# THE CEYLON TREASON TRIAL

*The Queen* v. *Liyanage and others*

By an information dated June 23, 1962, the Attorney-General of Ceylon charged Don John Francis Douglas Liyanage and twenty-three others with conspiring to wage war against the Queen, to overthrow otherwise than by lawful means the Government of Ceylon and with preparing to overthrow otherwise than by lawful means the Government of Ceylon. By an instrument of the same date the Minister of Justice, purporting to act under the authorization of section 440A(1)(a) of the Criminal Procedure Code, as amended by section 4 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, directed that the trial of the charged persons be held before the Supreme Court at Bar by three Judges without a jury. And by a further instrument also of the same date, addressed to the Chief Justice of the Supreme Court, the Minister of Justice, purporting to act under the authority of section 9 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, nominated the three Judges to preside at the trial.

The special three-judge Court, as nominated, ordered summonses to issue to the named persons to answer the charges on July 30, 1962. When called upon to plead to the charges, the defendants, through counsel, raised several preliminary objections, the most substantial being that the Court lacked jurisdiction to try the offences. Counsel framed this objection in a number of different ways, offering a variety of arguments for the position taken.

The Court first dealt with the objection that the direction of the persons to trial and the nomination of the Court were null and void for the reason that the documents signed by the Minister were in the English language, whereas Sinhala, by virtue of section 2 of the Official Language Act, No. 33 of 1956, read together with the Language of the Courts Act, No. 3 of 1961, had become, from January 1, 1961, the only official language of Ceylon. The contention was that the direction and nomination by the Minister, being "official acts of an official," were required to be done in the Sinhala language. Both counsel for the defendants and the Attorney-General submitted lengthy arguments on the interpretation of the language Acts in question, but the Judges declined to pass on the conflicting contentions. All parties admitted that, whatever the intention of the legislation, English was still, in fact, the language of the Court. Therefore, the Judges said, "communication by the Minister to the Court by documents made out in English of the direction and nomination of Judges by him is, in our opinion, a sufficient compliance with the existing law." It is submitted that while the above view appears immensely practical, the opinion leaves unclear the meaning of the phrase "existing law", as there used. The effective date of the Official Language Act was July 7, 1956. The Act contained a transitional provision; but it is difficult to read the terms of the Act as extending the transitional period beyond December 31, 1960. Section 2 of the Act reads:

> The Sinhala language shall be the one official language of Ceylon:
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> Provided that where the Minister considers it impracticable to commence the use of only the Sinhala language for any official purpose immediately on the coming into force of this Act, the language or languages hitherto used for that purpose may be continued to be so used until the necessary change is effected as early as possible before the expiry of the thirty-first day of December, 1960, and, if such change cannot be effected by administrative order, regulations may be made under this Act to effect such change.

On the effective date of the Act, the Prime Minister, the late S.W.R.D. Bandaranaike, declared that languages theretofore used as official languages could be "continued to be so used until the necessary change is effected in accordance with the provisions" of the Act.

One might well say on the basis of logic and subsequent experience that the transitional period was too short. But it seems strained to read the Act other than as intending the transitional period to end on December 31, 1960, with the alternative devices of administrative order or regulations under the Act to shorten (but not extend) the transitional period.

Counsel, who had moved the proposition, was not prepared to say that Sinhala became on and after January 1, 1961, the only language in which all the acts or all the functions of Government could have been performed, but argued that it was the only language in which "official acts of officials" could be embodied. Perhaps additional exposition of the meaning of the term "official language" would have been helpful to the Judges. An argument of the Attorney-General, neither accepted nor rejected by the Court, implied that the term "official language" would have acquired additional meaning had the legislature imposed sanctions for a failure to use the language in question. Certainly, to have voided the trial on the language issue would have required the Bench to impose sanctions not provided by the legislature. It is not surprising that the Judges would decline to undertake a manifestly legislative function.

Having disposed of the language objections, the Court turned its attention to what it called the "main objections," *i.e.*, the challenge to the powers of the Minister of Justice to constitute the three-judge Court, on the ground that sections 8 and 9 of the Criminal Law (Special Provisions) Act, under which he was purportedly proceeding, were *ultra vires* the powers of the Legislature as granted by the Ceylon (Constitution) Order in Council, 1946.

The Judges regarded the Minister's challenged power to issue a direction as being materially different from the allegedly invalid power to nominate the members of the Court. The Judges, therefore, considered these issues separately.

Most of the several counsel in the case abandoned the argument questioning the Minister's power to issue the direction. The statutory grant of power to the Minister in the Criminal Law (Special Provisions) Act seemed to be clear and unexceptional; and the Court's treatment of the objections actually argued will not be commented upon. The Bench upheld the power of the Minister to issue the direction.

The case was thus brought to the remaining substantial issue of the power of the Minister to nominate the members of the three-judge Court. The challenge was to the constitutionality of section 9 of Act No. 1 of 1962, which reads as follows:

> Where the Minister of Justice issues a direction under section 440A of the Criminal Procedure Code that the trial of any offence shall be held before the Supreme Court at Bar by three Judges without a jury, the three Judges shall be nominated by the Minister of Justice, and the Chief Justice if so nominated or, if he is not so nominated, the most senior of the three Judges so nominated, shall be the president of the Court.
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> The Court consisting of the three Judges so nominated shall, for all purposes, be duly constituted, and accordingly the constitution of that Court and its jurisdiction to try that offence, shall not be called in question in any Court, whether by way of writ or otherwise.

The Crown did not dispute the Court's right, despite the language in the second paragraph, to consider whether section 9 was itself *ultra vires.*

To ascertain the validity of their nomination, the Judges examined the doctrine of separation of powers in the Ceylon Constitution. Whatever the vires of section 9,

the Judges were not doubtful that they were in fact assembled as the Supreme Court, holding a Trial at Bar, and that they were not a separate court or tribunal. The Judges found that their nomination did not constitute an appointment to any new office or even to any office as such; for the three nominated were already Judges of the Supreme Court and in holding the Trial at Bar they functioned only in the capacity of Judges of the Supreme Court. It was clear to the Court that the Courts Ordinance of Ceylon followed a long history of Supreme Court Judges sitting apart singly or in various combinations. They further found that the power of nomination given to the Minister was no different in substance from that given to the Chief Justice under the Courts Ordinance to nominate a bench of Judges for certain purposes. Moreover, in the absence of statutory authorization the Judges found that the power of nomination of Judges resides in the Court itself but is, by convention, usually exercised by the Chief Justice. The important question for decision was whether the nomination by the Minister of Justice was an exercise of the judicial power of the State.

The Court found that the power of nomination or selection of the judges to hear particular cases or to constitute benches of the Supreme Court had, up to the time of the impugned Act, been invariably reposed in the Court, or of some part of the Court. They further found section 9 to be novel "the like of which does not hitherto appear to have found a place in any recognised system of law." They noted that the power to nominate was the power to exclude and that if section 9 were *intra vires* it could "result in a total negation of the judicial power of a judge or judges vested in them [by implication] by the Constitution." They reasoned that if the power to nominate could be reposed in the Minister, it could also be conferred on any other official, even one who might be a party interested in the litigation. The holding of the Judges was phrased in the following language:

> . . . we are of opinion that because
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> (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
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> (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,
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> section 9 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, is *ultra vires* the Constitution.

The Court, therefore, held itself to be without jurisdiction to enter upon a Trial at Bar of the defendants.

As the Judges fully recognized, this holding effectively disposed of the case, but they went on to analyze the instant facts in the light of Lord Hewart's well-known statement that "justice should not only be done, but should manifestly and undoubtedly be seen to be done". [1] The Judges eschewed any inquiry into the motives of Parliament; but they noted that prior to the 1962 amendment, under section 440A of the Criminal Procedure Code the Minister merely had the right to direct that the trial be held before a three-judge bench of the Supreme Court, sitting without a jury.

1. *R.* v. *Sussex Justices, ex parte McCarthy,* (1924) 1 K.B. 236.

It was further noted that the instant power of nomination was vested in the Minister after the alleged commission of these crimes against the Government of which the Minister was a member and that the law was made retroactive. Moreover, the Court observed that it was not disputed that the Minister had himself participated in the investigation and interrogation of some of the witnesses. The Judges asked themselves what impression of the administration of justice was likely to be created in the mind of the ordinary or reasonable man by this novel law. Not without reason, they concluded that the impartiality of the Bench might have become suspect. Also, they noted that by reason of the doctrine of ministerial responsibility, the propriety of the nomination was discussable in Parliament, which might involve debate on the merits or demerits of individual judges, a condition from which the judges had theretofore been free. For these reasons the Court opined that even if it had held a different view as to the vires of the Act, the result would not have been different.

In determining the issue of the constitutionality of the Act, the Judges found it helpful to look beyond the case law of Ceylon. While the Court, as it said, found the particular question unique, it was able to call upon decisions, especially from Australia[2] and the United States,[3] distinguishing the functions of courts from the other possessors of power. Beyond question, the decision in this case is within the highest tradition of Anglo-American jurisprudence. Casting their reasoning in the form of an analysis of the judicial process, the Judges have held firm the principle of the impartiality of the judiciary. That the case was one charged with the emotional and political content of a treason trial is the more credit to the courage and integrity of the Court.

H. E. GROVES.

2. *E.g.*, *The Queen* v. *Davison,* (1954) 90 C.L.R. 353.

3. *E.g.*, *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908).