commanded these officers to carry the sentences into execution.

At the hearing before us two objections were raised to the convictions. The first was that the power given to a Bribery Tribunal by amended section 66 (1) to pass sentence on an accused person whom it has found guilty is unconstitutional. The other objection was to the joinder of both appellants in one trial.

When the hearing of the appeal began, Mr. Pullenayegum raised a preliminary objection to the appeal being heard, apparently because he was under the impression that the appellants were challenging the validity of the entire Bribery Act. Basing his argument on the case of *The King Emperor v. Benoari Lal Sarma* [1] he submitted that where an Act is attacked as invalid, the right of appeal conferred by the Act cannot be exercised, and some remedy other than appeal should be sought. Mr. H. V. Perera, in reply to this objection, said that he was not challenging the validity of the whole Act, nor was he even going to argue that a Bribery Tribunal is an unconstitutional body. His objection to the convictions, he said, was that they were bad in so far as the Bribery Tribunal purported to exercise the power of convicting, fining and imprisoning persons charged before it. He claimed that section 69A of the Act gave him a right of appeal which he was entitled to exercise by asking that the sentence of imprisonment and fine be set aside. With regard to the finding of guilt made against his client, he did not attack that finding as unconstitutional, but he submitted that the finding could not stand in view of the objection of misjoinder taken by him.

[1] *(1945) A. C. 14.*

Since section 69A gives a convicted person a right of appeal against a conviction for any error in law or in fact, I think the appellants have a right of appeal in this case. They are entitled to show, if they can, that the whole or a part of the order is illegal ; and that the Tribunal, while a valid body possessing certain powers, has assumed other powers which it could not exercise, as it was not properly constituted for that purpose.

The first point taken by the appellants raises a question of great constitutional importance and involves the interpretation of section 55 of the Ceylon (Constitution) Order in Council, 1946, which I shall refer to hereafter as the Order in Council. That section reads :

(1) The appointment, transfer, dismissal and disciplinary control of judicial officers is hereby vested in the Judicial Service Commission.

(2) Any judicial officer may resign his office by writing under his hand addressed to the Governor-General.

(3) Every judicial officer appointed before the date on which this Part of this Order comes into operation and in office on that date shall continue in office as if he had been appointed under this Part of this Order.

(4) The Judicial Service Commission may, by Order published in the *Government Gazette*, delegate to the Secretary to the Commission the power to authorise all transfers, other than transfers involving increase of salary, or to make acting appointments in such cases and subject to such limitation as may be specified in the Order.

(5) In this section " appointment " includes an acting or temporary appointment and " judicial officer " means the holder of any judicial office but does not include a Judge of the Supreme Court or a Commissioner of Assize.

This section requires that the members of a Bribery Tribunal, before they function as judicial officers, should be appointed to the Tribunal by the Judicial Service Commission. They were not so appointed, having been appointed by the Governor-General on the advice of the Minister of Justice, in terms of amended section 41 of the Act. It is not the appellants' contention that the members of a Bribery Tribunal appointed in that way have no status at all, for it is conceded that they can be appointed by the Governor-General ; the contention is that members who have been so appointed cannot exercise judicial power. The argument, in brief, was that while a Bribery Tribunal can perform certain functions assigned to it by the Act, its members are not validly appointed to exercise judicial power : the Constitution requires that any person exercising such power should be appointed by the Judicial Service Commission : therefore, even if any provisions of the Act purport to confer that power on them, particularly the power to pass a sentence of fine or imprisonment, they are not entitled in law to exercise it if they were appointed in the manner stipulated in the Act.

We were taken through the Bribery Act as originally enacted, and as amended in 1958. The former section 5 empowered the Attorney-General, if he was satisfied that there was a prima facie case of bribery, to indict the offender, if he was not a public servant, before the Supreme Court or the District Court. Where the offender was a public servant, he could be so indicted, or he could be arraigned before a Board of Inquiry. The amended section 5 empowers the Bribery Commissioner, an officer brought into being by the amending Act, to prosecute any person, if he is satisfied that there is a prima facie case of the commission of an offence specified in Part 2 of the Act, before a Bribery Tribunal. Sweeping amendments were introduced in 1958 which abolished trials before the District Court or the Supreme Court and inquiries before Boards of Inquiry. Boards of Inquiry were abolished, and Bribery Tribunals came into existence : the former had the power to inquire into charges of bribery against public servants brought before them by the Attorney-General, and to decide whether or not the accused person was guilty ; that decision would be communicated to the authority that had appointed the accused person, and certain statutory penalties automatically supervened. The Board also had certain powers of punishment, which it is not necessary to detail here ; nor do I consider it necessary to discuss whether, or to what extent, the establishment of such Boards was in accord with the Constitution. Bribery Tribunals were constituted under amended section 42 " for the trial of persons prosecuted for bribery ", with power to " hear, try and determine any prosecution for bribery made against any person before the Tribunal ". All the offences of bribery specified in Part 2 of the Act, all of them punishable with rigorous imprisonment for a term not exceeding seven years or a fine not exceeding Rs. 5,000, or both, became triable by the newly constituted Bribery Tribunals and were no longer triable by the Courts. Section 28, as amended, provides that a sentence of imprisonment passed by a Bribery Tribunal, on a person convicted by the Tribunal of bribery, shall be executed in the same manner as if the Tribunal were a Court ; and that a fine or penalty imposed by a Bribery Tribunal may be recovered on an application made to a District Court by the Attorney-General. Section 68 empowers a Tribunal to enforce its authority and obedience to its orders by punishing, as for contempt, any disregard of or disobedience to its authority committed in its presence or in the course of any proceedings before it. For this purpose it has been given all the powers conferred on a Court by Section 57 of the Courts Ordinance and Chapter 65 of the Civil Procedure Code.

Reverting now to section 55 of the Order in Council, sub-section (5) provides that a " judicial officer " means " the holder of any judicial office but does not include a Judge of the Supreme Court or a Commissioner of Assize ". Section 3 defines " judicial office " as " any paid judicial office ". Section 45 of the Bribery Act, as amended, provides that the members of the Panel appointed by the Governor-General (from which the members of a Bribery Tribunal are selected) shall be paid such remuneration as may be fixed by the Minister of Justice in consultation with the Minister of

Finance from time to time. If the members of a Bribery Tribunal function as judicial officers when they exercise judicial power, it cannot be doubted that they act in breach of section 55 of the Order in Council so long as they have not been appointed by the Judicial Service Commission ; and any exercise of judicial power by members not so appointed is necessarily invalid.

It is essential to read the Order in Council as a whole, letting each Part shed light on the other Parts, so that they may all be given effect to. Part 2 deals with the Governor-General. He is authorised to exercise such powers, authorities and functions of Her Majesty as she may be pleased to assign to him, *but subject to the provisions of the Order in Council.* The Letters Patent, 1947, which determine the distribution of powers between the Queen and the Governor-General, by section 9 empower the Governor-General to appoint " all such Judges, Commissioners, Justices of the Peace and other officers as may lawfully be constituted or appointed by us", but this again is subject to the provisions of the Orders in Council, 1946 and 1947. Part 3 of the Order in Council deals with the legislature and the power of Parliament to make laws " subject to the provisions of this Order". Part 5 deals with the executive ; the executive power of the Island continues to be vested in Her Majesty, and it may be exercised on her behalf by the Governor-General " in accordance with the provisions of this Order and of any other law for the time being in force". Part 6 deals with the judicature. This threefold division of the legislative power, the executive power and the judicial power, first mentioned in Aristotle's Politics, has been dealt with in Blackstone's Commentaries published in 1768. That learned author wrote that the " legislative power " is vested by the English constitution in Parliament, the " executive power " in the King or Queen ; while with regard to the " judicial power " he said : " By the long and uniform usage of many ages, our Kings have delegated their whole judicial power to the Judges of their several courts .... And, in order to maintain both the dignity and independence of the Judges in the superior courts, it is enacted by the statute 13 Will. III. c. 2, that their commissions shall be made (not, as formerly, *durante bene placito*, but) *quamdiu bene se gesserint*, and their salaries ascertained and established ; but that it may be lawful to remove them on the address of both houses of Parliament. And now, by the noble improvements of that law, in the statute of 1 Geo. III. c. 23, enacted at the earnest recommendation of the King himself from the throne, the Judges are continued in their offices during their good behaviour, notwithstanding any demise of the Crown, (which was formerly held immediately to vacate their seats) and their full salaries are absolutely secured to them during the continuance of their commissions ; his majesty having been pleased to declare, ' that he looked upon the independence and uprightness of the Judges as essential to the impartial administration of justice, as one of the best securities of the rights and liberties of his subjects ; and as most conducive to the honour of the Crown'. "

In *Toronto Corporation v. York Corporation* [1], Lord Atkin referred to the British North America Act, 1867 which protected the independence of the judges in Canada by provisions that the judges of the Superior, District and County courts shall be appointed by the Governor-General, that the judges of the Superior courts shall hold office during good behaviour, and that the salaries of the judges of those three courts shall be fixed and provided by the Parliament of Canada. He then said: "These are three principal pillars in the temple of justice, and they are not to be undermined." We find these same safeguards in section 52 of the Order in Council which deals with the judges of the Supreme Court. They and Commissioners of Assize are to be appointed by the Governor-General. The framers of our Constitution erected a fourth pillar in that temple when the power of appointment, transfer, dismissal and disciplinary control of judicial officers was vested in the Judicial Service Commission. Blackstone, having dealt at page 267 of Volume I with the judicial power, explained on page 269 why a distinct and separate existence of the judicial power is necessary in a free state. He wrote: "In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure by the Crown, consists one main preservative of the public liberty which cannot subsist long in any state, unless the administration of common justice be, in some degree, separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative."

What is this "judicial power" which is exercised by judges, and when can it be said to be exercised? From such inquiry as I have been able to make into the subject, I have learnt that it is difficult to define the precise limits of the power. There are, however, cases which raise no doubt, and I need only consider where this particular case lies.

In the Canadian case mentioned earlier, the Privy Council had to decide whether certain provisions of an Act passed by the Ontario legislature offended against the Canadian Constitution. It held that while the Municipal Board constituted under the particular Act was primarily entrusted with administrative functions it was also entrusted, by certain sections of the Act, with the jurisdiction and powers of a Superior Court, such as the power to set aside a contract and impose new terms upon the parties to it. "It is difficult", says the judgment, "to avoid the conclusion that, whatever be the definition given to Court of Justice, or judicial power, the sections in question do purport to clothe the Board with the functions of a Court, and to vest in it judicial powers."

[1] *(1938) A.C. 415.*

It was further held in that case that so far as legislation purported to give it judicial authority, that attempt must fail, since it was not validly constituted to receive judicial authority ; but as an administrative body its constitution was valid.

Another case cited by Mr. H. V. Perera was *Attorney-General for Australia v. The Queen* [1]. The Privy Council there considered whether it was constitutional for the Commonwealth Parliament to grant both judicial and non-judicial powers to judges appointed for life. The Commonwealth Court of Conciliation and Arbitration which was vested with administrative, arbitral and executive powers, was by certain sections of the Conciliation and Arbitration Act, 1904-1952, also vested with judicial powers, such as powers to impose penalties for a breach of an order or award, and to punish contempts of its power and authority. The Privy Council held that under the constitution it was not possible to vest in the Court a judicial power " even to the extent of fining a citizen or depriving him of his liberty." It is pertinent to recall, at this point, the provisions of section 68 which confer similar powers on a Bribery Tribunal.

In the course of his judgment Viscount Simonds distinguished between arbitral power and judicial power, and quoted from the Australian case of *Waterside Workers Federation of Australia v. Alexander (J.W.) Ltd.* [2]. Isaacs, J. and Rich, J. there said : " The essential difference is that the judicial power is concerned with the ascertaining, declaration and *enforcement* of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted ; whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare, *but not enforce* what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other." They further said that Parliament can give an arbitrator power to inquire and declare what in his opinion ought to be the respective rights and liabilities with respect to the matters in dispute, and say that when so declared those shall be their mutual rights and liabilities. The matter is then in the position of a valid Act enacting the identical mutual rights and liabilities. In this way " the arbitral function is ancillary to the legislative function, and provides the factum upon which the law operates to create the right or duty. The judicial function is an entirely separate branch, and first ascertains whether the alleged right or duty exists in law, and, if it binds it, then proceeds if necessary to *enforce* the law." The italics in each case are mine. Griffith, C.J. said : " The question whether any specific function does or does not appertain to the judicial power depends upon its nature, and not upon the name by which the authority which exercises it is designated in a statute, or upon what it is called in argument." Barton, J. drew a clear distinction between a court which could enforce its decisions and thereby performs strictly judicial functions, and such bodies as arbitrators whose proceedings

[1] *(1957) A.C. 288.* [2] *(1918) 25 C.L.R. 434.*

lacked compulsive powers and especially the power of enforcement. The latter for this reason did not exercise judicial power, and they could be compared to commissions for investigating and pronouncing on questions of fact for the information of the public or as a foundation for executive or legislative action. Both types of tribunals do work which is judicial in the sense of bringing to bear the judicial faculty, but it is only the courts which were judicial in the sense of the exercise of power upon the parties in their dispute. Guided by these observations, I regard this exercise of power to enforce his decisions as the key to the meaning of the phrase " judicial officer " in section 55 of the Order in Council. It is beyond question to my mind that, as was held in that case, the power to convict for offences and the power to impose penalties and punishments are matters appertaining exclusively to the judicial power.

Mr. Pullenayegum argued that the phrase should be limited to those who hold office as District Judges, Magistrates, Commissioners of Requests and Presidents of Rural Courts. He relied on para. 397 of the Report of the Soulbury Commission as he was no doubt entitled to do. If we are confined to the Report as an aid to the interpretation of section 55, that might be the only conclusion. But it is significant that the Order in Council does not follow the wording of the Report on this subject. It does not even mention a Judicial Service. There has also to be considered the Ministers' Draft, which recommended in Article 69 (3) that " an appointment to a judicial office (other than Judges of the Supreme Court) should be made by the Governor-General on the recommendation of the Judicial Commission."

There are, however, more weighty considerations that lead me to hold that " judicial officer " includes all persons who exercise judicial power. To hold otherwise would be to hold that Parliament can establish new Courts with powers as great as, or even greater than, those possessed by the established Courts, and devise a new method of appointing the judges who are to preside over them. Such substitute or parallel courts could be given unlimited power over " the life, liberty and property of the subject," to be exercised by persons to be appointed in any manner Parliament might choose. The idea is not fantastic. The 1958 amendments to the Bribery Act were designed to deprive the established Courts of their jurisdiction to try charges of bribery, and to invest permanently established Bribery Tribunals with that jurisdiction. Let me repeat that observation in different words. The Bribery Tribunals were Courts set up in substitution for the established Courts, and they were entrusted with the function of administering justice in a particular sphere. It must not, of course, be forgotten that the trial of criminal prosecutions is the main function of a Court exercising criminal jurisdiction. Such an attempt made once could well be repeated. True, they are called Tribunals and not Courts, but " whether persons were Judges, whether tribunals were Courts, and whether they exercised what is now called judicial power, depended and depends on substance

and not on mere name." [1]. These considerations seem to me to be relevant, because " as good a test as I know of the significance of an opinion is to contemplate the consequences of its opposite."

When Part 6 of the Order in Council speaks of the Judicature and refers to Judges of the Supreme Court, Commissioners of Assize, and judicial officers it seems to me to be dealing with all those persons to whom judicial power may be delegated. It includes not only the officers of the established Courts but those akin to them in the sense that, without being judges, they exercise judicial power. The separate treatment which the judicature receives has its antecedents in Blackstone's thesis and rests, I think, on the fundamental belief that appointment by an independent body like the Judicial Service Commission is an essential safeguard of personal liberty and judicial independence.

The question remains whether the provisions of the Act conferring judicial power on the Tribunals are distinct and severable from the other provisions which confer other powers. Mr. Perera submitted that up to the point of finding a person brought before it guilty or not guilty the members of the Tribunal were entitled to act, even though not appointed by the Judicial Service Commission. Certain statutory penalties and disqualifications specified in section 29 would attach to a person found guilty, and its decision would be reported to the persons or bodies mentioned in section 66. But he submitted that the provisions of section 26, empowering a Tribunal to order the payment of a penalty by the person convicted—a power which could formerly be exercised only by a Court—clearly confer a judicial power, and the members have not been validly appointed to exercise such power. I am inclined to agree with that view. It is right that we should preserve as much of the will of Parliament as possible : and so far as that will, as expressed in a Statute, is not repugnant to the Constitution, we should uphold those provisions which we consider not to conflict with the Constitution. I see no objection to the conferment of arbitral functions which involve the investigation and pronouncement of a finding on questions of fact, though I must confess that the manner in which arbitral and judicial functions have been conferred on Tribunals makes this a border-line case. To that extent the finding of guilt in this case would be operative.

The only other matter for decision is the objection of misjoinder. The argument for the appellants was founded on the terms of new section 5 (1) which reads :

> " If the Bribery Commissioner is satisfied that there is a prima facie case of the commission by any person of an offence specified in Part II of this Act, such Commissioner or any advocate, proctor or officer authorised in writing by such Commissioner shall prosecute such person before a Bribery Tribunal."

[1] *(1918) 25 C.L.R. at 451.*

While it was conceded that two persons could be charged and tried at one trial with two or more offences, provided they were offences of the same kind and they were jointly liable, it was urged that the section did not permit a joinder such as we have in the present case. It was also pointed out for the appellants that section 6, which had made the provisions of the Criminal Procedure Code (except section 325) applicable to proceedings in any Court for bribery, was repealed in 1958 ; further, that section 48 (2) which required a Board of Inquiry " to make a thorough inquiry without regard to legal forms and solemnities ", was also repealed in 1958. One can guess why these changes were made in 1958, but I do not think it would serve any purpose to go into further detail on this aspect of the arguments. The matter seems to me to be concluded by the terms of new section 52 (1) which reads :

> " Subject to the provisions of this Act, a Bribery Tribunal may regulate its own procedure."

I agree with Mr. Pullenayegum that this provision makes a Bribery Tribunal the master of its own procedure, so long as it does not offend against the principles of natural justice. A Tribunal is thereby empowered to draw up a charge sheet and join such charges and accused persons in the manner it thinks best fitted to serve the ends of justice, for these are matters of procedure. I do not think that the joinder of the accused persons and charges in this case is open to objection, and I hold that there was no misjoinder.

In the result I uphold the first objection raised on behalf of the appellants and make order quashing the convictions and the sentences passed on them.

T. S. FERNANDO, J.—I agree.

Convictions and sentences quashed.