Privy Council Appeal No. 25 of 1965

Don John Francis Douglas Liyanage and others – – – *Appellants*

v.

The Queen – – – – – – – – – *Respondent*

FROM

THE SUPREME COURT OF CEYLON

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

DELIVERED THE 2ND DECEMBER 1965

Present at the Hearing
LORD MACDERMOTT
LORD MORRIS OF BORTH-Y-GEST
LORD GUEST
LORD PEARCE
LORD PEARSON
[*Delivered by* LORD PEARCE]

This is an appeal against the judgment and sentence of the Supreme Court of Ceylon. The eleven appellants were each convicted of three offences in respect of an abortive *coup d'etat* on 27th January 1962. The offences were, first that they conspired to wage war against the Queen, secondly that they conspired to overawe by means of criminal force or the show of criminal force the Government of Ceylon and thirdly that they conspired to overthrow otherwise than by lawful means the Government of Ceylon by law established. Thirteen other defendants who were tried with the appellants were acquitted. Each of the appellants was sentenced to ten years rigorous imprisonment and forfeiture of all his property.

The appellants were not tried by a judge and jury in accordance with the normal criminal procedure, but by three judges of the Supreme Court sitting without a jury. The trial was very long and complicated since so many defendants were involved, playing, as was alleged, different parts in the attempted *coup*. Indeed, the judgment of the Court occupies more than 200 pages of the law reports (*The Queen v. Liyanage & Ors.* 67 N.L.R. 193). The individual appeals raise many points which demand a very extensive consideration of evidence and factual detail.

All the appeals however share a common submission that, whatever be the details of fact or evidence, these convictions must be quashed owing to the invalidity of certain legislation in 1962 passed especially in order to deal with the trial of those persons who partook in the abortive *coup*. This legislation affected the mode of trial, the offences, the admissibility of evidence and the sentences. It was rightly agreed between the parties that, if this legislation was invalid, the convictions cannot be sustained. Their Lordships therefore decided that before embarking on a detailed investigation of the facts and evidence they should first decide, as a preliminary point, whether the legislation in question was invalid.

The detailed story of the *coup d'etat* of 27th January 1962 and how it was foiled at the very last moment, is set out in a White Paper of the Ceylon Government issued on 13th February 1962. This sets out the names of thirty alleged conspirators and the parts played by them. All the accused were named in it. It alleges that the *coup* was planned by certain police

and army officers with the object of overthrowing the Government and arresting, *inter alios*, the Parliamentary Secretary for Defence and External Affairs since he could give orders to the Service Commanders which might frustrate the *coup*. The White Paper stated what the participants intended to do and gave descriptions of their interrogation by Ministers immediately after their arrest. It concluded with the observation " It is also essential that a deterrent punishment of a severe character must be imposed on all those who are guilty of this attempt to inflict violence and bloodshed on innocent people throughout the country for the pursuit of reactionary aims and objectives. The investigation must proceed to its logical end and the people of this country may rest assured that the Government will do its duty by them."

From about 27th January all the accused were in custody (except one who gave himself up on 31st July 1962), and they remained thereafter in very rigorous custody. (See *The Queen v. Liyanage & Ors.* 67 N.L.R. at 259.) They were questioned both on the night of 27th January 1962 and thereafter while in custody.

On 16th March 1962 there was passed the Criminal Law (Special Provisions) Act, No. 1 of 1962 (for convenience referred to as the " first Act "). That it was directed towards the participants in the *coup* is clear. It was given retrospective force and section 19 reads:—

> " 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:
>
> Provided, however, that the provisions of Part I of this Act shall be limited in its application to any offence against the State alleged to have been committed on or about January 27, 1962, or any matter, act, or thing connected therewith or incidental thereto."

Part I was directed towards legalising the detention of the persons who had been imprisoned in respect of the attempted *coup*. Under the general criminal law an arrested person has the following protective provisions. Under the Criminal Procedure Code he must without unreasonable delay be taken or sent before a Magistrate (section 36). If he is arrested without a warrant, the reasonable period shall not exceed 24 hours (section 37). The police must report the arrest to the Magistrate's Court (section 38). Part I of the first Act legalised *ex post facto* the detention for 60 days of any person suspected of having committed offences against the State, but the fact of his having been arrested had to be notified to the Magistrate's Court.

In Part II of the first Act section 4 altered the mode of trial for the offences here in question in the following manner. Under section 440A of the Criminal Procedure Code the Minister of Justice could direct that the defendant be tried by three judges without a jury in the case of the offence of sedition and any other offence in which such a mode of trial would be appropriate by reason of civil commotion, disturbance of public feeling or any other similar cause. That clause was amended so as to apply expressly not only to sedition but to any other offence under Part VI of the Penal Code, the part which dealt with offences against the State, the offences with which the appellants were charged. Thus the Minister could direct that the appellants should be tried by three judges without a jury. With this section one may conveniently read section 9 of the first Act whereby in cases in which the Minister directs a trial by three judges without a jury, the three judges should be nominated by the Minister of Justice, and section 17 which provided for the addition of two more judges to the Supreme Court, such provision to come into operation on such date as the Minister might appoint.

Section 5 retrospectively allowed arrest without a warrant for the offence of waging war against the Queen whereas previously a warrant had been necessary.

Section 6 altered the penalty for an offence under section 114 of the Penal Code, namely for waging war against the Queen, by inserting a minimum punishment of not less than ten years' imprisonment. It altered the penalty

for an offence under section 115 of the Penal Code, namely for conspiring to wage war against the Queen and overawe the Government by criminal force, by inserting a minimum punishment of ten years' imprisonment and a forfeiture of all property. It also altered the offence itself. Section 115 had read previously as follows:—

> " Whoever conspires to commit any of the offences punishable by the next preceding section, or to deprive the Queen of the sovereignty of Ceylon or of any part thereof, or of any of Her Majesty's Realms and Territories, or conspires to overawe, by means of criminal force or the show of criminal force, the Government of Ceylon, shall be punished with imprisonment of either description which may extend to twenty years, and shall also be liable to fine."

This was amended as follows:—

> " By the substitution, for all the words from " Ceylon, shall " to " to fine.", of the following:—
>
> > " Ceylon, or conspires to overthrow, or attemps or prepares to overthrow, or does any act, or conspires to do, or attempts or prepares to do any act, calculated to overthrow, or with the object or intention of overthrowing, or as a means of overthrowing, otherwise than by lawful means, the Government of Ceylon by law established, or conspires to murder, or attempts to murder, or wrongfully confines, or conspires or attempts or prepares to wrongfully confine, the Governor-General or the Prime Minister or any other member of the Cabinet of Ministers, with the intention of inducing or compelling him to exercise or refrain from exercising in any manner any of the lawful powers of such Governor-General, Prime Minister or Cabinet Minister, shall be punished with death, or imprisonment of either description which shall extend to at least ten years but shall not extend to more than twenty years, and shall forfeit all his property."

Thus a new offence was added *ex post facto* to meet the circumstances of the abortive *coup*.

Section 11 of the first Act provided that the Attorney General might before or at any stage during the trial pardon any accomplice with a view to obtaining his evidence.

Section 12 altered the laws of evidence in the case of offences against the State. The general criminal law gave the following protections to an accused person.

It provided that " No confession made to a police officer shall be proved as against a person accused of any offence " (Evidence Code section 25(1)). It further provided that no confession made by an accused in the custody of a police officer could be proved against him, unless made in the immediate presence of a Magistrate. (Evidence Code section 26 (1)). And it forbade that a confession by one of several co-defendants should be used against the other. (Evidence Code section 30). It excluded from admission all statements to a police officer in the course of an investigation (Criminal Procedure Code section 122 (3)). Further, the onus of proving a confession to be voluntary was on the prosecution.

The first Act swept these protections away. It allowed statements made in the custody of a police officer to be admitted provided the police officer was not below the rank of Assistant Superintendent (section 12 (1)). It laid on the accused the burden of proving that a statement made by him was not voluntary (section 12 (3)). It removed the effect of sections 25, 26 and 30 of the Evidence Ordinance above referred to (section 12 (4)).

Section 12 (2) provided that " In the case of an offence against the State, a statement made by any person which may be proved under subsection (1) of this section " (i.e. whether or not in the custody of a police officer) "as against himself may be proved as against any other person jointly charged with such person if, but only if, such statement is corroborated in material particulars by evidence other than a statement proved under that subsection." Thus a vital and age old protective rule of evidence was removed.

Section 12 (5) removed the protection of section 122 (3) of the Criminal Procedure Code which prohibited the admission of statements made to a police officer in the course of an enquiry. Section 15 removed the right of appeal to the Court of Criminal Appeal in the case of trials before three judges without a jury.

Finally section 21 provided as follows:—

> " The preceding provisions of this Act, save and except Part I and section 17, shall cease to be operative after the conclusion of all legal proceedings connected with or incidental to any offence against the State committed on or about 27th January 1962, or from one year after the date of commencement of this Act, whichever is later, provided that the Senate and the House of Representatives may, by resolution setting out the grounds therefor, extend the operation of this Act from time to time for further periods not exceeding one year at a time."

In the circumstances the reference to one year after the commencement of the Act cannot be read as indicating any intention that the provisions in question should continue in force beyond the conclusion of the proceedings mentioned. Thus, apart from the increase in the number of judges by s.17 (which obviously could not be temporary), and apart from Part I (which gives the right to arrest and detain persons suspected of having committed an offence against the State and which in itself is limited to any offence against the State alleged to have been committed on or about 27th January 1962 and matters incidental thereto) the whole of these elaborate provisions for altering the nature of the offence, for providing a trial without a jury, and for allowing the admission of otherwise inadmissible statements and confessions is to end when the proceedings based on the *coup* come to an end. By that time it would have served its purpose which would appear to be the fulfilment of the promise implied in the last two sentences of the White Paper, quoted above.

The Minister of Justice then nominated three judges to try the accused Preliminary objection was taken that the nomination and the section under which it was made were *ultra vires* the Constitution. In October 1962 the three learned judges of the Supreme Court in a full and careful judgment in which they examined the relevant authorities unanimously upheld the objection (*The Queen v. Liyanage & Ors.* 64 N.L.R. 313). They concluded (at page 359)—

> " For reasons which we have endeavoured to indicate above, we are of opinion that because
>
> (*a*) the power of nomination conferred on the Minister is an interference with the exercise by the Judges of the Supreme Court of the strict judicial power of the State vested in them by virtue of their appointment in terms of section 52 of the Ceylon (Constitution) Order in Council, 1946, or is in derogation thereof, and
>
> (*b*) the power of nomination is one which has hitherto been invariably exercised by the Judicature as being part of the exercise of the judicial power of the State, and cannot be reposed in anyone outside the Judicature,
>
> section 9 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, is *ultra vires* the Constitution."

This conclusion was not challenged by an appeal to this Board. But in November 1962 there was passed the Criminal Law Act, No. 31 of 1962 (for convenience referred to as the second Act). This repealed those provisions of the first Act which dealt with section 440A of the Criminal Procedure Code, and amended that section anew by providing as respects offences under certain sections of the Penal Code, including section 115, for a trial before three judges without a jury; but instead of the nomination by the Minister which had been rejected by the Supreme Court, there was inserted a new subsection whereby the Chief Justice could nominate three judges before whom the trial should be held. It was also provided that the determination should be according to the majority. Further the second Act (section 6) nullified the Minister's earlier direction, information and nomination in the proceedings (setting them out in schedules), and it deemed that the Minister had never had any power to nominate the judges for the trial without a jury,

and any action proceeding or thing instituted by virtue of the said direction information or nomination was deemed for all purposes never to have been instituted or commenced.

All the other elaborate provisions of the first Act were left untouched.

The trial proceeded before three judges nominated by the Chief Justice. In April 1965 after a very extensive trial the appellants were convicted and sentenced.

Mr. Gratiaen on behalf of the appellants attacks the validity of the convictions on three main grounds.

The first is that the Ceylon Parliament is limited by an inability to pass legislation which is contrary to fundamental principles of justice. The 1962 Acts, it is said, are contrary to such principles in that they not only are directed against individuals but also *ex post facto* create crimes and punishments, and destroy fair safeguards by which those individuals would otherwise be protected.

The appellants' second contention is that the 1962 Acts offended against the Constitution in that they amounted to a direction to convict the appellants or to a legislative plan to secure the conviction and severe punishment of the appellants and thus constituted an unjustifiable assumption of judicial power by the legislature, or an interference with judicial power, which is outside the legislature's competence and is inconsistent with the severance of power between legislature, executive, and judiciary which the Constitution ordains.

The appellants' third argument is that the language of the 1962 Acts did not suffice " in the absence of an express provision to that effect " (Interpretation Ordinance section 6(3)) to deprive the appellants of the right to a jury which they had acquired previous to the passing of those Acts.

The first argument starts with a judgment of Lord Mansfield L.C.J. In *Campbell v. Hall* 1 Cowp. 204 at 209, 98 E.R. 1045 he laid down as a clear proposition that " if the King (and when I say the King, I always mean the King without the concurrence of Parliament) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament he cannot make any new change contrary to fundamental principles ". The Crown having, therefore (it is said), no power over Ceylon as a colony to make laws which offended against fundamental principles, could not hand over to Ceylon a higher power than it possessed itself. The Constitution of Ceylon was not laid down as in the case of many other colonies by an Act of Parliament but by an Order in Council (The Ceylon (Constitution) Order in Council 1946) which gave power to the Ceylon Parliament to make laws for the peace order and good Government of the Island. This was followed by the Ceylon Independence Act, 1947, a United Kingdom Act. But Parliament, it is contended, did not in terms transfer to Ceylon the Sovereign right of the United Kingdom Parliament. Therefore the legislative power of Ceylon is still limited by the inability (which it inherits from the Crown) to pass laws which offend against fundamental principles. This vague and uncertain phrase might arguably be called in aid against some of the statutes passed by any Sovereign power. And it would be regrettable if the procedure adopted in giving independence to Ceylon has produced the situation for which the the appellants contend.

In the view of their Lordships, however, such a contention is not maintainable. Before the passing of the Colonial Laws Validity Act 1865 considerable difficulties had been caused by the over-insistence of a Colonial judge in South Australia that colonial legislative Acts must not be repugnant to English law (see " The Statute of Westminster and Dominion Status " by K. C. Wheare 4th edition pp. 75–7). That Act was intended to and did overcome the difficulties. It provided that colonial laws should be void to the extent to which they were repugnant to an Act of the United Kingdom Parliament applicable to that colony, " *but not otherwise* " (section 2) and that they should not be void or inoperative on the ground of repugnancy to the law of England (section 3). " The essential feature of this measure is that

it abolished once and for all the vague doctrine of repugnancy to the principles of English law as a source of invalidity of any colonial act . . . The boon thus secured was enormous; it was now necessary only for the colonial legislator to ascertain that there was no Imperial Act applicable and his field of action and choice of means became unfettered ". (" The Sovereignty of the British Dominions " by Prof. Keith 1929 at p. 45.)

Their Lordships cannot accept the view that the legislature while removing the fetter of repugnancy to English law, left in existence a fetter of repugnancy to some vague unspecified law of natural justice. The terms of the Colonial Laws Validity Act and especially the words " but not otherwise " in section 2 make it clear that Parliament was intending to deal with the whole question of repugnancy. Moreover their Lordships doubt whether Lord Mansfield was intending to say that what was not repugnant to English law might yet be repugnant to fundamental principles or to set up the latter as a different test from the former. Whatever may have been the possible arguments in this matter prior to the passing of the Colonial Laws Validity Act, they are not maintainable at the present date. No case has been cited in which during the last 100 years any judgment (or, so far as one can see, any argument) has been founded on that portion of Lord Mansfield's judgment. And in *Abeyesekera v. Jayatilake* [1932] A.C. 260, a case from Ceylon dealing with the validity of a retrospective Order in Council and therefore a fertile field for the germination of arguments about fundamental principles, Lord Mansfield's judgment in *Campbell v. Hall* was only referred to in the Board's judgment as authority on a wholly different point.

The Ceylon Independence Act 1947 of the British Parliament provided:—

" 1.—(1) No Act of the Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to Ceylon as part of the law of Ceylon, unless it is expressly declared in that Act that Ceylon has requested, and consented to, the enactment thereof.

(2) As from the appointed day His Majesty's Government in the United Kingdom shall have no responsibility for the government of Ceylon.

(3) As from the appointed day the provisions of the First Schedule to this Act shall have effect with respect to the legislative powers of Ceylon."

* * *

" First Schedule

Legislative Powers of Ceylon

1. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the appointed day by the Parliament of Ceylon.

(2) No law and no provision of any law made after the appointed day by the Parliament of Ceylon shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of Ceylon shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of Ceylon.

2. The Parliament of Ceylon shall have full power to make laws having extra-territorial operation."

These liberating provisions thus incorporated and enlarged the enabling terms of the Act of 1865, and it is clear that the joint effect of the Order in Council of 1946 and the Act of 1947 was intended to and did have the result of giving to the Ceylon Parliament the full legislative powers of a sovereign independent State. (See *Ibralebbe v. The Queen* [1964] A.C. 900.)

Accordingly the appellants' first argument fails.

Those powers, however, as in the case of all countries with written constitutions, must be exercised in accordance with the terms of the constitution from which the power derives. The appellants' second argument maintains that the powers of Parliament were not so exercised in the passing of the Acts which are here in question.

The learned Solicitor-General in his clear, fair and forceful argument strongly relied on the fact that there is no express vesting of judicial power in the Courts, such as one finds for example in the case of the United States of America or Australia. But that is not necessarily decisive. For in the two latter instances there were no federal Courts apart from the Constitution. Unless such Courts were created and invested with power by the Constitution they had no existence or power.

In Ceylon, however, the position was different. The change of sovereignty did not in itself produce any apparent change in the constituents or the functioning of the Judicature. So far as the Courts were concerned their work continued unaffected by the new Constitution, and the ordinances under which they functioned remained in force. The judicial system had been established in Ceylon by the Charter of Justice in 1833. Clause 4 of the Charter read " And to provide for the administration of justice hereafter in Our said Island Our will and pleasure is, and We do hereby direct that the entire administration of justice, civil and criminal therein, shall be vested exclusively in the courts erected and constituted by this Our Charter . . . And it is Our pleasure and We hereby declare, that it is not, and shall not be competent to the Governor of Our said Island by any Law or Ordinance to be by him made, with the advice of the Legislative Council thereof or otherwise howsoever, to constitute or establish any court for the administration of justice in any case civil or criminal, save as hereinafter is expressly saved and provided." Clause 5 established the Supreme Court and clause 6 a Chief Justice and two puisne Judges. Clause 7 gave the Governor powers of appointing their successors. There follow many clauses with regard to administrative, procedural and jurisdictional matters. Some half a century later Ordinances (in particular the Courts Ordinance) continued the jurisdiction and procedure of the Courts. Thereunder the Courts have functioned continuously up to the present day.

There was no compelling need therefore to make any specific reference to the judicial power of the Courts when the legislative and executive powers changed hands. " But the importance of securing the independence of judges and maintaining the dividing line between the judiciary and the executive " (and also, one should add, the legislature) " was appreciated by those who framed the Constitution " (see *Bribery Commissioner v. Ranasinghe* [1965] A.C. 172 at 190). The Constitution is significantly divided into parts— " Part 2 The Governor-General ", " Part 3 the Legislature ", " Part 4 Delimitation of Electoral Districts ", " Part 5 The Executive ", " Part 6 The Judicature ", " Part 7 The Public Service ", " Part 8 Finance ". And although no express mention is made of vesting in the Judicature the judicial power which it already had and was wielding in its daily process under the Courts Ordinance, there is provision under Part 6 for the appointment of judges by a Judicial Service Commission which shall not contain a member of either House but shall be composed of the Chief Justice and a judge and another person who is or shall have been a judge. Any attempt to influence any decision of the Commission is made a criminal offence. There is also provision that judges shall not be removable except by the Governor-General on an address of both Houses.

These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature.

During the argument analogies were naturally sought to be drawn from the British Constitution. But any analogy must be very indirect, and provides no helpful guidance. The British Constitution is unwritten whereas in the case of Ceylon their Lordships have to interpret a written document from which alone the legislature derives its legislative power.

The difficult question as to the separation of powers was carefully argued before the learned judges on the hearing of the interlocutory application which successfully challenged the Minister's nomination of three judges to try the accused. (*The Queen v. Liyanage & Ors.* (64 N.L.R. 313)). The learned Attorney-General there contended that " no separation of powers exists under our Constitution and that if a separation of powers exists *dehors* the written constitution it is a separation after the British method because we have been accustomed to that kind of separation throughout the British occupation of this country " (at p. 348). But he conceded that there was a recognised separation of functions. As the Court itself said (at p. 350). " That a division of the three main functions of Government is recognised in our Constitution was indeed conceded by the learned Attorney-General himself. For the purposes of the present case it is sufficient to say that he did not contest that judicial power in the sense of the judicial power of the State is vested in the Judicature i.e. the established civil courts of this country. There is no dispute that the three of us, as constituting, for the purposes of this Trial at Bar, the Supreme Court are called upon to exercise the strict judicial power of the State and in fact we have, all three of us, received at one time or another, but in each case before the Supreme Court was so called upon to exercise judicial power, appointment by the Governor-General acting under section 52 (1) of the 1946 Order in Council." After a careful review of authorities the three learned judges came to the conclusions quoted previously and decided that the Minister's nomination of judges was an infringement of the judicial power of the State which cannot be reposed in anyone outside the judicature.

The learned Solicitor-General before the Board has contended that the decision was wrong and that there was no separation of powers such as would justify it. But in their Lordships' view that decision was correct and there exists a separate power in the judicature which under the Constitution as it stands cannot be usurped or infringed by the executive or the legislature.

Section 29 (1) of the Constitution says:—" Subject to the provisions of this Order Parliament shall have power to make laws for the peace order and good government of the Island ". These words have habitually been construed in their fullest scope. Section 29 (4) provides that Parliament may amend the Constitution on a two-thirds majority with a certificate of the Speaker. Their Lordships however cannot read the words of section 29 (1) as entitling Parliament to pass legislation which usurps the judicial power of the judicature—e.g. by passing an act of attainder against some person or instructing a judge to bring in a verdict of guilty against some one who is being tried—if in law such usurpation would otherwise be contrary to the Constitution. There was speculation during the argument as to what the position would be if Parliament sought to procure such a result by first amending the Constitution by a two-thirds majority. But such a situation does not arise here. In so far as any Act passed without recourse to section 29 (4) of the Constitution purports to usurp or infringe the judicial power it is *ultra vires*.

But do the Acts of 1962, otherwise than in respect of the Minister's nomination, usurp or infringe that power? It goes without saying that the legislature may legislate, for the generality of its subjects, by the creation of crimes and penalties or by enacting rules relating to evidence. But the Acts of 1962 had no such general intention. They were clearly aimed at particular known individuals who had been named in a White Paper and were in prison awaiting their fate. The fact that the learned judges declined to convict some of the prisoners is not to the point. That the alterations in the law were not intended for the generality of the citizens or designed as any improvement of the general law, is shown by the fact that the effect of those alterations was to be limited to the participants in the January *coup* and that after these had been dealt with by the judges, the law should revert to its normal state.

But such a lack of generality in criminal legislation need not, of itself, involve the judicial function, and their Lordships are not prepared to hold that every enactment in this field which can be described as *ad hominem* and

ex post facto must inevitably usurp or infringe the judicial power. Nor do they find it necessary to attempt the almost impossible task of tracing where the line is to be drawn between what will and what will not constitute such an interference. Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings. It is therefore necessary to consider more closely the nature of the legislation challenged in this appeal.

Mr. Gratiaen succinctly summarises his attack on the Acts in question as follows. The first Act was wholly bad in that it was a special direction to the judiciary as to the trial of particular prisoners who were identifiable (in view of the White Paper) and charged with particular offences on a particular occasion. The pith and substance of both Acts was a legislative plan *ex post facto* to secure the conviction and enhance the punishment of those particular individuals. It legalised their imprisonment while they were awaiting trial. It made admissible their statements inadmissibly obtained during that period. It altered the fundamental law of evidence so as to facilitate their conviction. And finally it altered *ex post facto* the punishment to be imposed on them.

In their Lordships' view that cogent summary fairly describes the effect of the Acts. As has been indicated already, legislation *ad hominem* which is thus directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary. But in the present case their Lordships have no doubt that there was such interference; that it was not only the likely but the intended effect of the impugned enactments; and that it is fatal to their validity. The true nature and purpose of these enactments are revealed by their conjoint impact on the specific proceedings in respect of which they were designed, and they take their colour, in particular, from the alterations they purported to make as to their ultimate objective, the punishment of those convicted. These alterations constituted a grave and deliberate incursion into the judicial sphere. Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences. They were compelled to sentence each offender on conviction to not less than ten years' imprisonment, and compelled to order confiscation of his possessions, even though his part in the conspiracy might have been trivial.

The trial Court concluded its long and careful judgment with these words (67 N.L.R. 194 at 424).

> " But we must draw attention to the fact that the Act of 1962 radically altered *ex post facto* the punishment to which the defendants are rendered liable. The Act removed the discretion of the Court as to the period of the sentence to be imposed, and compels the Court to impose a term of 10 years' imprisonment, although we would have wished to differentiate in the matter of sentence between those who organised the conspiracy and those who were induced to join it. It also imposes a compulsory forfeiture of property. These amendments were not merely retroactive: they were also *ad hoc*, applicable only to the conspiracy which was the subject of the charges we have tried. We are unable to understand this discrimination. To the Courts, which must be free of political bias, treasonable offences are equally heinous, whatever be the complexion of the Government in power or whoever be the offenders."

Their Lordships sympathise with that protest and wholly agree with it.

One might fairly apply to these Acts the words of Mr. Justice Chase in the Supreme Court of the United States in *Calder v. Bull* (1798) 1 Curtis 269 at 272: " These acts were legislative judgments; and an exercise of judicial power.".

Blackstone in his Commentaries wrote at p. 44 " Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of

high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only and has no relation to the community in general: it is rather a sentence than a law ".

If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges. It is appreciated that the legislature had no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial power may be eroded. Such an erosion is contrary to the clear intention of the Constitution. In their Lordships' view the Acts were *ultra vires* and invalid.

The appellants' third argument as to the appellants' right to a jury does not therefore arise and their Lordships express no opinion on the matter.

It may be that section 17 of the first Act can escape from its context and survive under the authority of *Thambiayah v. Kulasingham* (50 N.L.R. 25 at 37), but as their Lordships had no argument on this point they prefer to express no opinion.

It was agreed between the parties that if the Acts were *ultra vires* and invalid, the convictions cannot stand. Their Lordships have therefore humbly advised Her Majesty that these appeals should be allowed and that the convictions should be quashed.

(93338) Wt. 8052/124 150 1/66 Hw.

In the Privy Council

DON JOHN FRANCIS DOUGLAS LIYANAGE
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