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

THE QUEEN *v.* REV. H. GNANASEEHA THERO and others

S. C. 372/67—Application to summon a Special Jury in M.C. Colombo, 34638/A

Jury—Accused persons' election to be tried by a Sinhala-speaking jury—Attorney-General's application thereafter to summon a special jury—Requirement of cogent grounds—Anachronistic nature of qualifications for special jurors—Criminal Procedure Code, ss. 165B, 222, 224, 257 (1) (b), 267 (1) (d).

Where accused persons elect, under section 165 B of the Criminal Procedure Code, to be tried by a Sinhala-speaking jury from the list of persons referred to in section 257 (1) (*b*), the Court will not override such election otherwise than on cogent grounds if the Attorney-General makes an application thereafter to the Supreme Court under section 222 for an order requring a special jury to be summoned to try the case against the accused. The language and income qualifications presently set out in section 257 (1) (*d*) for the special panel of jurors are anachronic and merit re-consideration by the Legislature.

APPLICATION to summon a Special Jury.

V. S. A. Pullenayegum, Crown Counsel, with *Wakeley Paul*, Crown Counsel, for Attorney-General, in support.

Colvin R. de Silva, with *K. C. de Silva*, *C. D. S. Siriwardena* and *H. L. K. Karawita*, for 1st Accused.

Colvin R. de Silva, with *Malcolm Perera* and *M. D. S. Boralessa*, for 5th Accused.

Colvin R. de Silva, at their request in Court, for 7th, 8th and 9th Accused.

Colvin R. de Silva, with *R. Weerakoon*, for 11th and 16th Accused.

Neville Samarakoon, with *Felix R. Dias Bandaranaike* and *Nihal Jayawickrema*, for 4th Accused.

P. K. Liyanage, with *H. M. Jayatissa Herath*, for 3rd and 13th Accused.

U. B. Weerasekera, for 18th Accused.

D. W. Abayakoon, with *Harischandra Mendis* and *Vernon Gooneratne*, for 14th Accused.

Prins Gunasekera, for 20th Accused.

Mohamed Nassim, for 12th Accused.

Percy Karunaratne, for 15th Accused.

D. T. P. Rajapakse, with *M. D. S. Boralessa*, for 6th Accused.

Sarath Muttetuwegama, for 17th Accused.

1*—H 12401—2,130 (3/68)

G. D. C. Weerasinghe, with *Harischandra Mendis*, for 2nd Accused.

Harischandra Mendis, for 10th Accused.

Stanley Tillekeratne, with *Harischandra Mendis*, for 19th Accused.

Mangala Moonesinghe, with *G. C. Wanigasekera*, for 22nd Accused.

Cur. adv. vult.

October 19, 1967. H. N. G. FERNANDO, C.J.—

22 accused have been indicted in this case of charges :—

(i) That between the 1st day of December, 1965, and the 18th day of February, 1966, at Maharagama, Homagama, Nugegoda, Colombo and other places, in the division of Colombo, within the jurisdiction of this Court, you with others did conspire to wage war against the Queen, and that you have thereby committed an offence punishable under Section 115 of the Penal Code ; and

(ii) that within the period and at the places aforesaid and in the course of the same transaction, you with others did conspire to overawe by means of criminal force or the show of criminal force, the Government of Ceylon, and that you have thereby committed an offence punishable under Section 115 of the Penal Code.

In response to the inquiry made by the committing Magistrate under s. 165B of the Criminal Procedure Code, the accused elected that the Jury shall be taken for the trial from the Sinhala-speaking panel, i.e. from the list referred to in s. 257 of persons who can speak, read and write the Sinhalese language and possessing the requisite qualifications specified in paragraph (*b*) of sub-section (1) of that section. Thereafter the Attorney-General made an application to the Supreme Court for an order requiring a special jury to be summoned to try the case against the accused. That application was refused after we had heard the arguments of learned Crown Counsel, and we now state our reasons.

It was rightly submitted that the application was one made under s. 222 of the Code ; accordingly the question which arose was whether the Court considers the application for a special jury to be just and reasonable. There were two main grounds urged in support of the argument that the case is one which should be tried by a special jury : *firstly*, that the case is of unusual complexity in that evidence will be led at the trial of several incidents, the connection between some of which will not be easily apparent, and that the prosecution will be relying largely, for proof of the alleged conspiracy, on inferences arising from various incidents and from the conduct of the accused persons ; and *secondly*, that the prosecution will be proving confessions made by some of the accused, the contents of which will not in law be admissible as against others of the accused, and that a special jury will be better able than a Sinhala-speaking jury to observe the principle that a confession by one accused is not evidence against the others.

In considering the question whether a special jury will be better qualified than a Sinhala-speaking jury to cope with these anticipated difficulties, the first point which arises is whether the distinctions made in the law between the special panel and the other panels reasonably ensure that the special panel will consist of more competent persons than those on the ordinary panels. Under s. 257 (1) (*d*) the special panel consists only of persons who can speak, read and write the English language. In addition, paragraph (*d*) requires *one* of the following qualifications :—

(*a*) the possession of an income of not less than Rs. 3,000 a year ;

(*b*) in one's own right or that of one's wife, the possession of movable or immovable property not less than Rs. 20,000 in value ;

(*c*) the enjoyment of a monthly salary of not less than Rs. 500.

Paragraph (*b*) of s. 257 (1) provides for a list of persons who can speak, read and write the Sinhalese language, and requires one of the following additional qualifications :—

(i) the possession in one's own or in one's wife's right of movable or immovable property, not less than Rs. 1,000 in value ;

(ii) an income of Rs. 500 a year.

Paragraph (*c*) provides corresponding requirements in the case of the Tamil-speaking panel.

It will be seen that the distinctions made in s. 257 refer firstly to the matter of the language which a person can speak, read, and write, and secondly, to the income or wealth which a person or his wife may possess. Thus s. 257 does not directly require in either case any minimum educational qualification. Nevertheless Counsel argued that, because the Legislature in paragraph (*d*) laid down certain qualifications for a *special* jury, it follows that the Legislature's intention and expectation was that persons on the *special* panel will be better educated and more capable of dealing with complexities of facts and the law than persons on the other panels.

I entirely agree that the Legislature which enacted the Criminal Procedure Code in 1898 must have entertained the intention and the expectation just mentioned. But it is necessary to consider, as they appear from the Statute, the matters on which the Legislature relied for the realisation of its intention and expectation. The matter first expressed pertains to language, and it is manifest that the Legislature in 1898 expected that persons having a knowledge of the English Language are likely to be better educated than those having only a knowledge of Sinhala or Tamil. Having regard to the known facts concerning the educational policy of the British Government of Ceylon and to its consequences, that was quite a reasonable expectation ; secondary education, for instance, was in 1898 and until fairly recent times imparted exclusively through the English medium, and the language of the Administration and of Commerce was in all important respects exclusively English. The provision in paragraph (*d*) of s. 257 requiring for a special

juror the enjoyment of a monthly salary of not less than Rs. 500 did certainly ensure the possession of a reasonably high educational qualification and/or of commercial or administrative experience, and there could have been in 1898 but few persons having a knowledge only of Sinhalese or Tamil language enjoying salaries at that level. In brief therefore s. 257 was based on a perfectly valid assumption that a person on the special panel would in many respects be a more competent juror than persons of the other panels. It follows therefore that for many years after 1898 it would have been just and reasonable in a fit case to direct that it be tried by a special jury.

But I am satisfied that the assumption validly made by the Legislature in 1898 no longer holds good having regard to the radical change of circumstances which has taken place in this country particularly after Independence. It is a matter of common knowledge that the majority of those who now complete secondary education receive their education in the Sinhala medium and not in English. It is also a matter of common knowledge that even the minority which receives secondary education in the English medium no longer possesses a proficiency in the English language in any way comparable to the proficiency attained in that language prior to the 1940s.

The figures of recent University entries establish that the majority of the young people who are now competitively selected for University education have little or no knowledge of the English language, so that there has come a stage when the majority of those possessing superior educational qualifications will not on the ground of language be eligible for the panel of special jurors. Thus the principal ground for the assumption which led the Legislature in 1898 to lay down the language qualifications specified in paragraph (*d*) of s. 257 is no longer valid.

Passing now to the income qualification, here again it may have been reasonable to suppose at the beginning of this century that the requirement of an annual income of Rs. 3,000 or of the possession of property worth Rs. 20,000 would secure that persons on the special panel would be better educated than others in less affluent circumstances, but having regard to the changes in the real value of money, the limits imposed in paragraph (*d*) are far too low to justify a similar expectation at the present time.

Counsel attempted to equate what he termed the complexity of the present case to the complexity which might arise in a case in which the evidence relates to involved accounts or matters of business practice. In a case like the present one, the functions of the Jury will not be extraordinary ; their task will be to decide such matters as whether a particular incident did occur, whether a person said or did something on a particular occasion, whether one accused was aware of some purpose which another may have entertained, whether an inference of guilt should be drawn from matters held to have been proved. That in no way resembles the task of the Jury in a case in which the evidence cannot be properly

understood save by persons possessing some knowledge or experience of accounting, commercial or scientific matters. Even if persons having the qualifications set out in paragraph (*d*) of s. 257 (1) of the Code may be more competent than others to serve as jurors for a case of the latter type, we are not here concerned with such a case.

On the grounds discussed above, it does not appear to me reasonable to deprive the accused in this case of the right they have exercised under s. 165B to be tried by a Sinhala-speaking Jury.

There is the further consideration arising under s. 222 whether or not it is *just* that the case be tried by a special jury, when the accused have exercised their statutory right of election that they be tried by a Sinhalese-speaking jury. The second argument of learned Crown Counsel is relevant to this matter. He suggested that a Sinhalese-speaking jury may be less able than a special jury to keep out of consideration as against some accused confessions alleged to have been made by other accused. In other words, he urged that a special jury was advisable in the interests of the defence. Had the accused made no objection, then perhaps it was incumbent on the Court to consider whether the interests of the defence would be better served by the empanelling of a special jury. But when the accused themselves have elected a Sinhalese-speaking jury, and when they have through their Counsel intimated their objection to a special jury, it would be gratuitous and, as my brother remarked, patronizing, for the Court, in the supposed interests of the accused, to over-ride a choice freely made by the accused and their advisers.

I presume that some of the witnesses at the impending trial will give their evidence in English ; if so, it is not the practice for that evidence to be translated into Sinhalese at a trial before an English-speaking jury. One of the advantages therefore which the accused will enjoy if tried according to their choice, is that they will be able personally to understand all the evidence, and thus to instruct their Counsel more usefully.

I do not propose to discuss the other practical advantages which the Legislature must be presumed to have intended to afford to accused persons by the exercise of their right to choose the particular language speaking panel from which juries should be drawn. But having regard to the clear right of election thus conferred, justice will not appear to be done if this Court were to over-ride such an election otherwise than on cogent grounds. I have tried to show already that no sufficient grounds have been made out in this case.

The rejection by this Court of the accuseds' choice to be tried by a Sinhalese-speaking jury, at a time when Sinhala is generally the language of official business and education and often the language of the Legislature's deliberations, can confuse and perplex the mind of the public and so lead to distrust of our Courts. That is an evil which all those concerned in the administration of justice must be watchful to avert.

Learned Crown Counsel repeatedly stated that in previous cases a special jury has been ordered although the accused's election under s. 165B had been only for an ordinary jury. The instance to which he often referred was the trial concerning the assassination of the late Prime Minister, Mr. Bandaranaike. In that case apparently the accused had elected to be tried by an English-speaking jury, and the Court acceded to an application by the accused themselves for a special jury. In the result the accused were yet tried according to their own choice because a special jury under s. 257 is always English-speaking. No question there arose of the Court over-riding the election made by the accused. For this reason that particular instance is not favourable, but is rather opposed, to the present application.

The case of *The King v. Nadarajah*[1] does not support the Crown in this case. There the prisoners had elected under s. 165B to be tried by an English-speaking jury in a case expected to be heard in the Northern Circuit; the Attorney-General thereafter transferred the case to the Western Circuit at Colombo, and the prisoners then applied to be tried by a Tamil-speaking jury. That application did not fall under s. 222 of the Court, but instead under s. 224. The trial Judge relied upon the provision in s. 165B that an accused is bound by his election under that Section; and in refusing the application for an alteration of the election, the Judge exercised his discretion under s. 224. No question arose in that case, as in this one, of over-riding the election made under s. 165B.

The case of *The King v. Thelenis Appuhamy*[2] was again one of an application not under s. 222, but under s. 224. That fact suffices to distinguish the case. True it was that the accuseds' election of a Tamil-speaking jury was there over-ridden by an order of Court under s.224, but it is clear that the trial Judge made his order because of the peculiar circumstance that Sinhalese accused had in that case elected to be tried by a Tamil-speaking jury upon grounds which in the opinion of the trial Judge were quite unreasonable.

The instances to which Counsel referred during his argument afford no grounds for holding that in the present case it would be *just* to order these accused to be tried by a special jury.

One last observation is necessary. I must not be understood to hold the opinion that special panels of jurors are no longer necessary for criminal trials. But I do think that the qualifications presently set out in s. 257 of the Code for the special panel are anachronic and merit reconsideration by the Legislature.

T. S. FERNANDO, J.—I agree.

Application refused.

[1] *(1945) 46 N. L. R. 198.*

[2] *(1945) 46 N. L. R. 304.*

1967 *Present :* **T. S. Fernando, A.C.J., and Sirimane, J.**

A. H. M. RAZEEM, Appellant, *and* A. M. NAZEER, Respondent

S. C. 18 of 1966—In the matter of an Application for a Mandate in the nature of a Writ of Quo Warranto challenging the right of an elected member of the Colombo Municipal Council to hold office

Quo warranto—*Member of Municipal Council—Allegation of disqualification on the ground that he is not a citizen of Ceylon—Burden of proof—Presence of a member's name in register of voters—Effect—Local Authorities Elections Ordinance (Cap. 262), ss. 8, 9 (1), 10, 18—Citizenship Act (Cap. 349), s. 2 (2).*

The applicant applied for a writ of *quo warranto* against the respondent on the ground that the latter, who was elected to represent a Ward of the Colombo Municipal Council to sit and vote as a member thereof, was disqualified under section 9 (1) of the Local Authorities Elections Ordinance for membership of the Council in that he was not a citizen of Ceylon.

Held (i) that the onus of satisfying the Court that the respondent was not a citizen of Ceylon was on the applicant.

(ii) that the fact that the respondent's name was on the register of voters was not a bar to the present application. The right to be elected to membership of the Council and the right to sit and vote as a member thereof are not one and the same thing.

APPLICATION for a writ of *quo warranto* challenging the right of an elected member of the Colombo Municipal Council to hold office.

E. R. S. R. Coomaraswamy, with *Rajah Bandaranayake*, *Nihal Jayawickrama* and *S. S. Sahabandu*, for the applicant.

H. W. Jayewardene, Q.C., with *Izadeen Mohamed* and *S. C. Crossette-Thambiah*, for the respondent.

Cur. adv. vult.

November 10, 1967. T. S. FERNANDO, A.C.J.—

This was an application filed questioning the right of the respondent, a person elected to represent Ward No. 16 of the Colombo Municipal Council, to sit and vote as a member thereof. The sole allegation upon which the application was sought to be supported was that the respondent was disqualified for membership of the Council in that he is not a citizen of Ceylon as required by section 9 (1) of the Local Authorities Elections Ordinance (Cap. 262). The onus of satisfying this Court that the respondent is not such a citizen was undoubtedly on the applicant and, at the conclusion of the hearing, we were not satisfied that that onus had been discharged. We therefore dismissed the application with costs.

We wish, however, to refer to a point taken by Mr. Jayewardene by way of a preliminary objection to the maintenance of this application. He pointed to the fact that, at the time of the preparation of the electoral lists, an objection to the inclusion of the respondent's name in the relevant electoral list had been lodged on the ground that he was not a citizen of Ceylon, and had been inquired into and decided in favour of the

respondent. In these circumstances, Mr. Jayewardene claimed that it is now too late for any person to question the respondent's right to sit on the Council after a valid election. He cited in favour of this claim an unreported decision of this Court (S. C. Application No. 94 of 1960—S. C. Minutes of March 7, 1960) made by Sinnetamby J. to the effect that so long as an elected member's name remains on the register of voters an application for a writ of *quo warranto* cannot be entertained. We wish to state, with all respect to that learned judge, that the right to be elected to membership of the Council and the right to sit and vote as a member thereof are not one and the same thing. While a person whose name has been finally entered on the electoral list and who has the residential qualification specified in section 8 of the Local Authorities Elections Ordinance is qualified for election to membership of the Council, section 10 of the same Ordinance disqualifies the member from sitting or voting if he is disqualified by reason of the operation of any of the provisions of section 9. One of such provisions, as already indicated above, requires the member to be a citizen of Ceylon. For this reason we found ourselves disposed not to follow the decision referred to above. We need only add that, if a decision of an elections officer under section 18 of the Local Authorities Elections Ordinance has the far reaching effect implicit in the judgment above referred to, it is capable of leading to a practice of obtaining decisions from an elections officer in favour of intending candidates for membership of a Council by objections lodged in collusion with such candidates, a phenomenon which cannot be brushed aside as unlikely in this Country. Moreover, it can render nugatory the provisions of section 2 (2) of the Citizenship Act (Cap. 349) under which a person becomes entitled to the status of Ceylon citizenship only in the ways specified therein.

SIRIMANE, J.—I agree.

Application dismissed.