# DIGEST



Bribery-Evidence 75 NLR 121



[PRIVY COUNCIL]

1971 *Present:* Viscount Dilhorne, Lord Hodson, Lord Simon of Glaisdale, Lord Cross of Chelsea and Lord Kilbrandon

R. G. MOSES, Appellant, *and* THE QUEEN, Respondent

PRIVY COUNCIL APPEAL 13 OF 1969

*S. C. 3/68 (Bribery)—D. C. Colombo, 29/B*

*Evidence—Charge of bribery—Previous conviction—Inadmissibility—Participants in offence—Weight of their evidence—Courts Ordinance (Cap. 6), s. 39—Criminal Procedure Code (Cap. 20), s. 425—Evidence Ordinance, s. 54—Bribery Act (Cap. 26), ss. 20, 79 (1).*

The accused-appellant was charged with an offence punishable under section 20 of the Bribery Act. The trial Judge admitted in evidence a previous conviction of the appellant for obtaining money by false pretences and relied on this previous conviction in convicting him on the bribery charge. The Crown conceded that the cross-examination of the appellant on the previous conviction should not have been permitted but submitted that notwithstanding this error of the trial Judge the appeal should be dismissed.

*Held*, that the conviction of the appellant must be quashed on the ground that the evidence of the previous conviction, which was inadmissible according to section 54 of the Evidence Ordinance, had been taken into account in the trial Judge's judgment and was in a high degree prejudicial to the appellant. In such a case the substantial question is whether or not the accused has been deprived of a fair trial.

*Held further*, that it was at least doubtful in the present case whether the quality of the prosecution witnesses was properly estimated by the trial Judge. If bribery had been established they would have been involved in it as participants and there was nothing in the Bribery Act, section 79 (1), which of itself enhanced their credibility.

APPEAL, with special leave, from a judgment of the Supreme Court.

*Eugene Cotran*, for the accused-appellant.

*Richard Du Cann*, for the respondent.

*Cur. adv. vult.*

October 27, 1971. [*Delivered by* LORD HODSON]—

This is an appeal by special leave from the judgment and order of the Supreme Court of Ceylon dated 23rd January 1969 dismissing, without giving reasons, the appeal of the appellant Rajamuni Gnanamuttu Moses against his conviction by the District Court, Colombo, on a charge of bribery.

He was sentenced to three years' rigorous imprisonment and in addition a fine of Rs. 500/- was imposed with, in default of payment, six months' rigorous imprisonment.


1*——K 13021—2,257 (5/72)

The main ground of this appeal is that the trial judge wrongly admitted in evidence a previous conviction of the appellant for obtaining money by false pretences and wrongly relied on this previous conviction in convicting him on the bribery charge.

The charge was contained in an indictment dated 27th October 1967, nearly eight years after the bribe was alleged to have been taken, and reads as follows:

> "That on or about the 3rd day of December, 1959, at Kalubowila, in the division of Colombo, within the jurisdictioin of this Court, you did accept a gratification of Rs. 500/- from Magammana Uggallage Thomas Singho as an inducement for Procuring for Uggallage Kumatheris employment in the Food Control Department and that you are thereby guilty of an offence punishable under Section 20 of the Bribery Act."

The Crown concedes that the cross-examination of the appellant on the previous conviction should not have been permitted but submits that notwithstanding this error of the trial judge the appeal should be dismissed.

The trial was held in the usual manner before a District Judge sitting alone without a jury and consideration has to be given to the question whether the admission of this evidence having regard to the language of the District Judge's judgment upon this matter was to quote from the case of *Ibrahim v. The King*[1] [1914] A.C. 599 at 615 "something which . . . deprives the accused of the substance of fair trial and the protection of the law". As was stated in the judgment of the Board delivered by Lord Normand in the case of *Lejzor Teper v. The Queen*[2] [1952] A.C. 480 at page 491—"It is a principle of the proceedings of the Board that, it is for the appellant in a criminal appeal to satisfy the Board that a real miscarriage of justice has occurred." In *Teper's* case there was a jury and the situation differs in such a case as the present in this respect. A judge may notwithstanding the wrongful admission of evidence make it plain that he has ignored it whereas the jury's reasons for arriving at a verdict are not given.

The relevant statutory provision in Ceylon is section 36 of the Courts Ordinance, Chapter 6, which provides:

> "The appellate jurisdiction of the Supreme Court shall be ordinarily exercised only at Colombo. Subject to the provisions in that behalf in the Criminal Procedure Code or any enactment amending the same contained, such jurisdiction shall extend to the correction of all errors in fact or in law which shall be committed by any Judge of the Supreme Court sitting alone as hereinafter provided, to the correction of all errors in fact or in law which shall be committed by any District Court, to the correction of all

[1] *(1914) A. C. 599 at 615.*

[2] *(1952) A. C. 480 at 491.*



> errors in fact or in law which shall be committed by any Court of Requests in any final judgment or any order having the effect of a final judgment, and to the correction of all errors in fact or in law committed by any Magistrate's Court or by the Court of any Municipal Magistrate. But no judgment, sentence, or order pronounced by any court shall on appeal or revision be reversed, altered, or amended on account of any error, defect, or irregularity *which shall not have prejudiced the substantial rights of either party.*"

The last sentence is worded in such a way as to indicate that when there is error, defect or irregularity it has to be shown that they have not prejudiced the substantial rights of either party. In other Statutes different language is used, cf. section 425 of the Criminal Procedure Code: Chapter 20, where it is laid down that no judgment shall be reversed on account of any errors in the judgment "unless such error, omission, irregularity, or want has occasioned a failure of justice."

Their Lordships do not however consider that there is any question of burden of proof involved in such cases. The substantial question is whether or not the accused has been deprived of a fair trial. Referring again to *Teper's* case the following passage which appears on page 492 is relevant:

> "Their Lordships have therefore in the end to decide whether the appellant has shown that the improper admission of the hearsay evidence of identification was so prejudicial to the appellant, in a case where the rest of the evidence was weak, that the proceedings as a whole have not resulted in a fair trial. The test is whether on a fair consideration of the whole proceedings the Board must hold that there is a probability that the improper admission of hearsay evidence turned the scale against the appellant."

It is useful to see how comparable cases have been dealt with in Ceylon.

In *The King v. Perera*[1] (1941) 42 N.L.R. 526 on appeal from a District Judge to the Supreme Court the conviction was upheld because there was nothing to indicate that evidence of bad character of the accused wrongly admitted at the trial, influenced the District Judge in convicting him. An opposite conclusion was reached by Gratiaen J. on appeal from a judgment of the Magistrate's Court in *Peter Singho v. Werapitiya*[2] (1953) 55 N.L.R. page 155. He held that where a trial judge has permitted himself through an improper appreciation of the law to allow evidence to be led which is of such character as to prejudice the chances of a fair trial on the real issues in the case, improper reception of the evidence is fatal to the conviction of the accused, although the accused had been tried not by lay jurors but by a Magistrate learned in the law.

[1] *(1941) 42 N. L. R. 526.*

[2] *(1953) 55 N. L. R. 155.*

The relevant statutory provision in such cases is section 54 of the Evidence Ordinance which provides :

> "In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant."

In the instant case the prosecution said that a man named Kumatheris was looking for employment as a clerk and made arrangements with some other witnesses for the prosecution which culminated in a meeting on 3rd December in Colombo when Thomas Singho, father of Kumatheris, also a witness, paid Rs. 500/– to the appellant in the presence of his son and two other people, Don David and one Gunapala. The appellant is then said to have reiterated the promise he had previously given to secure employment for Kumatheris within a month, otherwise to return the money. The appellant gave Singho a receipt for the Rs. 500/– in the form of a promissory note signed by him and witnessed by two witnesses.

The appellant, it was said, failed to obtain employment for Kumatheris and on 17th and 29th December 1959 wrote letters to Don David which the prosecution relied upon as referring to the repayment of the money and to the delay in "finalising the application" as meaning the application for employment of Kumatheris which the appellant was arranging.

There was a complete conflict of evidence. The appellant, who conducted his case in person, denied the allegation that he had taken the money as a bribe to obtain a job for Kumatheris and maintained that the whole money dealing in which he had engaged was a loan transaction.

During his cross-examination counsel sought to question him on a previous conviction of falsely representing to one Rosalin Kariyapperuma that he would find her a job if she gave him Rs. 500/–.

The questioning was as follows :

"*A.* I know a lady called Rosalin Kariyapperuma. I have borrowed money from her also. I did not pay that money to her. She took me to Court. I have borrowed money from so many. I did not promise to find out a job for Rosalin Kariyapperuma, and take the money.

(At this stage Mr. Adv. Wickremanayake, Crown Counsel, moves to put to the witness, certain facts which will prove system, and in consequence his state of mind.

I allow the application.

Sgd. C. V. Udalagama.

A. D. J. 21.2.68)



*Q.* You said you did not cheat Rosalin Kariyapperuma ?

*A.* Yes.

*Q.* You were charged and convicted in M.C. Gampaha, in Case No. 88081 ?

*A.* I was convicted.

*Q.* You were charged with falsely representing to Rosalin Kariyapperuma that you will find a job for her and induced her to give Rs. 500/–?

*A.* Yes.

*Q.* You were found guilty and sentenced to 4 months' rigorous imprisonment ?

*A.* Yes. I appealed and the appeal was dismissed.

*Q.* You produced a writing given by you and you said it was a loan ?

*A.* Yes.

*Q.* I suggest to you that you took a gratification from Thomas Singho and not a loan ?

*A.* I borrowed a loan."

The District Judge having reviewed the evidence and having indicated more than once that he disbelieved the appellant's evidence concluded by saying :

> "It appears that the accused on an earlier occasion too had promised one Rosalin Kariyapperuma a job and obtained money on a promissory note in similar circumstances. He admitted that he was charged in M.C. Gampaha case No. 88081 with falsely representing to Rosalin Kariyapperuma that he would find a job for her and induced her to give him Rs.500/– and was convicted and sentenced to four months' rigorous imprisonment. I disbelieve the accused and reject his defence.
>
> For the above reasons I find the accused guilty of the charge."

It is unnecessary to consider what would have been required to establish a system. No system was in fact proved but the last paragraph of the District Judge's judgment shows clearly that he took into account the inadmissible evidence relating to Rosalin Kariyapperuma.

Their Lordships are of opinion that the conviction of the appellant must be quashed upon this ground alone. A perusal of the judgment does not enable them to conclude that the District Judge did not take the inadmissible evidence into account. Having wrongly admitted it he referred to it in his judgment as part of the foundation for his conclusion that the appellant was guilty. It cannot be asserted that he disregarded the evidence. On the contrary he referred to the appellant having done the same thing on another occasion as one of the reasons for rejecting his evidence. The appellant who was unrepresented was never asked

any questions about the meaning of the two letters to Don David by the prosecuting counsel or by the Court. Nevertheless the judge said that they gave the lie to his defence. Finally it is at least doubtful whether the quality of the prosecution witnesses was properly estimated by the District Judge. If bribery had been established they would have been involved in it as participants and there is nothing in the Bribery Act section 79 (1) which of itself enhances their credibility.

Their Lordships are satisfied that the admission of the Rosalin Kariyapperuma evidence was in a high degree prejudicial to the appellant and for this reason alone, apart from the additional reasons to which they have referred, they have humbly advised Her Majesty that the appeal should be allowed.

*Appeal allowed.*

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1972 *Present :* **H. N. G. Fernando, C.J., G. P. A. Silva, S.P.J., and Alles, J.**

C. SUNTHARALINGAM, Petitioner, *and* THE ATTORNEY-GENERAL and 2 others, Respondents

*S. C. 1 of 1972—Application for Injunction*

*Injunction—Proceedings of Constituent Assembly—Supreme Court cannot order discontinuance of such proceedings.*

In an application to obtain an injunction to prevent and prohibit the Minister for Constitutional Affairs "from taking any steps to repeal the Ceylon (Constitution and Independence Orders-in-Council, 1946 and 1947) and to substitute therefor a Constitution entitled a 'Constitution of Sri Lanka' "—

*Held*, that a Court cannot consider the validity or otherwise of a new Constitution, unless and until a new Constitution is established or purported to be established.

APPLICATION for an Injunction against the Attorney-General and the Minister for Constitutional Affairs.

*C. Suntharalingam*, the relator-petitioner, in person.

*Cur. adv. vult.*



**February 7, 1972.** H. N. G. FERNANDO, C.J.—

The purpose of this Application is to obtain an injunction from this Court to prevent and prohibit the Minister for Constitutional Affairs "from taking any steps to Repeal the Ceylon (Constitution and Independence Orders-in-Council, 1946 and 1947) and to substitute therefor a Constitution entitled a 'Constitution of Sri Lanka'."

The same petitioner made a previous application naming as respondents the Honourable Sirimavo R. D. Bandaranaike and the other members of the Cabinet. In that application the petitioner sought orders restraining the respondents from conducting the proposed proceedings of the Constituent Assembly as convoked and created by a Resolution of the members of the House of Representatives passed on 19th July, 1970. That application was refused by my judgment dated 13th February, 1971, my brother Wijayatilake agreeing. The Privy Council thereafter refused leave to appeal from that judgment without reasons stated. In these circumstances it has to be assumed that the Privy Council confirmed or adopted the reasons stated in the former judgment for the refusal of the petitioner's previous application, and we therefore considered ourselves bound by that judgment.

The operative passage in the former judgment, which indeed has been relied on by the petitioner on the present occasion, is the following :—

> "If and when such a new Constitution is established or is purported to be established, one of two possible situations will in my opinion exist :—
>
> (1) That the new Constitution is a legal and valid instrument which will in law supersede the Constitution and Independence Orders-in-Council which are presently law ; in which event a challenge of the validity of the new Constitution will be fruitless.
>
> (2) *Alternatively*, if the true position be, that the new Constitution established by the Constituent Assembly does lack legal force and validity, and if a competent Court will have jurisdiction so to pronounce, the occasion for the making of such a pronouncement can arise only after the Constitution is established or purports to be established, and only in a proceeding in which the validity of some provision of the Constitution properly and actively arises for determination."

It is clear from this passage that the ground for the refusal of the previous application was that a Court cannot consider the validity or otherwise of a new Constitution, unless and until a new Constitution is established or purported to be established. That contemplated event has not yet occurred.

The petitioner has relied on the provision contained in s. 48 (2) of the draft of a new Constitution which has been published in the Gazette of 29th December, 1971, and he has submitted that the position has materially altered in view of that provision. This submission has apparently