1966 *Present :* **G. P. A. Silva, J.**

P. K. PREMASINGHE, Petitioner, *and* B. A. H. BANDARA, Respondent

Election Petition No. 5 of 1965—Electoral District No. 123 (Badulla)

Election petition—Allegation of making false statement about candidate—Allegation of agency—Requirement of proof beyond reasonable doubt—Corrupt practice—Illegal practice—Ceylon (Parliamentary Elections) Order in Council, 1946 (Cap. 381), ss. 58, 72 (1) (2), 77, 82, 82 C (2) (b).

In an election petition, a charge of making a false statement of fact in relation to the personal character and conduct of a candidate must be proved beyond reasonable doubt. Such a charge is also a corrupt practice falling into the same category as bribery, treating, undue influence, etc., which are enumerated in section 58 of the Parliamentary Elections Order in Council and there is no justification to make a distinction in the onus of proof in respect of these different corrupt practices.

Don Philip v. Ilangaratne (51 N. L. R. 561) not followed.

An allegation of agency too must be proved by the petitioner beyond reasonable doubt.

ELECTION Petition No. 5 of 1965—Electoral District No. 123 (Badulla).

Izadeen Mohamed, with *H. D. Tambiah*, for the petitioner.

Jaya Pathirana, with *Prins Gunasekera*, *Hannan Ismail* and *Stanley Tillekeratne*, for the respondent.

Cur. adv. vult.

June 22, 1966. G. P. A. SILVA, J.—

By his petition dated the 9th of April, 1965, Pihille Kankanamge Premasinghe, a voter of the Badulla Electoral District, whom I shall hereafter refer to as the petitioner, has challenged the election of Bamunusinghe Aratchige Heen Bandara who was returned as the duly elected Member of the said Electoral District and whom I shall refer to hereafter as the respondent. The election of the respondent was assailed on the following three grounds :—

(1) that the said respondent by himself, his agent or agents and/or other persons acting on his behalf or with his knowledge and/or consent was guilty of bribery before, during and after the said election ;

(2) that the said respondent was by himself, his agent or agents and/or other persons acting on his behalf or with his knowledge and/or consent guilty of undue influence before, during and after the said election ;

(3) that the said respondent by himself, his agent or agents and/or other persons acting on his behalf or with his knowledge and/or consent made and/or published before or during the said election false statements of fact in relation to the personal character and/or conduct of H. M. Jinadasa, a candidate at the said election, for the purpose of affecting the return of the said H. M. Jinadasa at the said election.

Counsel for the petitioner, at the commencement of the inquiry into the petition, for certain reasons of convenience, wished to lead evidence of these charges with the order reversed, that is to say, making or publication of false statements, undue influence and bribery, respectively, in that order and I permitted him to do so.

Mr. Pathirana, counsel for the respondent, who launched an attack on every aspect of the petitioner's case, succeeded in driving a wedge into every corner-stone of this case. So successfully did he attack the petitioner's case in respect of the charges of bribery, undue influence and part of the false evidence charges that the petitioner's counsel was compelled to withdraw these charges at the end of the respondent's case. Counsel for the petitioner, Mr. Mohamed, who realised the weakness of

his case in respect of these charges at this stage acted very properly when he withdrew all the charges which he could not sustain instead of persisting in the original case with which he came to court and by this course of action he has considerably assisted this court.

One aspect of the withdrawal of these charges, however, is that it carries with it a possible though not a necessary implication. It suggests :—

(1) that the petitioner could not support the position taken up earlier in regard to P 17 and P 18 which were alleged to be typed and signed letters of the respondent;

(2) that these documents were either diabolical forgeries or that they were fabricated, for the purpose of misleading the electorate, on official House of Representatives notepaper which the respondent had left signed in blank for a different purpose, and which had reached the hands of Jinadasa or his agent by questionable means;

(3) that the charge levelled against Jinadasa or his agents by the respondent of forging his signature and making false documents could not be refuted;

(4) that the fairly large superstructure of oral evidence regarding the charges of bribery and undue influence against the respondent or his agents which was sought to be built on the foundation of P 17 was rejected by the petitioner himself;

(5) that the candidate Jinadasa or someone on his behalf was prepared not merely to fabricate such a document as P 17 but, by means of such fabrication, to involve the respondent in a very serious charge not merely of bribery but of bribery of several public servants, namely, the Grama Sevakas of the area, and the perversion of the whole administrative machinery of their respective divisions. I may say that even if counsel for the petitioner had not taken the step of withdrawing these charges, I should have had no hesitation in rejecting the evidence on which those charges were founded. If there was admittedly such a volume of both oral and documentary evidence which was false or at least unreliable—for the oral evidence alone, if reliable, could have established the charges of bribery and undue influence without any assistance from the document P 17—why then this court has to be even more cautious than in the normal case in assessing the rest of the available evidence in support of the only charge that is left for consideration.

Before I examine the evidence, it is necessary for me to consider certain questions of law regarding the burden of proof on which both counsel have addressed me at length. In view of the very conflicting

submissions made by counsel on either side on the burden of proof required of a petitioner in respect of a charge of making false statements I think I should deal with the question in some detail. Counsel for the respondent submitted that Nagalingam J. was in error when he held in the case of *Don Philip v. Ilangaratne* [1] that, where the allegation is that the respondent or his agents are guilty of making false statements of fact, the falsity of the statement is prima facie established when there is a denial on oath, and that it is for the party who asserts that a statement alleged to be false is true to establish beyond reasonable doubt the truth of that statement. For the submission he made he relied on the decision of Sri Skanda Rajah J. in the Bentara-Elpitiya Election Petition case in which he examined and disagreed with the reasoning of Nagalingam J. in the earlier case. It would appear from the judgment of Nagalingam J. that he too agreed with the necessity of proof beyond reasonable doubt in respect of bribery or treating and that it was only in respect of false statements that he contemplated a different standard. Even here as was conceded by the counsel for the petitioner, who naturally relied strongly on the pronouncement of Nagalingam J., the fact of making the statement had to be established beyond reasonable doubt. Once this fact was established and there was a denial on oath that the statement was false, the view taken by Nagalingam J. was that the burden of proving the truth of the impugned statement was shifted to the respondent. This is a view with which I find it difficult to agree. In the first place, where the denial on oath by the candidate affected or anyone else on his behalf is not allowed by the respondent to remain unchallenged and where the assertion of falsity of the statement complained of is successfully shaken in cross-examination, whether it be by a general impeachment of the credit of the witness concerned or by the production of documentary evidence in the course of such cross-examination which will contradict the denial on oath, then there is no question of prima facie proof of falsity. Secondly, in view of what I state below regarding the degree of proof necessary in my opinion to establish a charge contained in an election petition, I am compelled, with respect, to disagree with the dictum of Nagalingam J. on this matter.

The contention of counsel for the respondent, in support of which he cited several cases, was that the burden of proof that a petitioner has to discharge in respect of every element of an offence is the same as that expected of the prosecution in a criminal case. This principle, so far as criminal law is concerned, is now fairly well settled and it is hardly necessary to go into cases such as *King v. Fernando* [2] cited by counsel to show that the burden shifts to an accused person only after the prosecution has established its prima facie case beyond reasonable doubt and the accused has pleaded the benefit of a general exception. I shall therefore confine my attention to a scrutiny of the important judgments in earlier election petition cases.

[1] *(1949) 51 N. L. R. 561.* [2] *(1947) 48 N. L. R. 249.*

In the case of *Ilangaratne v. G. E. de Silva*[1], Windham J. held to be proved only those charges in respect of which the evidence satisfied him beyond reasonable doubt. After giving seven reasons for his conclusion, he went on to say at page 175: "On all these grounds I am convinced beyond reasonable doubt, and I find as a fact, that the respondent did at the Mapanawatura meeting on August 27, 1947, during the election campaign, make the above false statement of fact in relation to the personal character and conduct of the candidate Ilangaratne. That it was made for the purpose of affecting the latter's return admits of no reasonable doubt, having regard to the circumstances in which it was made." In respect of some of the other charges he held that the evidence did not convince him or that it did not prove the charge positively and that it did not raise more than a suspicion and he dismissed those charges. Concerning another charge of undue influence resulting from the threat he observed: "These considerations make it highly probable that the threat (to see that a voter would be out of an estate if he did not work for the respondent) was made. Nevertheless, viewing the conflicting evidence as a whole, I am not satisfied beyond a reasonable doubt as to where the truth lay. In these circumstances I cannot hold the charge to be proved. The same considerations apply in the case of the next incident where the evidence consisted of the sole testimony of the witness Augustine Peiris against the denial of the respondent. According to Peiris . . . . . the respondent came into the Post Office and said to him 'I have authentic proof that your father is working against me. I have been responsible for giving you this Post Office. I shall see that it is shifted from here'. Again the words ring true to character. But in view of the paucity of evidence—one man's word against another's—I cannot say that the charge has been proved beyond reasonable doubt. And in such charges, a strong suspicion is not enough."

In the case of *Aluwihare v. Nanayakkara*[2], it was held by Basnayake J. that the standard of proof required of a petition at an election inquiry must be higher than required in a civil case and not lower than that required in the case of a criminal charge and, citing a number of English cases in support, added (at page 533) that in a wide range of cases which are strictly not criminal the standard of proof is the same as for a criminal case. He held further that where allegations of offences statutory or otherwise which carried with them severe penalties were made in proceedings which were strictly not criminal, the trend of judicial decisions was to require proof beyond reasonable doubt in respect of such allegations.

In *Chelvanayakam v. Natesan*[3], this view was confirmed by de Silva J. when he held that election offences must be strictly proved.

The English decisions appear to be even more emphatic in their insistence on a standard of proof beyond reasonable doubt. In the *Warrington case*[4], Baron Martin in giving judgment for the respondent stated:— "I adhere to what Mr. Justice Willes said at Lichfield, that a Judge to

[1] *(1948) 49 N. L. R. 169.*
[2] *(1948) 50 N. L. R. 529.*
[3] *(1954) 56 N L. R. 271*
[4] *1 O'Mally & Hardcastle 42 at 44.*

upset an election ought to be satisfied beyond all doubt that the election was void, and that the return of a member is a serious matter, and not to be lightly set aside." In the *Londenderry case*[1], with reference to a charge of bribery, Mr. Justice O'brien said :—" The charge of bribery, whether by a candidate or his agent, is one which should be established by clear and satisfactory evidence. The consequences resulting from such a charge being established are very serious. In the first place it avoids the election, ... In the next place, the 43rd and 45th sections of the Parliamentary Elections Act, 1868 impose further and severe penalties for the offence, whether committed by the candidate or by his agent. Mere suspicion, therefore, will not be sufficient to establish a charge of bribery, and a judge, in discharging the duty imposed upon him by the statute, acting in the double capacity of judge and juror, should not hold that charge established upon evidence which, in his opinion, would not be sufficient to warrant a jury in finding the charge proved."

From all these decisions, barring that of Nagalingam J. with which I have disagreed, it is reasonable to draw the following conclusions :—

1. that any charge laid against a successful candidate by a petitioner in an election petition should be proved beyond reasonable doubt before a court could satisfy itself of such charge ;

2. that suspicion however strong it may be does not amount to proof of any charge ;

3. that even a high degree of probability is not sufficient to constitute the proof required to establish a charge and ;

4. that a court should be slow to act on one witness' word against another's even if the word of the person who supports a charge rings true when that constitutes the only evidence of such charge.

Although these decisions furnish abundant authority to require from a petitioner proof beyond reasonable doubt in respect of his allegations in the petition there is another consideration, not so far dealt with in any of the cases cited by counsel, which strikes me as being decisive in this matter. I base my conclusion on a study of the sections of the Ceylon (Parliamentary Elections) Order in Council themselves. Quite irrespective of the presentation of an election petition, section 58 of this Order makes a person guilty of a corrupt practice, among other things, if he—

(1) commits the offence of treating, undue influence or bribery, or

[1] *1 O'Mally & Hardcastle 274 at 278.*

(2) makes or publishes, before or during an election, for the purpose of affecting the return of any candidate, any false statement of fact in relation to the personal character or conduct of such candidate,

these offences being defined in the immediately preceding sections. Similarly, the sections that immediately follow section 58 make certain acts or omissions illegal practices. A person committing any of these offences before, during or after an election, as the case may be, is liable to be prosecuted with the sanction of the Attorney-General in terms of section 58 (3) and section 72 (2) respectively and, on conviction by a District Court, is punishable with imprisonment and/or a fine as prescribed by sections 58 (1) and 72 (1) respectively. In addition to a conviction and sentence by the District Court, sections 58 (2) and 72 (1) impose on a person convicted of such an offence the incapacity of not being registered as an elector and not being appointed as a Senator or a Member of Parliament for a specified period from the date of conviction.

I shall now turn for a moment to the provisions regarding election petitions. Under section 77 of the Order-in-Council, an election can be declared void by an Election Court on proof of precisely the same (among other) grounds as those in respect of which any person can be charged and convicted in a criminal court. Section 82 requires an Election Judge, at the conclusion of a trial of an election petition, to make a report setting out whether any corrupt or illegal practice has or has not been proved to have been committed and section 82 C (2) (*b*) subjects a person who has committed a corrupt or illegal practice to the same incapacities as if at the date of the report of the Election Judge he had been convicted of that practice. It would thus appear that a person can be visited with the severe penalties of certain civic disabilities in respect of the same act, namely, a corrupt or illegal practice in one of two ways, one by a prosecution in a court of law and the other by a finding of an Election Judge. If without an election petition being even filed a person who has committed a corrupt or illegal practice is prosecuted before a criminal court, the standard of proof that will be required for a conviction of such person will be the same as in any other criminal charge, namely, proof beyond reasonable doubt. If the law should be that the standard of proof for establishing charges on an election petition is lower than that required in a criminal trial and that such charges can be proved by a balance of probability, the resulting position will be that the same grave consequences of losing certain civic rights can befall the same person by being found guilty of the same charges by a preponderance of probability in one court and by proof beyond reasonable doubt in the other. It seems to me that there is an inherent fallacy in such a proposition and I will not subscribe to it. It would be revolting to one's sense of justice if such a person's guilt of a corrupt or illegal practice, which will be visited with the very same punishments can be established by means of an election petition with a different and lower standard of proof than by means of a trial before a criminal court.

The only just course which commends itself to a court of law therefore is to require the same standard of proof, whether the result is reached via a prosecution or via an election petition.

When I consider the question of making or publishing false statements in the light of this view which I have formed, I find no difficulty in deciding that an allegation of false statements against a respondent too like any other charge must be proved beyond reasonable doubt. For, a charge of making false statements is also a corrupt practice falling into the same category as bribery, treating, undue influence, etc., which are enumerated in section 58 of the Order and there is no justification to make a distinction in the onus of proof in respect of these different corrupt practices. This approach to the problem—and I hope I am not wrong in my approach—fortifies me in the view I have already expressed in dissenting from the judgment of Nagalingam J. in *Don Philip v. Ilangaratne.*

With this conclusion in the background let me consider the submission made by counsel for the petitioner that the standard of proof regarding agency is not as heavy as that required to establish substantive charges of election offences. In this matter he relied on the judgment of Sri Skanda Rajah J. in the Balangoda Election Petition case, in which he revised the previous view he took in the Bentara-Elpitiya Election Petition No. 26 of 1965 and held that though the other elements of a charge should be established by the petitioner beyond reasonable doubt, he need not do so in regard to agency. On this matter of agency he adopted what was stated in the *Worcester case*[1], to the effect that enough evidence may have been given to put the onus of disproving it upon the respondent. The reason given by Sri Skanda Rajah J. for adopting this view was that efforts were directed, more often than not, to conceal agency, thereby rendering it very difficult for a petitioner to establish agency. While I am prepared to agree that agency must be given a very wide meaning in election law and not a restrictive meaning in the sense that agency may be proved by surrounding circumstances and not necessarily by an express appointment, with all deference to my brother, I am disinclined to relax the requirement as to the degree of proof even in the case of agency. For, agency is as much an essential element of the offence as any other when the charge is that a candidate through his agent committed an election offence. It will therefore be illogical, consistently with the view I have formed, for a court which insists on the proof of an election offence beyond reasonable doubt to be satisfied with a lower standard of proof in respect of one of the essential ingredients. If I may draw an analogy from a trial of a criminal offence, the vicarious liability sought to be established in an election case against a respondent to a petition through an agent is similar to such liability being brought home to an accused in the footing of a common intention or through an unlawful assembly or conspiracy charge with others. In any one of these cases the elements that would establish vicarious liability should

[1] *(1892) Day's Election Cases 89.*

be proved beyond reasonable doubt in the same way as the other ingredients that would establish the substantive offence with which the accused are charged. I therefore hold that the allegation of agency too must be proved by a petitioner beyond reasonable doubt.

As I have indicated before, the fact of agency may be established by circumstantial evidence and there is no requirement to prove an express appointment. This view has often been taken by the English courts and I see no reason to doubt the correctness of it. A court has, however, to be careful to satisfy itself that the adverse inferences drawn against a respondent in the matter of agency are the only inferences which can reasonably be drawn from the circumstances proved, before it decides that a disputed person is an agent.

With these observations in the legal aspects that arise for decision, I shall now proceed to consider the evidence in respect of the only charge of making and/or publishing the false statement contained in P 9.

[His Lordship then examined the evidence at length, and concluded :—]

For the reasons stated above, the only charge which was proceeded with by the petitioner fails and the petition is therefore dismissed. I accordingly hold that the respondent Bamunusinghe Aratchige Heen Bandara, whose election as Member of Parliament for Badulla is complained of, was duly elected. Since only two of the three substantial charges were seriously pursued till the conclusion of the evidence, the evidence of bribery offered by the petitioner being negligible, I order the petitioner to pay two-third of the taxed costs to the respondent.

In conclusion, I wish to thank all the counsel who appeared at this inquiry for their valuable assistance. Mr. Mohamed acted very honourably in the best traditions of the Bar when he withdrew the charges which he did not feel justified in proceeding with on the evidence and facilitated the task of this court. Mr. Pathirana conducted the case with restraint and commendable thoroughness and acted with a high sense of propriety in dealing with the witnesses for the petitioner and the unsuccessful candidate Jinadasa. For all these qualities which both counsel displayed and for the willing co-operation extended to me in the course of this prolonged inquiry, I am in their debt. I also take this opportunity of expressing my gratitude to the staff of the court and to the Bandarawela Police for the efficient manner in which all the necessary arrangements were made for the convenience of the court during this inquiry.

Election petition dismissed.