(*32nd Edn.*) *p. 53* mentions, as one of the reasons which would justify a discretion to order separate trials, a situation where one accused person desires to call for the defence a person jointly indicted with him. No such application was made on the applicant's behalf, nor was an intimation made to the presiding judge at any stage that the appellant might possibly be prejudiced (as he now says he was) if the trial took a course which would prevent him from calling the 2nd accused as a compellable witness to support his defence. Indeed, the appellant seems to be unduly optimistic in assuming that, if the 2nd accused had implicated himself in the witness box as the person who actually stabbed the deceased, such evidence would have been "*in accordance with the statement made by the 2nd accused to the police*". We have examined this statement on which the appellant had apparently hoped to rely, and it is quite clear that the 2nd accused said nothing to the police which either implicated himself or exonerated the appellant of responsibility for the stabbing.

For these reasons we made order dismissing the appeal and affirming the conviction.

Appeal dismissed.

Req.- A.G Signature of Crown Counsel

1955 *Present :* **de Silva J. and Sansoni J.**

57 NLR 9

THE ATTORNEY-GENERAL, Appellant, *and* WILLIAM *et al.*, Respondents

S. C. 12—D. C. (Criminal) Jaffna, 4,489

Bribery Act, No. 11 of 1954—Indictment—Requirement of signature of Attorney-General—Sections 3 (2), 5, 6 (1), 8, 9 (1), 19 (b), 25, 78 (1)— Criminal Procedure Code, ss. 148 (e), 165 F, 186, 393.

In a prosecution for bribery under the Bribery Act, an indictment signed by a Crown Counsel contravenes the requirement of sections 5, 8 and 78 (1) that the indictment should not be signed except by the Attorney-General. A District Judge has no jurisdiction to try the accused upon such an indictment.

APPEAL from a judgment of the District Court, Jaffna.

Douglas Jansze, Acting Solicitor-General, with *L. B. T. Premaratne* and *V. S. A. Pullenayagam*, Crown Counsel, for the Attorney-General, appellant.

S. Nadesan, Q.C., with *J. V. C. Nathaniel*, for the accused respondent.

Cur. adv. vult.

August 22, 1955. SANSONI J.—

This is an appeal by the Attorney-General against the order of the learned District Judge of Jaffna discharging both the accused who appeared before him in these proceedings upon being served with copies of an indictment in the following terms :

"You are indicted at the instance of Thusew Samuel Fernando, Esquire, Q.C., Her Majesty's Attorney-General, and the charge against you is

That on or about the 18th day of June 1954, at Jaffna within the jurisdiction of this Court, you, Rajapaksa Vithanage William, being a public servant, to wit, Examiner of Motor Vehicles in the Department of the Commissioner of Motor Traffic, did accept a gratification, to wit, a sum of Rs. 50, as an inducement or reward for your performing an official act, to wit, the examining of and recommending the issue of a licence to drive a motor vehicle to P. B. R. S. Cooray of Jaffna, and that you are thereby guilty of an offence punishable under Section 19 (*b*) of the Bribery Act, No. 11 of 1954.

2. That at the time and place and in the course of the same transaction aforesaid you, Arunasalam Sinnapodiya Nagalingam, the second accused above-named, did abet the commission of the said offence of bribery which said offence was committed in consequence of such abetment, and that you are thereby guilty of an offence punishable under Section 19 (*b*) read with Section 25 of the said Bribery Act, No. 11 of 1954.

This 19th day of October, 1954.

Sgd.....

Crown Counsel."

A preliminary objection was taken by their Counsel based on S. 78 (1) of the Bribery Act, No. 11 of 1954, which reads : "No prosecution for any offence under this Act shall be instituted in any Court except by, or with the written sanction of, the Attorney-General". It was contended that this prosecution had not been instituted by the Attorney-General or with his written sanction. The Act makes provision for the prosecution of two classes of offences, namely, offences of bribery and offences other than bribery, and these two classes are dealt with in Part II and Part V respectively. The offences with which the accused were charged fall within Part II, and all prosecutions for such offences have to be instituted by the Attorney-General.

The earliest stage at which it can be said that a prosecution has been initiated is when the Attorney-General requires a Magistrate, upon a warrant under S. 148 (1) (*e*) of the Criminal Procedure Code, to hold an inquiry in respect of an allegation of bribery—S. 3 (2), but that course was not adopted in this prosecution. A prosecution can also be said to be initiated where without such preliminary inquiry the Attorney-General indicts the offender before the Supreme Court or the District Court, or arraigns him before a Board of Inquiry—S. 5 and S. 8. It will be observed that the Attorney-General alone is empowered to act under SS. 3 (2), 5 and 8.

There are two Sections which confer upon the Attorney-General the power to indict for bribery. One is S. 5 which reads : "If the Attorney-General is satisfied that there is a prima facie case of bribery he may

(*a*) where the offender is not a public servant, indict the offender before the Supreme Court or the District Court, as the Attorney-General may determine ; and

(*b*) where the offender is a public servant, either indict the offender as provided in the preceding paragraph (*a*) or arraign the offender before a Board of Inquiry, after informing the Public Service Commission."

The other is S. 8 which empowers the Attorney-General to indict a person for bribery without a preliminary inquiry by a Magistrate's Court as provided in Chapter 16 of the Criminal Procedure Code.

Now although the two accused were indicted in this case upon a supposed exercise of the powers vested in the Attorney-General by SS. 5 and 8, the indictment presented was not signed by the Attorney-General but by a Crown Counsel, and the preliminary objection was based on this omission. The learned Judge in his order took the view that the general scheme of the Act was that the Attorney-General himself should be concerned with the prosecution of cases arising under the Act, and he held that this was not a prosecution by the Attorney-General. The point that arises for decision is whether an indictment signed by a Crown Counsel and presented to the District Court in a case where there has been no preliminary inquiry by a Magistrate, contravenes the express provision of S. 78 (1) that no prosecution shall be instituted in any Court except by the Attorney-General.

The Act contemplates power being exercised by the Attorney-General in three different ways. In some matters he must act himself ; in other matters he may act himself or through an officer authorised by him ; in yet other matters he may authorise an officer *in writing* to take action.

Instances where the Attorney-General himself must act are :

(1) Under SS. 3 (2) and 3 (3) to require a Magistrate upon warrant under S. 148 (1) (*e*) of the Criminal Procedure Code, to hold an inquiry under Chapter 16 of that Code, and at the conclusion of the inquiry to require the Magistrate to record such further evidence as the Attorney-General may consider necessary.

(2) Under S. 4 (1) by written notice (*a*) to require an accused person to furnish a sworn statement in writing of his property, and the property of the members of his family ; (*b*) to require the Manager of any Bank to produce the accounts of an accused person or of any member of his family ; (*c*) to require the Commissioner of Income Tax to furnish all information available to him relating to the affairs of an accused person or any member of his family ; (*d*) to require the person in charge of any Government Department or of a Local Authority or of a scheduled institution to produce any document in his possession or under his control.

(3) Under S. 42 to select the members of a Board of Inquiry.

(4) Under S. 80 (2) to determine how long a person remanded to Fiscal's custody in default of bail should be kept in such custody.

Instances where the Attorney-General may act himself or through an officer authorised by him are :

(1) Under S. 3 (1) to direct and conduct the investigation of allegations of bribery.

(2) Under S. 3 (4) to direct in writing any person to appear and answer questions orally on oath or affirmation, to state facts by means of an affidavit, and to produce documents.

(3) Under SS. 4 (3) and (4) to enter and search any Department, office or establishment of the Government with such assistance as may be necessary ; and to apply to any public servant or any other person for assistance in the exercise of his powers and the discharge of his duties under the Act.

(4) Under S. 7 to apply to such Magistrate as the Attorney-General may determine for a search warrant to enter and search any place or building and to remove anything relevant to an investigation.

Instances where an officer authorised in writing by the Attorney-General may act are :

(1) Under S. 11, to present the case against a Public Servant who is arraigned before a Board of Inquiry.

(2) Under S. 81 (1) to authorise a Magistrate to tender a pardon to a person directly or indirectly concerned in or privy to an offence of bribery, with the view of obtaining the evidence of such a person.

(3) Under S. 83, to delegate to the Solicitor-General any of his powers and functions under the Act, except the power to sanction civil or criminal proceedings.

That the legislature intended to draw a clear distinction between these three classes of cases becomes apparent when one considers some of these Sections which I have already referred to. If one considers SS. 3, 4 and 7, to mention only three, one finds that each of them requires the Attorney-General to exercise certain powers himself, and authorises him to exercise other powers through an officer authorised by him. It is only too clear that this distinction has been deliberately drawn, and there is no room for the argument that where a Crown Counsel acts it should be presumed that he acted with the authority of the Attorney-General. The reason, I think, is obvious. Some of the powers conferred on the Attorney-General are of such magnitude that it was probably considered necessary that they should be exercised by him and by him alone to ensure that his judgment and decision will serve as a guarantee that those powers would be properly exercised.

When we examine the question arising on this appeal in the light of these considerations, we can understand why S. 5 empowers the Attorney-General (and nobody else) if he is satisfied that there is a prima facie case of bribery, to indict or arraign an offender, and also why S. 8 confers on the Attorney-General (and nobody else) the power to indict a person for bribery without a preliminary inquiry by a Magistrate. S. 5 makes the opinion of the Attorney-General the deciding factor as to whether there should be a prosecution or not. S. 8 brings into being an entirely novel procedure, since it abolishes such safeguards as the preliminary

examination of witnesses on oath or affirmation, and their cross-examination. S. 3 (2) is another drastic provision which relates to cases where a preliminary inquiry has been held by a Magistrate : the Magistrate is not permitted to exercise the normal judicial function of discharging the accused in a case where he considers that no useful purpose will be served by committing him for trial, but is required instead to transmit the record to the Attorney-General. Powers such as these which have been entrusted to the Attorney-General are not to be regarded lightly ; they must be exercised by him and him alone.

Mr. Nadesan who appeared for the accused submitted that the words "no prosecution shall be instituted except by the Attorney-General" to be found in S. 78 connote that the Attorney-General and nobody else shall institute the prosecution. He drew attention to the analogous provisions of S. 148 of the Criminal Procedure Code which enumerate the different ways in which proceedings shall be instituted by different categories of persons in a Magistrate's Court, and his contention was that since the Act empowered the Attorney-General to indict an offender the signing of the indictment by the Crown Counsel would not be in compliance with the Act, for if Crown Counsel signs it is he who indicts.

Now a prosecution for an offence of bribery can be instituted in one of two ways :

1. By warrant under the hand of the Attorney-General requiring a Magistrate to hold an inquiry under Chapter 16 of the Criminal Procedure Code—S. 3 (2).

2. By indictment before the Supreme Court or District Court, or arraignment before a Board of Inquiry—S. 5. It seems to me that it is only where the Attorney-General signs the warrant or the indictment or the order for arraignment that the prosecution can be said to have been instituted by him, just as it is only where he signs the written sanction for the institution of proceedings that it can be said that they have been instituted with his written sanction.

Mr. Nadesan also relied on the judgment of Pereira J. in the case of the *Attorney-General v. Silva* [1] where the learned Judge had to interpret the provisions of SS. 336 and 393 of the Criminal Procedure Code. Under S. 336 there can be no appeal from an acquittal by a District Court or a Magistrate's Court except "at the instance or with the written sanction of the Attorney-General". In that case the Solicitor-General acting on a delegation under S. 393 preferred a petition of appeal which was in the name of the Attorney-General, but signed by himself as Solicitor-General. Pereira J. held that the petition of appeal should in such a case have been in the name of the Solicitor-General, and that one which ran in the name of the Attorney-General should have been signed by the Attorney-General. This position is all the clearer in view of the many references to cases where officers other than the Attorney-General have been specifically empowered to act where the legislature has thought fit to empower them.

[1] *(1911) 17 N. L. R. 193.*

The Solicitor-General relied strongly on S. 9 (1) of the Act which directs that "an indictment prepared in the manner prescribed by S. 186 of the Criminal Procedure Code shall be transmitted by the Attorney-General to the Court of trial selected by him". He submitted that since S. 186 of the Code provides that all indictments shall be brought in the name of the Attorney-General and be in accordance with the prescribed form, and shall be signed by the Attorney-General or the Solicitor-General or a Crown Counsel or some Advocate authorised by the Attorney-General, the indictment in this case could have been signed by any of those persons. But this argument overlooks the purpose for which S. 186 of the Code has been referred to in S. 9. S. 9 merely provides that the indictment should be *prepared* in the manner prescribed in S. 186, and not that it may be signed by the different officers mentioned in S. 186. The reference to S. 186 is limited in scope, and is confined to the manner of the preparation of the indictment, which I understand to mean the form in which it shall be made ready or drawn up. To that extent the indictment in question is in order, but I cannot extend the meaning of the word "prepared" to include the essential operation of signing. This duty, it seems to me, has already been cast upon the Attorney-General by SS. 5 and 8. I would refer in this connection to S. 165F of the Criminal Procedure Code which speaks of an indictment being "drawn up" and "signed" as two distinct operations; also to S. 188 of the Civil Procedure Code which similarly speaks of a decree being "drawn up" and "signed". S. 9 does not, it will be noted, require the Attorney-General to prepare the indictment, and this duty can therefore be performed by any officer in his Department; but it does require the Attorney-General to transmit the indictment to the Court of trial selected by him, and to transmit copies of the indictment for service on the accused persons to the Fiscal. A later provision of the Section requires the Fiscal to make return of such service to the Court of trial and to the Attorney-General *or any officer appointed by the Attorney-General* to represent him. Here again, then, we find a provision which draws a sharp distinction between the Attorney-General acting himself and acting through an officer appointed by him.

The Solicitor-General, however, contended that where the Act requires the Attorney-General to sign a document it says so, and therefore the absence of any provision in SS. 5 and 8 requiring the Attorney-General to sign the indictment implies that any other officer of his Department mentioned in S. 186 of the Code may sign it.

It is true that instances of the Attorney-General being required to sign documents are to be found, for example, in S. 11, under which he may authorise in writing an Advocate or Proctor or other officer to present the case against the public servant before a Board of Inquiry, and in S. 83 under which he may by writing under his hand delegate all but one of his powers and functions to the Solicitor-General. But it is one thing for the Act to require the Attorney-General to confer authority, or to delegate his functions, or to give directions, by writing under his hand; it is a different thing to require that he and he alone—for that, it seems to me, is the necessary inference in the absence of all reference

to any other person exercising the function—should indict. The very reference to the act of indicting necessarily involves the duty of signing, for one cannot indict except by a written document, whereas one can delegate or authorise or direct orally.

In passing I would refer to S. 6 (1) of the Act which enacts that such of the provisions of the Criminal Procedure Code as are not inconsistent with the provisions of the Act shall apply to proceedings in any Court for bribery, but in my opinion those provisions of S. 186 which empower persons other than the Attorney-General to sign an indictment, are inconsistent with SS. 5 and 8 of the Act, and cannot therefore apply to this case.

S. 393 of the Code which empowers the Solicitor-General and Crown Counsel to exercise all or any of the powers conferred upon, and to perform all or any of the duties imposed upon the Attorney-General *by the Code* if the Attorney-General so directs, except the power to enter a nolle prosequi, and to pardon an accomplice, does not apply either.

The absence from the Act of any provision similar to S. 393 of the Code, and the pointed references in the Act to certain duties being performed by the Attorney-General alone, and others being performed by him or officers authorised by him, necessarily flow from the far-reaching nature of certain of the powers conferred upon the Attorney-General by the Act. It is only reasonable to presume that the legislature designedly abstained from conferring upon any officer but the Attorney-General the right to exercise the more responsible powers conferred upon the latter. It was not prepared to permit the Attorney-General to delegate the power to sanction civil or criminal proceedings. This is a power which has to be exercised in connection with the prosecution of offences other than bribery. It would not be unreasonable to expect that the corresponding power of indicting or arraigning, in the case of offences of bribery, should be exercised by the Attorney-General and nobody else, and it is not easy to see why the legislature appears to have empowered the Attorney-General by writing under his hand to delegate to the Solicitor-General the power to indict, but not the power to sanction civil or criminal proceedings. The question does not, however, arise for decision in this case whether S. 83 requires such an interpretation to be placed upon it, since it is not suggested that there has been any such delegation, and in any event the indictment has not been signed by the Solicitor-General.

For the reasons I have given I would hold that the indictment in this case failed to comply with the requirements of SS. 5, 8 and 78 (1) of the Act. The District Judge therefore had no jurisdiction to try the accused upon such indictment, and the proper order to be made was that the indictment be quashed. I would make that order now and dismiss this appeal.

DE SILVA J.—I agree.

Appeal dismissed.