

1944

*Present: Hearne J.*RUTNAM *v.* M. DINGIRI BANDAIN THE MATTER OF THE ELECTION FOR THE NUWARA ELIYA
ELECTORAL DISTRICT.

Election Petition—Charge of undue influence by agents—Activities of agents adopted by candidate—Offences committed by agents would avoid election—General intimidation affecting result of election—Burden of proof—(State Council Elections) Order-in-Council, 1931, Article 53.

Where, in an election petition, there is evidence that certain persons were found canvassing and distributing identity cards and leaflets on behalf of a candidate and that the candidate adopted their activities, a Judge may conclude that the agency of such persons has been established. Undue influence exercised by such persons would avoid an election even if the offence was committed without the sanction or connivance of the candidate, unless it could be shown that the candidate had taken all reasonable means for preventing the commission of corrupt and illegal practices.

Where general intimidation that may have affected the result of an election is proved it is no part of the duty of a Judge to enter into a scrutiny whether, if that intimidation had not existed, the result would have been different. In such a case the burden of proof is cast upon the constituency whose conduct is incriminated, and unless it can be shown that the gross amount of intimidation could not have possibly affected the result, the election ought to be declared void.

THIS was an election petition impugning the return of the respondent as member of the State Council for the Nuwara Eliya Electoral District at an election held on October 16, 1943.

The charges laid in the petition were (a) general intimidation and (b) undue influence under Article 53 of the (State Council Elections) Order-in-Council, 1931.

The facts are fully stated in the judgment.

C. S. Barr Kumarakulasingham (with him *Vernon Wijetunge, T. D. L. Aponso, J. G. T. Weeraratne* and *Muttusamy*), for the petitioner.

R. L. Pereira, K.C. (with him *H. W. Jayewardene* and *G. T. Samarawickreme*), for the respondent.

LATER: *E. G. Wikremenayake* (with him *H. W. Jayewardene* and *Samarawickreme*), for the respondent.

Cur. adv. vult.

March 10, 1944. HEARNE J.—

This is an inquiry into a petition by Mr. Rutnam impugning the return of Mr. Banda as Member of the State Council for the Nuwara Eliya Electoral District No. 22 at an election held on October 16, 1943.

The petitioner, a Ceylon Tamil, received 11,093 votes, the respondent a Kandyan Sinhalese 12,652, while Mr. Beddewella and Mr. Alawatugoda also Kandyan Sinhalese, received 1,484 and 204 votes respectively.

The charges laid in the petition were (a) general intimidation and (b) that "the respondent was guilty of undue influence under Article 5^a of the Order-in-Council, 1931, as he, by persons acting on his behalf, used force and violence and threatened to use force and violence on voters in order to induce and compel such persons to refrain from voting at the election".

Freedom of choice is essential to the validity of an election and if, by intimidation of voters, this freedom is prevented generally, the election is void. But, as I pointed out to Counsel for the petitioner, in order to avoid the election under (b), it would be necessary to prove that the undue influence alleged was committed by the respondent, or with his knowledge or consent, or by an agent or agents. He undertook to prove that the guilty parties were agents of the respondent.

This inquiry, it need hardly be said, is not solely a contest between Mr. Rutnam and Mr. Banda. Much more than a mere personal issue is involved. One of my duties is to ascertain whether there has been a violation of a fundamental right, the free exercise of the franchise, and in this the public weal is involved.

If voters are driven from the polls by force or prevented from going to the polls by threats or obstruction or denunciation and abuse, freedom of election in Ceylon will cease to exist. The successful candidate will be the one whose supporters have the *power* to record their votes and, as far as possible to prevent the rival candidate's supporters from doing so. It would be utterly subversive of the principle of freedom of election.

The victimisation of voters at Wellagiriya, one of the polling stations, affords a good illustration of what I have in mind.

It was by playing on the fears of the labourers from Marigold estate, who accompanied Maiyappen Kangany, rather than by actual intimidation, that some of them were induced to refrain from voting. They were told on their arrival that there was trouble ahead and, if they went any further, they would do so at their peril, or words to that effect. According to Maiyappen about a third of his followers fled, the remainder stood their ground till the arrival of an Assistant Superintendent of Police when they voted.

With the exception of a very few the followers of Francis Moses, the tea maker, did not even wait for the police. At the first sign of opposition and of threats they abandoned their mission and made for the security of Marigold. They had been told that "if they voted they would not return to the estate alive."

It cannot be said that Maiyappen's followers displayed the ordinary nerve and courage of adult men, but I am not prepared to say that had they shown greater determination than they did, a breach of the peace would not have resulted.

It would certainly have resulted in the case of the followers of Vaithy Kangany. They were earlier arrivals who were stopped at the foot of a flight of steps leading to the polling station. Access to the steps could be had one or two at a time and it was at this position of advantage that

Sinhalese had assembled. At the time of the arrival of Mr. Gomis with Vaithy and his men, an Indian labourer was being handled in an objectionable manner by a ruffian who had decided that the labourer was too young to vote. He was at least 25 years of age. This was followed by a decision that no Indians were to be permitted to vote at all. Sinhalese voters were allowed to pass up the steps but Indian voters were pushed back.

It is impossible to conceive of a more astounding situation. Unmitigated hooligans had taken full control of affairs. They were deciding who were to be permitted to vote and who were to be turned away and they were doing this, it is to be noted, almost at the very portals of what has been called "the voters' hall of freedom", the polling booth.

Mr. Gomis was socially on good terms with Mr. Banda, he was not a political supporter of Mr. Rutnam, he is a Sinhalese employed on an estate as a dispenser and I accept his evidence as being frank and disinterested.

A statement alleged to have been made by him to the police was proved. According to police witnesses this statement and those of others which were recorded at Wellagiriya indicated that all the Marigold labourers who had come there to vote eventually did so. I do not accept this conclusion. Those who remained till the arrival of the police probably did, but not those who had left before 12.10. This was the time that an A.S.P. and an Inspector arrived.

Till then there had been a steady flow of Sinhalese voters to the polls. The Indians, on the other hand, were standing about in groups. They were not waiting out of choice but out of necessity or, rather because they were afraid. The more timid ones, however, had fled. Mr. Finlison was definitely told that some Marigold labourers had been unable to record their votes and on the evidence I accept this as the truth.

I have already referred to the fate of those who accompanied Maiyappen and Francis Moses. Of Vaithy's followers a very few voted, the majority of them preferred inglorious retreat. The Indian labourers from Gonapitiya showed the same preference and, as will be seen, with more justification.

They were led by Arunachalam, the Head Kangany. On his arrival the rosette he was wearing was snatched from his coat and later he was struck on the back of his head. Arunachalam's assailant, definitely identified as Kiri Banda Samarakone, was also responsible for an assault on a labourer by the name of Suppiah. He was probably the leader of that party of ruffians at Wellagiriya which included, amongst others, his brother Dingiri Banda Samarakone and E. U. B. Ratnayake.

I accept the evidence that Arunachalam's men were actively obstructed, that they were threatened by the use of such expressions as "those who go in to vote will discover their mistake" and that they were insulted by being called "sons of Tamil whores who have no vote". This expression of abuse, I may add, is mild in comparison with others that were used at the election. Some of the latter, hurled at voters or painted in tar on culverts, walls and trees, reveal the recesses of very lewd minds.

I also find that physical violence was used on Arunachalam and Suppiah in order to deter them as well as others who witnessed the assaults from exercising their right to vote.

A complaint was made on the same day to Mr. Schofield, the Superintendent of Gonapitiya Estate. When he arrived at his office there were about one hundred labourers there "all of whom were shouting out and complaining". In giving evidence he said that he understood from Arunachalam that he and his men "could not go beyond the patna" where they had met Sinhalese who threw stones at them and drove them back.

This is not in accordance with the evidence given in Court which was to the effect that the main trouble occurred at Wellagiriya which was reached, and that on the way back, in the patna, there was further trouble including the pelting of stones. I am satisfied there was a misunderstanding by Mr. Schofield of the nature of the complaint he received. It is not surprising that a mistake was made when a hundred labourers were trying to ventilate their grievances at the same time. The information given to the Chief Clerk—this was *before* Mr. Schofield was summoned—is in keeping with the position taken up in Court.

I have seen and heard the witnesses called by the petitioner and, after listening to the witnesses called on the other side, I am left with the firm conviction that the former deposed, not to "imaginary incidents", but to incidents of which they were victims.

There were certain discrepancies in the evidence which I have considered. When events move quickly and are viewed from different angles by witnesses whose powers of observation differ, there are bound to be. On the other hand, in regard to the main features as distinct from details, there was considerable mutual corroboration by the witnesses of each other. I have also not lost sight of suggestions which were made on behalf of the respondent. The suggestion which proceeded on the assumption that every witness, if he was at Wellagiriya, must necessarily have seen every other witness who claimed to have been there is one which takes no account of the realities of the situation that existed. The suggestion that Mr. S. Rutnam's activities were dictated by a desire to place on record complaints which might subsequently, in the event of his brother's defeat, support an election petition I reject utterly.

A further question was put in cross-examination which suggested that what had happened at Wellagiriya was that "the Sinhalese claimed precedence over the Tamils and went up" the steps leading to the polling station. But this would not condone their conduct. On what was their claim based?

The arrogation to itself, by any class of voters, of priority over any other class is completely devoid of legal sanction and the sooner Mr. Banda's supporters disabuse their minds of all pompous ideas of precedence the better for them and for him. However deserving he may be of a seat in the State Council, that is most emphatically not the way to get him there.

The state of affairs that existed for a time at Maturata, another polling station, may best be described as aggressive obstruction.

Two of Mr. Rutnam's workers who were assisting the labourers from High Forest estate were assaulted but not seriously. A cordon was formed by the Sinhalese supporters of Mr. Banda in order to prevent Mr. Rutnam's supporters from going to the polls. They were encouraged and applauded by groups of Sinhalese standing around. Stones and sand were thrown and the usual type of filthy abuse filled the air.

A stampede ensued. Some of the Indian voters fled incontinently to their lines, others took refuge in the surrounding tea bushes. The conciliatory attitude adopted by Mr. Aziz was productive of good. Active obstruction ceased, the voters in the tea emerged from their hiding and a message was sent to recall those who were in the lines. Many of them returned. In the end a high percentage voted but this does not make the conduct of the Sinhalese less iniquitous than it was.

In his evidence the Presiding Officer states that he personally saw no obstruction of Indian voters. But he could not have done so. When he came out of the polling station "at about noon" the disturbance, consequent upon the arrival of Mr. Aziz, had abated. Even if he had come out earlier, assuming he made a mistake in regard to the time, he did not leave the precincts of the polling station. The impression he received, at a distance of about 75 yards, of what was happening at "the junction", where most of the trouble is alleged to have occurred, does not displace the evidence of those who were there. The evidence of Mr. Aziz and of the Assistant Presiding Officer was, in my opinion, certainly not false, and the Presiding Officer was not in a position to say so and in fact did not say so. Samel Appuhamy and a person by the name of John were named as the chief aggressors. Had they chosen they could have rebutted the case of the petitioner. Their names appeared on the respondent's list of witnesses but they were not called.

An incident of another kind took place at the polling station. A young Indian woman who was suspected of personation was arrested. Indian labourers armed with sticks assembled in a large body and clamoured for her release. Their demeanour caused alarm and the Sergeant in charge at Maturata Club telephoned for an armed guard. The conduct of these Indians must be condemned. According to the evidence I have heard the woman was properly under suspicion even if she was subsequently acquitted. But, in considering this incident two points must be borne in mind. One is that the Indians had been thwarted, humiliated and abused; no action had been taken against the miscreants who were responsible for what had occurred; the only arrest that was made was of one of their own number. No doubt they felt they had reason to be aggrieved. The other is that the demonstration was spontaneous, it sprang from an unforeseen cause, it had no ulterior motive. In particular no attempt was made to impede the flow of Sinhalese voters to the polls. The Sinhalese, on the other hand, had organised themselves to cause trouble. The obstruction of Indian voters had been deliberately planned in advance.

Before leaving Maturata I would refer to the cross-examination of the petitioner's witnesses who claimed to have been at this polling station.

It was suggested that there had been personation by Indians on a large scale, the only evidence is to the contrary; that Indians were blocking

the entrance to the polling booth, there is not a scintilla of evidence to this effect; that the Sinhalese voters held their hands in order to help themselves and not to obstruct the Indian voters, no responsible witness has said so; that the Indian woman who was arrested had been challenged on four separate occasions, there is no proof of this: that the Indians tried to invade the booth to rescue the woman, the evidence I have heard does not even suggest it: that the Indians "smashed" the boutique of one Henry, if this is so why was no evidence called to prove it?

It seems to me to be quite futile that in an inquiry which can only be decided by ascertained facts, attempts should be made to create an atmosphere by putting forward suggestions which are devoid of truth or, at the least, are unsupported by evidence.

Mr. Cartlidge, Assistant Superintendent of Police, was of the opinion that the crowd at Handewelapitiya was very well behaved. Counsel for the respondent sought to take credit for this and Counsel for the petitioner remarked that it was well behaved "because it was predominately Tamil." Certainly on the arrival of Mr. Cartlidge the only unruly members, so far as he was aware, were supporters of Mr. Banda. Five or six persons in green caps were disorganising the queue which the Police were attempting to form.

I am not satisfied that the conditions that prevailed at Handewelapitiya were such as would have prevented men of ordinary courage from exercising their right to vote. At one time what was described as "a commotion" occurred but the supporters of Mr. Rutnam were indirectly responsible for it.

"Identity cards" had been sent to Hope estate for distribution amongst labourers who were supporting Mr. Rutnam. A hundred or more of these cards were still in the hands of kanganies on October 15 and it was decided to complete the distribution on the 16th (polling day) in the open space close to the polling station.

Both the site and the time were ill-chosen. Voters streamed down a narrow flight of steps and debouched into the open space in front of the polling station. It was the petitioner's case that distribution of the cards was prevented by jostling on the part of partisans of the respondent. But I am not prepared in the circumstances that existed to ascribe blame to them. The task of collecting the labourers who had no "identity cards" and of supplying their needs could not have been an easy one. Interference with the progress of others to the polling station was inevitable. Jostling in all probability took place but it must be remembered that the pressure exercised by a crowd is often involuntary.

If this were all that there was to say about Handewelapitiya it is not much. But there is more. Two ardent supporters of Mr. Banda, Ranawera and Ellangasekera, had come all the way from Rahantugoda for the express purpose of making themselves as obnoxious as possible, and they were quick to exploit the situation that the kanganies from Hope estate had created. They snatched and instigated others to snatch Mr. Rutnam's "identity cards" which were then destroyed. I am not clear that their conduct brings them within Article 53 and I am, therefore, not deciding whether they were agents of Mr. Banda. But agents or not, they behaved despicably. Ranawera had probably had too much to drink.

The fact that Mr. Cartlidge did not see any snatching of cards does not prove that it did not take place. Police officers are not Argus-eyed. Mr. Cartlidge was engaged at the polling station bringing under control an awkward situation that had arisen there. His attention was occupied.

A report was made to the Superintendent of Hope estate on the following morning. The names of Ranawera and Ellangasekera were mentioned by the labourers and appeared in the list of respondent's witnesses, but they did not enter the witness box. Is there no significance in mere suggestion taking the place of available evidence?

Many other incidents were described in the course of the proceedings. I am not dealing with them chronologically. Some occurred before election day.

Nanu-oya was the scene of comparatively minor disturbances on October 15, and on the 16, there was a fight near the railway bridge between a party of Indian labourers and a party of Sinhalese in the course of which a member of the former was stabbed. The police filed a plaint against one Sadiris, a disreputable loafer in the bazaar area, and he was acquitted. I am not concerned with the result of that case. But it is relevant in this inquiry to decide how the clash originated. There can be no doubt that the Sinhalese, who hurriedly left the scene on the approach of Mr. Fowler, were unprovoked aggressors at the expense of Abbotsford labourers who were on their way to vote for the petitioner. One result was that Indian labourers, not only from Abbotsford, but also Glassaugh estate, did not record their votes.

At Nuwara Eliya the canvassing that was being done by Mr. Rutnam aroused the annoyance of Radin Silva, as disreputable a character as Sadiris, and but for the intervention of Piyasena, Mr. Rutnam may have been stabbed. An injury was inflicted on Piyasena and on conviction Radin Silva was sentenced to pay a fine of Rs. 75.

Hanguranketa was the stronghold of Mr. Banda. A knife was thrown on the table at which George Wilson sat in the local hotel with the words "if you work against Mr. Banda, that is what we will give you". George Wilson is an Indian born in Kandy. He had been sent to Hanguranketa "to work in secret" but his mission had been discovered. His enthusiasm for the cause of Mr. Rutnam and his courage soon evaporated and who is there to blame him? The next day, to use his own words, he took "to his heels in a mortal funk".

At Hanguranketa is an estate which is managed on behalf of the proprietor by Mr. Lobo, a friend of Mr. Banda. Darmalingam, the Head Kangany, had worked for Mr. Rutnam at previous elections and Mr. Rutnam had, therefore, addressed a registered letter to him soliciting his support at the coming election.

The name of the kangany's correspondent on the envelope was seen by Mr. Lobo. "At his request" Darmalingam handed over the letter, no reply was sent and Mr. Rutnam received no support.

Darmalingam who was called by the respondent was not an inspiring figure in the witness box. Quite clearly his sympathies were with Mr. Rutnam but he was determined to steer his course in the election by the fixed star of self interest or, in other words, the will of his master. He admitted that "if Mr. Lobo had not been his boss, he would have

refused to hand over the letter". He also stated that on the last pay day before the election Mr. Lobo had distributed green identity cards, the cards of Mr. Banda, to Indian as well as Sinhalese labourers. No doubt they understood for whom it was expected, or shall I say hoped they would vote.

It was this estate that Munisamy, who had accompanied George Wilson, had the temerity to enter on the night of October 15 in the hope of canvassing the votes of labourers. He was taken by Darmalingam to Mr. Lobo at his house. Mr. Banda was there. Mr. Lobo detained Munisamy and had him sent to an Inspector who in turn sent him to the Korale. He was eventually released on the payment, as it is alleged, of a sum of money. The Korale was not called by the respondent to deny this. Nor did Mr. Lobo appear. It was said that he had left Hanguranketa on holiday and could not be traced.

Munisamy, it is unnecessary to say, needed no encouragement from George Wilson to join him in the race for Nuwara Eliya the following day. The possibility of canvassing votes at Hanguranketa in the interests of the petitioner had been effectively stifled.

Mr. Beddewela's arrangements to hold a meeting at Gonagama were frustrated, the organisers were intimidated and one of them was rather seriously assaulted. In the course of his evidence Mr. Banda made the suggestion that Mr. Abeygunesekera, the member for Nuwara Eliya who had resigned, had supported the candidature of Mr. Beddewela solely for the purpose of helping Mr. Rutnam by splitting the Sinhalese vote. Assuming this was or was thought to be the case, it provided a motive for the opposition by Mr. Banda's supporters to Mr. Beddewela's meeting. The entry made by the Arachchi in his diary was that Mr. Beddewela had arrived to hold a meeting and "was not allowed to do so". All his perjury in the witness box could not explain that entry away. The Rev. Saranapala did not commend himself to me as a witness of truth, while the evidence of Newton Wickremasinghe was clearly false.

I have referred to most of the evidence relating to general intimidation and I now pass on to consider the second charge.

The evidence is overwhelming that Dingiri Banda Samarakone, Kiri Banda Samarakone, and E. U. B. Ratnayake "used force and violence and threatened to use force and violence in order to compel or induce voters to refrain from voting at the election". It is not necessary to refer to their individual activities. They are on record. Each must be taken to have intended the natural and probable consequences of the combination of acts in which he joined. The consequences were, as they were intended to be, complete frustration of the right of voters to go unhindered to the polls and there to vote for the candidate of their choice.

In his evidence Mr. Banda admitted that the two Samarakones and Ratnayake were at Wellagiriya on polling day and that "there was interference with labourers on the score that they were attempting to personate." He explained that by "interference" he meant that the labourers were "admonished not to vote if they had no vote". They were told "those of you who have no vote, cannot vote here. If you go and vote we will see that you are prosecuted".

But D. B. Samarakone would not have such language attributed to him. According to him he merely cautioned Indian labourers, presumably in their own interests, to see that they had been duly registered as voters before proceeding to record their votes. "If you have votes" he claims to have told them "go forward and vote: if you are not registered, be careful". I do not know whether his assumption in Court of the role of gentle counsellor to Indian labourers was more facetious or impertinent. I do not believe a word of his evidence.

Kiri Banda Samarakone's evidence was that he had playfully removed Arunachalam's rosette, that he was then struck on his back with a stick and that he in turn slapped his assailant. That was all that happened. In his manner and hesitations, in his evasiveness and contradictions, he showed quite clearly that he is a person with no regard for the truth. The one statement he made which I believe is that the account he gave to the police when he was questioned was a tissue of falsehood. So was his evidence in Court.

E. U. B. Ratnayake was a pathetic figure. He walked into the witness box, raced through the story which he and Kiri Banda Samarakone had conspired to tell and, when he was confronted with two previous statements made by him to the police, collapsed. "They were lies" he faltered "but now I am speaking the truth". To the police his defence had been an alibi.

It is clear to my mind that D. B. Samarakone, K. B. Samarakone and E. U. B. Ratnayake were actively engaged in canvassing votes for Mr. Banda and in generally promoting his interests. If there was no other evidence in the case, and there is, I would accept the evidence of Mr. Gomis and of Arunachalam as being conclusive on this point.

But were these three rascals agents of Mr. Banda in the sense that, in furthering his election, they were acting with his authority, express or implied? Did he ask them to work for him or alternatively did he have knowledge that they were working for him and accept their work? To use the language in a reported case "did he to some extent put himself in their hands and make common cause with them for the purpose of promoting his election"?

The respondent stated that he asked them for their votes and also asked them to canvass the votes of their relatives. Limited canvassing of this nature would not of course give rise to a presumption of agency. He denied he was aware that they were working in his interests in any other way if, indeed, they were. He made the claim that he selected as his agents "only people well known" to him and those "who would carry out instructions exactly".

If this claim is, generally speaking, the truth he certainly made an exception in the case of Radin Silva. This reprobate was not well known to him for he had merely met him "on the roadside" in Nuwara Eliya. It could hardly be said that a person who stabbed Piyasena and attempted to stab Mr. Rutnam in the circumstances I have mentioned was one who was likely to pay any regard to instructions. But it was to this casual acquaintance on the roadside that Mr. Banda admittedly entrusted the

work of canvassing. "I was aware" he said "that Radin was not merely voting for me but working to get me votes. I was content to rely upon the support which he offered me".

D. B. Samarakone was not the street Arab that Radin Silva was. He is the owner of a flourishing boutique at Maturata and admittedly a man of considerable local influence. Brother of the Korale of the adjoining village, he is the wholesale distributor of rice in the area and Chairman of the Village Committee. How closely he had been associated with Mr. Banda is shown by the fact that "he was one of the signatories of a petition inviting the respondent to stand for the Nuwara Eliya seat" and that at the election he proposed him as a candidate. Surely if Mr. Banda was prepared to accept the help of Radin Silva he would have solicited the support of a man of D. B. Samarakone's standing, especially as he had so unmistakably identified himself with his cause.

It is against this background of antecedent probability that the evidence must be considered.

The evidence of Arunachalam was that K. B. Samarakone, brother of D. B. Samarakone, handed green identity cards, the cards of Mr. Banda, to the tea maker at Gonapitiya for distribution amongst the labourers. The tea maker was not called by the petitioner who may, however, have thought it was unnecessary to do so, as Arunachalam's evidence on this point was not challenged in cross examination. The respondent's reply to the evidence was far from being unambiguous. At first he said that he was certain "identity cards" had not been issued from his office with the names of Gonapitiya labourers marked on them and, later, that "they were in the Maturata bundle and the Schoolmaster (Wickremasinghe) must have given them to someone to distribute". But Wickremasinghe would not admit to having handled Gonapitiya cards. The cards which were delivered to the tea maker were, in my opinion, sent to him by Mr. Banda or with his knowledge and consent.

Reginald Abeygunesekera gave evidence that he had seen D. B. Samarakone canvassing alone and in the company of Mr. Banda and that K. B. Samarakone "and his people had canvassed almost all the voters in the village". It is absurd to suggest that Reginald Abeygunesekera is unworthy of credit solely because he is the nephew of the ex-member for Nuwara Eliya. The latter's name figured prominently in the respondent's case—as a red herring!

"Canvassing affords premises from which a Judge, discharging the functions of a Jury, may conclude that agency is established". On a full consideration of the evidence relative to canvassing as well as of the rest of the evidence including the distribution of "identity cards" and leaflets, I hold that in the case of D. B. Samarakone and K. B. Samarakone agency has been established.

Putting the matter at its lowest the respondent was aware of their activities and adopted them as his own. But, in addition to this, difficult as it is of direct proof, there is a very high degree of probability that these two brothers were acting with the express authority of the respondent. E. U. B. Ratnayake, a relation of the Samarakones, was possibly a volunteer. Mr. Banda may or may not have known of the keen interest he was taking in the election on his behalf.

On the ground that offences of undue influence were committed by two agents of the respondent in connection with the election, it must be declared to be void. 3

I am far from thinking that these offences were committed with Mr. Banda's sanction or connivance. I am even prepared to hold that they were committed contrary to his orders. He was his own "election agent" and was guilty of no election offence. But I cannot hold that he took all reasonable means for preventing the commission of corrupt and illegal practices. To appoint a person of the obviously aggressive type of Kiri Banda Samarakone and to leave him uncontrolled is to invite trouble. I say nothing about Radin Silva. On the subject of the agents he employed Mr. Banda was very reticent. Nor do I think the offences were of a trivial, unimportant and limited character. At Wellagiriya itself the undue influence practised was of a most aggravated nature.

It may seem unfortunate that a candidate is liable to be penalised for the acts of his agents, even where the agents disobey orders, but as Bowen, J. pointed out in *Wigan*¹, "it is the purest justice and common sense". Mellor, J. in *Barnstaple*², said "He (the candidate) cannot take the benefit of the services of the individual and repudiate them at the same time".

In the present case, however, not only were the respondent's agents but, in a sense, the whole electorate was on trial, the latter on a charge of general intimidation.

I have been asked to consider certain statistics and to hold that, notwithstanding the intimidation that took place, the result of the election could not have been affected by it. In the *North Durham Case*³, Mr. Baron Bramwell said "Where it (intimidation) is of such a general character that the result may have been affected, in my judgment it is no part of the duty of a Judge to enter into a kind of scrutiny to see whether possibly, or probably even, or as a matter of conclusion upon the evidence, if that intimidation had not existed, the result would have been different. What the Judge has to do in that case is to say that the burden of proof is cast upon the constituency whose conduct is incriminated, and unless it can be shown that the gross amount of intimidation could not possibly have affected the result of the election it ought to be declared void".

I hold that there was gross intimidation, that it was widespread in the areas where Mr. Rutnam had good reason to count upon heavy voting in his favour, and that it may well have prevented the majority of the electors from returning the candidate whom they preferred. On this ground too the election must be avoided.

I was invited, in the event of the petitioner succeeding, to make a specific order in regard to the costs payable by the respondent. I fix them at Rs. 3,500.

Election declared void.

¹ (1881) 4 O'M & H, 11.

² (1874) 2 O'M & H, 105.

³ (1874) 2 O'M & H, at page 157.