1967 *Present :* **H. N. G. Fernando, S.P.J., T. S. Fernando, J., and Abeyesundere, J.**

T. B. M. HERATH, Appellant, *and* W. M. SENAVIRATNE and another, Respondents

Election Petition Appeal No. 12 of 1966—Electoral District No. 47 (Walapane)

Election petition—Corrupt practice—False statements made at an election meeting concerning the unsuccessful candidate—Police reports in proof of such statements —Admissibility in evidence—Evidence Ordinance, ss. 35, 160—Amendment of particulars—Discretion of Court to allow it—Scope—Election Petition Rules, Rule 5.

(i) A police officer took down at an election meeting rough notes of the speeches made at the meeting and subsequently prepared from those notes a report for transmission to the Officer-in-Charge of the Station. After the report was prepared the rough notes were destroyed.

Held, that the Police report was not admissible in evidence under Section 35 of the Evidence Ordinance in proof of statements made by the speakers at the meeting. Such a report is not a " book, register or record " within the meaning of that Section.

Wimalasara Banda v. Yalegama (69 N. L. R. 361) followed.

(ii) Towards the close of the case for the petitioners-respondents, after some 10 dates of trial, Counsel appearing for them moved, in consequence of a statement made by the respondent-appellant during his cross-examination, to amend the particulars by adding a new charge of making a false statement concerning the character of the opposing candidate. This amendment was allowed by the Election Judge without appreciating the gravity of the prejudice to the appellant which arose upon his being required to face a new charge of which he had no warning earlier.

Held, that Rule 5 of the Election Petition Rules which provides that particulars may be ordered " to prevent surprise and unnecessary expense, and to secure a fair and effectual trial " does not permit the Election Judge to admit a new particular which is substantially a new charge never contemplated in the original petition.

Semble : Leave to amend particulars may be allowed only if it appears upon affidavit that the failure to furnish the particulars in due time had been *bona fide*. In practice the existence of good faith must be established by affidavit.

ELECTION Petition Appeal No. 12 of 1966—Electoral District No. 47 (Walapane).

Colvin R. de Silva, with *K. Shinya*, *Raja Bandaranayake*, *Jayatissa Herath*, and *Nihal Jayawickreme*, for Respondent-Appellant.

Sunil de Silva, in support of the application for a postponement by Petitioners-Respondents.

Cur. adv. vult.

1*—H 10108—(12/67)

January 16, 1967. H. N. G. FERNANDO, S.P.J.—

The appellant was elected Member of Parliament for Walapane at the General Election held in March 1965. His election was held to be void following an election petition on the ground that the appellant and three other persons, being agents of the appellant, had committed corrupt practices in connection with the election. The corrupt practice in each case consisted of the making of false statements of fact in relation to the personal character or conduct of the unsuccessful candidate.

The learned Election Judge has stated in his judgment that in the case of this petition, the petitioners relied only on Police reports in support of the charges that the alleged false statements had in fact been made. The summary of the evidence relating to the procedure according to which these reports were prepared establishes that the practice in the electorate had been for a police officer to take down at an election meeting rough notes of the speeches made, and subsequently to prepare from those notes a report for transmission to the Officer-in-Charge of the Station, and that after the report was prepared the rough notes were destroyed.

The learned Election Judge was clearly of opinion that these reports were admissible in evidence under section 35 of the Evidence Ordinance. I have considered in the Rattota Election Appeal (see S. C. Minutes of 20th December 1966)[1] the question whether such a report " is a book, register or record " within the meaning of section 35, and have there stated my reasons for holding that it is not. Moreover, it is perfectly clear that in the present case the reports were not used to refresh memory, or to enable a witness to give evidence in terms of section 160 of the Evidence Ordinance. The reports were therefore improperly admitted, and it follows that there was no legal evidence to establish that the several statements alleged to have been made had in fact been made by the appellant and his agents. The findings that corrupt practices had been committed were thus erroneous in law.

In the case of one charge which the learned Election Judge held to be established, there was material, other than a Police report, relied upon for the finding that the appellant had made a false statement of fact concerning the unsuccessful candidate.

In the course of the evidence given by the appellant at the trial he admitted that he had at an election meeting made the following statement :— " I will prove that Mr. Ramanayake (the opposing candidate) is a Christian. Why did he not vote at the election of a Basnayake Nilame." The learned trial Judge held that this statement was false because he reached the conclusion that Mr. Ramanayake was a Buddhist at the time that the statement was made although he had been the son of a Christian Minister, and had been a Christian until sometime in 1962. The Judge further held that this statement contained an innuendo that Mr. Ramanayake had been masquerading as a Buddhist, and therefore constituted a statement affecting his character or conduct.

[1] *(1966) 69 N. L. R. 361 (Wimalasara Banda v. Yalegama).*

In view of the admission by the appellant that he made the alleged statement, and of the conclusions of the trial Judge as to its falsity and the innuendo, I propose to assume for present purposes (despite the lack of the benefit of argument on behalf of the respondents to this appeal) that the improper admission of the relevant Police report does not vitiate the finding that the statement was in fact made by the appellant.

The Election Petition in this case was filed on 17th April 1965, and the particulars relating to the charges were furnished on 23rd February 1966. Those particulars did not refer to any alleged statement concerning the question whether Mr. Ramanayake was a Christian or a Buddhist. But apparently with the object of testing the credit and the honour of Mr. Ramanayake at the trial, Counsel for the appellant attempted to show that Mr. Ramanayake had posed as a Buddhist while in fact being a Christian. This he did by producing the Personal File contained in a Government Department in which Mr. Ramanayake had been employed; there was ample material in the file to show that in the year 1962 and earlier Mr. Ramanayake declared himself to be a Christian; and Counsel succeeded also in proving that Mr. Ramanayake's father had been a Minister of a Christian religion. Mr. Ramanayake bv his evidence apparently succeeded in satisfying the learned Election Judge that he had changed his religion, and had become a Buddhist after some date in 1962.

Towards the close of the case for the petitioners, after some 10 dates of trial, Counsel for the petitioners moved on 29th April 1966 to amend the particulars of alleged false statements by adding the particular that the appellant had made a false statement that Mr. Ramanayake was a Christian. This amendment was allowed by the learned Election Judge, and that is how the charge that this statement had been made came into issue at the trial. In allowing the amendment the learned Judge referred to Rule 5 of the Election Petition Rules which provides that particulars may be ordered "to prevent surprise and unnecessary expense, and to ensure a fair and effectual trial", and he was satisfied that the appellant would not be prejudiced by the admission of the new particular, which was substantially a new charge never contemplated in the original petition.

Counsel for the appellant referred to certain English decisions to the effect that leave to amend particulars may be allowed only if it appears upon affidavit that the failure to furnish the particulars in due time had been *bona fide*, and that in practice the existence of good faith must be established by affidavit. In the instant case although Counsel for the petitioner declared his intention to furnish such an affidavit it was not ultimately furnished.

But there is another ground which compels me to hold that the learned Election Judge wrongly exercised his discretion to allow this amendment. He failed to take account of the fact admitted by Mr. Ramanayake that he had been a Christian until 1962 and to realise that the question of fact

actually involved was one quite difficult of solution, namely whether Mr. Ramanayake had both ceased to be a Christian sometime in 1962, and also commenced thereafter to be a Buddhist. Had the appellant and his advisers been aware in February 1966 (when the particulars were furnished) or even when the trial commenced on 5th April 1966, that the issue of fact whether Mr. Ramanayake was still a Christian early in March 1965 would affect the appellant's due return and his franchise rights, many inquiries might have been successfully made with a view to establishing the truth of the statement that Mr. Ramanayake was a Christian. Indeed the burden of proving the falsity of that statement lay on the petitioners in this case, and much might have been done on behalf of the appellant in rebuttal of Mr. Ramanayake's version, if the vital importance of the question had been known before the trial commenced. Conscious of the possibility of prejudice to the appellant, the learned Judge indicated that he would permit the further cross-examination of witnesses previously called by the petitioners. But the Judge failed to appreciate the gravity of the prejudice to the appellant which arose upon his being required to face a new charge of which he had no warning until the closing stage of the petitioners' case. It was one thing for the appellant to hope to shake the credit of Mr. Ramanayake by an attempt to show that he had posed as a Buddhist ; it was quite another for the appellant, at the risk of forfeiting his seat in Parliament, to have to substantiate a former statement that Mr. Ramanayake had been a Christian.

I am satisfied in the circumstances that the appellant did not have a fair trial on the new charge, and that the Judge erred in law in admitting the charge.

For these reasons I would reverse the determination of the Election Judge, and hold that the appellant Tikiri Banda Mudiyanselage Herath *alias* Herath Mudiyanselage Tikiri Banda was duly elected as the Member for Walapane at the election held on 22nd March, 1965. The respondents to this appeal will pay to the appellant the taxed costs of the appeal and of the trial of the petition. I further direct that the report of the Election Judge dated July 29, 1966 and made in terms of section 82 of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, should not be transmitted to the Governor-General.

T. S. FERNANDO, J.—I agree.

ABEYESUNDERE, J.—I agree.

Appeal allowed.