1972 *Present:* G. P. A. Silva, S.P.J., Samerawickrame, J., and Weeramantry, J.

E. L. SENANAYAKE, Appellant, *and* G. B. DE SILVA and 2 others, Respondents

Election Petition Appeals Nos. 6–8 of 1971—Kandy

Parliamentary election—Election petition—Allegations of corrupt or illegal practices—Particulars which petitioner is required to file—Expiry of period prescribed for filing the main petition—Amendment or amplification of particulars thereafter—Allegations of fresh instances of corrupt or illegal practices cannot be permitted at that stage—Illegal practice of conveying voters to the poll—Quantum of evidence—Meaning of term "voter"—Power of Court to question a witness—Inherent limitations on it—Evidence Ordinance, s. 165—Election offences—Burden of proof—Criminal Procedure Code, ss. 181, 182—Ceylon (Parliamentary Elections) Order in Council, 1946 (Cap. 381), as amended by Act No. 9 of 1970, ss. 3 (1), 39 (4), 56 (1), 56 (4), 57, 67 (3), 77 (c), 80A (1) (b), 80B (c) (d), 80C, 83 (2), 83 (3).

In an election petition, the petitioner, who was the unsuccessful candidate at an election held in May 1970, challenged the validity of the election of the successful candidate (1st respondent) on the ground that the 1st respondent committed the corrupt practice of undue influence in contravention of subsections (4) and (1) of section 56 of the Ceylon (Parliamentary Elections) Order in Council. When the petition was originally filed it contained only one charge, namely, the charge under section 56 (4). It was only after the expiry of the period during which an election petition could be filed, that the charge under section 56 (1) was added with the leave of the Election Judge, despite objection raised by the 1st respondent. The Election Judge allowed the application for amendment because he was of opinion that the facts alleged in the charge under section 56 (4) constituted a corrupt practice not only under section 56 (4) but also under section 56 (1). At the end of the hearing of the petition the 1st respondent was found guilty only on the additional charge introduced by way of amendment.

There were also two charges against the 2nd and 3rd respondents as agents of the 1st respondent of having committed the illegal practice of using and/or employing vehicles during polling day for the purpose of conveying voters to and/or from the poll in contravention of section 67 (3) of the Ceylon (Parliamentary Elections) Order in Council as amended by Act No. 9 of 1970. These charges too were held by the Election Judge to have been proved.

In the present appeal preferred by the 1st respondent from the determination of the Election Judge—

Held, that the Election Judge had no power to allow the application for the amendment of the election petition by the addition of a corrupt or illegal practice not already specified previously in the petition. There are essential differences between the elements that go to prove an offence under section 56 (4) of the Parliamentary Elections Order in Council and those that are required to prove an offence under section 56 (1). Section 80C of the Order in Council, as amended by Act No. 9 of 1970, must be interpreted in the light of the limitations prescribed in section 83 (2). The word "amendment" in section 83 (2) has a meaning very different from that of the word "amendment" in section 80C. Section 80C (1) permits the Election Judge to allow the amendment or amplification of particulars, after the expiry of the period

prescribed for filing an election petition, within a very limited area only. The limits within which such amendments can take place may be summarised thus :—

(1) the amendment must relate to a corrupt or illegal practice already specified in the petition,

(2) the amendment must be necessary in the opinion of the Court for ensuring a fair and effective trial of the petition, and

(3) even if the amendment proposed complies with these two requirements the Court shall not allow such amendment if it will result in the introduction of particulars of any corrupt or illegal practice not previously alleged in the petition.

The third limitation is the most important of the three because, while the first and second leave some latitude to Court, the third does not.

Held further, (i) that, in regard to a charge of conveying voters to or from the poll in contravention of section 67 (3) (*a*) of the Parliamentary Elections Order in Council (as amended by Act No. 9 of 1970), a person intending to vote can reasonably be described as a voter without doing any violence to the definition of " voter " in the interpretation section 3 (1). In such a case it is not necessary to prove that the names of the persons conveyed are on the electoral register.

(ii) that the power conferred on the Court by section 165 of the Evidence Ordinance to put questions to a witness is subject to inherent limitations. In the present case, the questioning by the Court of a material witness called by the 2nd respondent was not such an exercise of the powers of the Court as are permitted by section 165 of the Evidence Ordinance.

(iii) that a petitioner undertaking to prove a charge in an election petition has to discharge the same burden that a prosecutor has in a criminal case. When the evidence is circumstantial, if the proved circumstances do not exclude the hypothesis that the offence may well have been committed by someone other than the respondent, even though one inference from the circumstances is that the respondent himself committed the offence, the Court has no alternative but to give the respondent the benefit of such doubt. Accordingly, this rule of evidence is applicable where the charge against a person, that he used or employed a vehicle for conveying a voter to the poll in contravention of section 67 (3) of the Parliamentary Elections Order in Council, is based on circumstantial evidence.

ELECTION Petition Appeals Nos. 6–8 of 1971, Kandy.

C. Ranganathan, Q.C., with *P. Navaratnarajah, Q.C.*, *Mark Fernando*, *W. P. Gunatilake*, *K. Kanag-Iswaran* and *M. Sivarajasingham*, for the respondents-appellants in Appeals 6, 7 and 8 and for the 2nd and 3rd respondents in Appeals 6, 7 and 8.

K. Shinya, with *Nimal Senanayake*, *S. B. Sangakkara*, *Nihal Singaravelu*, *Vijaya Wickremaratne* and *Lal Wijenayake*, for the petitioner-respondent in all the Appeals.

Cur. adv. vult.

March 6, 1972. ORDER OF THE COURT—

This is an appeal from the determination of an Election Judge in an election petition filed in respect of the Parliamentary General Election held in May, 1970, for the Kandy Electoral District. The petitioner in the case, who is also the 1st respondent to the appeal, was the unsuccessful candidate G. B. de Silva, hereinafter referred to as the petitioner. The successful candidate, who was the 1st respondent in the case, is the appellant, hereinafter referred to as such. The 2nd and 3rd respondents in the case are also the 2nd and 3rd respondents to the appeal.

There were at the trial four charges, two against the appellant of having committed the corrupt practice of undue influence as defined in Section 56 (4) and 65 (1) in that he, being the Minister of Health and as such, an employer and/or the virtual employer and/or in a position to give directions to and in relation to the employment of employees in the Department of Health of the Government of Ceylon, at a meeting of such employees held at the Conference Room of the Kandy Hospital on or about the 23rd May, 1970, indicated to those present that if they voted against him and he lost his seat, nevertheless the United National Party would still be returned to power and they (the hospital employees) there present would have to take the consequences including the loss of work for all casual employees and the transfer of permanent employees. The petition averred that the making of the said statement/or statements by the 1st respondent also constituted within the meaning of Section 56 (1) of the said Order-in-Council, a threat to inflict temporal injury, damage, harm or loss upon or against the employees there present in order to induce them to vote or refrain from voting or constituted within the meaning of the said Section 56 (1), duress which impeded or prevented the free exercise of the franchise of the said electors. There were also two charges against the 2nd and 3rd respondents as agents of the appellant of having committed the illegal practice of using and/or employing vehicles during polling day for the purpose of conveying voters to and/or from the poll as set out in Section 67 (3) of the Ceylon (Parliamentary Elections) Order-in-Council 1946 as amended by Act No. 9 of 1970.

We should add that when the petition was originally filed it contained only one charge against the appellant himself, namely, a charge under Section 56 (4), and that it was on the 25th July, after the expiry of the period during which an election petition could be filed against the appellant, that the petitioner moved to amend the petition by adding a charge under Section 56 (1). The motion to add this charge was strenuously opposed by counsel for the appellant. The learned Election Judge however accepted the submission of counsel for the petitioner that the facts stated in the charge under Section 56 (4) constituted a corrupt practice not only under Section 56 (4) but also under Section 56 (1) and took the view that the amendment was necessary to ensure

a fair and effective trial of the petition. In the result the petition which originally contained three charges went to trial on four charges.

It is important to note that in respect of the only charge against the appellant with which the petitioner came to Court the learned Election Judge found the appellant not guilty but that he found him guilty on the additional charge introduced by way of amendment.

We shall first of all deal with the submissions of the appellant that the learned Election Judge erred in law in allowing the amendment which resulted in the addition of a charge to the original petition.

The provisions regarding any amendment relating to petitions are contained in Section 83 (2) and Section 80C of the Order-in-Council.

Section 83 (2) enables an election petition presented in due time, for the questioning of the return or the election upon an allegation of a corrupt or illegal practice, to be amended with the leave of the Court *within the time within which an election petition questioning the return or the election upon that ground may be presented.* Sub-section 3 of course is in the nature of an exception, but we are not concerned with that in the instant case.

It will be noted that even under Section 83 (2), where a petitioner seeks to amend a petition within the time limit for presentation of a petition, two limitations are imposed by the section itself. It is in the first place confined to a petition questioning the return or the election upon an allegation of a corrupt or illegal practice and, secondly, an amendment can be effected only with the leave of a Judge of the Supreme Court. This seems to us to indicate the finality which the legislature attached to the filing of a petition and the possibility of a court refusing to allow an amendment even in the limited number of cases where an amendment can be applied for. It also shows that where the challenge is based on allegations other than a corrupt or illegal practice, a petitioner is not entitled to apply to court for an amendment even though, if he had not already filed the petition, he could have, without any application to court, filed one with unlimited allegations or grounds. This means that when a petitioner files a petition he imposes on himself a voluntary bar against making any further allegations against the candidate. This bar is absolute in the case of a petition based on grounds other than a corrupt or illegal practice and qualified when it is based on an allegation of a corrupt or illegal practice, for, the leave of a Judge of the Supreme Court is required for amendment.

It is in the light of the limitations prescribed in Section 83 (2) that one has to interpret the provisions of Section 80C. It seems to us that the word "amendment" referred to in Section 83 (2) has a meaning very different from that of the word "amendment" referred to in Section 80C. Section 83 (2) speaks of an amendment to a petition which can be effected within the time within which an election petition can be presented. Being still within the time when a petition could have

been presented it is not unreasonable to think that a court can and will ordinarily allow an amendment by the addition of allegations of corrupt or illegal practices not previously made. For, if the petitioner had not presented the petition too early within the prescribed time, he could still have filed it with the additional allegations which he applies to include by way of amendment and there is no strong reason for a court to stand in the way of any such additional allegations which the petitioner could have made if only he did not rush to court. It should also be observed that Section 83 (2) refers to an amendment with the leave of *a Judge of the Supreme Court*, which suggests that the stage contemplated is one before the trial commences, for if it is after the commencement of the trial the presiding Judge will be an Election Judge. Section 80C (1) on the other hand gives the power to an Election Judge to allow the particulars of any corrupt or illegal practice specified in an election petition to be amended or amplified in such manner as may be necessary to ensure a fair or effective trial. It is clear from these words that the section does not give the Election Judge the power to allow an amendment or amplification of a corrupt or illegal practice not specified in the petition. To our minds, the words in the first part of the section are by themselves sufficient to exclude an additional allegation not specified in the petition even without the words "he shall not allow such amendment or amplification if it will result in the introduction of particulars of any corrupt or illegal practice not previously alleged in the petition". The concluding words which reiterate the necessity to confine the further particulars to an illegal practice already specified can therefore be interpreted to be a repetition intended to lay further emphasis on the prohibition and to place the matter beyond doubt.

A striking contrast between the words of section 83 (2) and those of section 80C is that while the former speaks of amendment of a petition, the latter speaks of the amendment or amplification of the particulars of any corrupt or illegal practice specified in an election petition. Implicit in this language is the necessary inference that section 83 (2) refers to the amendment of a petition by the addition of fresh allegations, if allowed by court, while section 80C refers to the amendment or amplification of the particulars of a specific corrupt or illegal practice already alleged. This implication, so far as section 80C is concerned, is further strengthened and confirmed by the last few words that such amendment or amplification should not result in the introduction of particulars of any corrupt or illegal practice not previously alleged in the petition. The conclusion one can draw on a reading of these two sections is that the only opportunity a petitioner has to amend a petition by the addition, variation or substitution of an allegation or charge is the one contemplated by section 83 (2), which opportunity will be available only if an application therefor is made before the date of expiry for presenting a petition. Once the date of expiry has passed, the only amendment that the law allows is an amendment of particulars of a corrupt or illegal practice already specified in the petition.

Counsel for the petitioner has been at pains to persuade us that the corrupt or illegal practice specified in an election petition referred to in Section 80C, is a corrupt or illegal practice in the broad sense, referred to in Section 77 (*c*) of the Order-in-Council and set out in a petition as a ground for avoidance of an election such as bribery, treating or undue influence, and not a particular instance of any of those offences. His further contention which was a necessary corollary to this first contention was that by way of amendment or amplification of particulars under section 80C (1) the Election Judge may allow a petitioner to furnish further particulars of any number of fresh instances of the corrupt or illegal practice or practices alleged in the petition.

Several reasons militate against the acceptance of this submission and if it is accepted, the resulting position will be to completely defeat the very object which the new amendments to the Order-in-Council introduced by Act 9 of 1970 intended to achieve in this regard. In the first place, the very section which empowers the court to allow amendment or amplification permits such amendment or amplification only of the particulars and not amendment or amplification of allegations. Secondly, according to the section, such amendment or amplification can only relate to an illegal practice specified in the petition. Thirdly, the language of the section shows that the object which the section intends to achieve is to afford a fair trial and the limitation imposed by the last few words of the section makes it abundantly clear that the fair trial contemplated is one which benefits the respondent to the petition and not the petitioner. For, these words impose a prohibition on the court not to allow an amendment which will introduce particulars of a corrupt practice not previously alleged in the petition. This prohibition is manifestly one which operates to the advantage of a respondent who has to meet the allegations of corrupt or illegal practices and never to the advantage of a petitioner. One of the main objects of the 1970 amendment by introducing section 80B (*c*) and (*d*) and repealing Rule 5 of the Third Schedule regarding particulars was that the petition itself must contain the complete case which the respondent or respondents are called upon to meet. If after the respondent or respondents, as the case may be, get ready for the trial on the allegations made in the petition, they can be confronted with a series of fresh allegations at the trial, introduced in the guise of amendment or amplification of particulars, such a course will not merely reintroduce but heighten the mischief that the 1970 amendment set out to eradicate. If this court agrees to the interpretation contended for by Mr. Shinya, it will not merely be legislating but also deliberately repealing the latest amendment introduced by Parliament and arrogating to itself a function which it does not possess.

We shall now examine the further implications of the acceptance of Mr. Shinya's contention on the amendments contained in Act No. 9 of 1970. Section 80B requires in sub-section (*c*) that the petition should

contain a concise statement of the material facts on which the petitioner relies. This requirement is equally applicable, whatever allegations or charges may be contained in the petition. Where, however, according to this concise statement, there is an allegation of any corrupt or illegal practice, subsection (*d*) requires the petition to set forth (*a*) full particulars of the corrupt or illegal practice alleged, (*b*) as full a statement as possible of the names of parties alleged to have committed such corrupt or illegal practice, and (*c*) the date and place of the commission of such practice. In order to further ensure that the allegations specified by the above particulars have a basis of truth sub-section (*d*) imposes a further duty on the petitioner to furnish by himself or by an appropriate party an affidavit in support of such corrupt or illegal practice. If Mr. Shinya is correct in his contention that a corrupt or illegal practice should be given the wide meaning such as " bribery " or " treating " in section 80C (1) and not the narrow meaning of a specific act of bribery or treating it seems to us that there will be a violent conflict between section 80B (*c*) and 80B (*d*) on the one hand and 80C (1) on the other. For, when a petitioner has complied with section 80B (*c*) and (*d*) he would already have specified the corrupt or illegal practice which he alleges with so much particularity and further identified it by means of an affidavit that there is no further possibility of interpreting it broadly as an act of bribery, treating, undue influence or such other corrupt practice, simpliciter, for the purposes of section 80C. The particular corrupt practice is thus stated and affirmed to and fixed with certainty when complying with section 80B. It must be remembered that a petitioner has to comply with section 80B and (*d*) long before the stage contemplated in section 80C (1) when an Election Judge sits in judgment to allow or disallow an application for amendment or amplification of particulars. If the petitioner does not comply with 80B (*c*) and (*d*) he faces the hazard of his petition being not considered an election petition and being dismissed for such non-compliance, so that it is only an election petition which is in accordance with the law, that is to say, which has complied with section 80B (*c*) and (*d*) which can proceed to the next stage when the question of amendment or amplification of particulars under 80C (1) can arise. These considerations too confirm us in the view that any corrupt or illegal practice can only mean any particular instance of such an act in this context. Yet another impact on the meaning of the words corrupt or illegal practice in section 80C arises from section 80A (1) (*b*). Under this provision a petitioner shall join as respondents to his petition any other candidate or person against whom allegations of any corrupt or illegal practice are made in the petition. These respondents must surely mean the respondents against whom any specific allegation is made. If for instance A, B and C are alleged to have committed acts of bribery in relation to the election they will figure as respondents to the petition. If in amending or amplifying particulars under 80C allegations of bribery are sought to be made against X, Y and Z an Election Judge cannot allow the amendment without violating the

requirements of 80A (1) (*b*). For, there is no provision in the Act to add a respondent in these circumstances.

Not only would section 80B (*c*) and (*d*) be inconsistent with Section 80C (1) on the basis of acceptance of Mr. Shinya's contention, but the opposite contention would make the two sections consistent and workable. For, a petition which has complied with 80B (*c*) and (*d*) may still quite often be deficient in particulars so as to warrant a respondent to desire and apply for further particulars, in regard to a corrupt or illegal practice already specified. Supposing, for instance, a petition alleges *inter alia* that X as an agent of Y, the successful candidate, gave a bribe of Rs. 50/- at Galle on the 20th May, 1970 to one Perera. This allegation may be considered by the petitioner and accepted by a court as a sufficient bona fide compliance with the provisions of section 80B (*c*) and (*d*). The respondent may however wish to have further particulars of the exact place at Galle where the bribe is alleged to have been given, the full name of the person to whom it was given and in what circumstances it was given and such further particulars would indeed appear to be necessary in order to ensure for the respondent a fair trial. It will thus be seen how the amendment or amplification of particulars may be legitimately desired and ordered by court in respect of a corrupt act which was previously specified. It is also possible that a respondent, without applying for further particulars, moves for a dismissal of the petition on the ground of the deficiency of particulars and non-compliance with 80B (*c*) and (*d*). The petitioner may then offer to furnish more particulars or to amend them and the court acting under 80C (1) may allow more particulars to be given. Both these situations would arise on the basis of some particular corrupt or illegal practice being alleged in the petition. It is unthinkable however that a court, after the commencement of the trial, can or will make an order allowing the petitioner to give particulars of various instances of corrupt practices which he did not allege in the petition. Apart from the unfairness of such a trial to a respondent contrary to section 80C (1) those corrupt practices will be corrupt practices in respect of which persons against whom the allegations are made have not been joined as respondents in terms of section 80A (1) (*b*) and the names of parties who committed the corrupt practice, the date of such commission, the place of such commission nor any other particulars had been given in the petition as required by section 80B (*c*) and (*d*). On a careful construction of the relevant sections alone, therefore, Mr. Shinya's contention will be in direct conflict with the provisions of sections 80A, 80B and 80C.

The implications of the new sections 80B and 80C in regard to what an Election Petition should contain and the scope of a Court's power to allow an amendment or amplification of the particulars set out in the petition have been dealt with in some recent cases. The view taken in regard to furnishing of particulars under Rule 5 of the old law in earlier decisions too has a bearing on this question. We shall therefore examine some of those decisions which would help to clarify the position

as it exists today. Prior to the amendments brought about by Act No. 9 of 1970, Rule 4 (1) (*b*) required the facts and grounds relied on by the petitioner to sustain the prayer to be stated in the petition. In *Tillakawardena v. Obeyesekere* [1] 33 N. L. R. 65 and *P. P. Wickremasuriya v. P. H. William de Silva* [2] 67 N. L. R. 538 it was held that the statement of something more than the ground in the petition was sufficient because details could be ascertained by the respondent by applying for particulars under Rule 5. In the latter case, one of the paragraphs in the petition set out the following facts :—" . . . the respondent by himself or his agents and/or other persons acting with his knowledge or consent, made or published before or during the said election, false statements of facts in relation to the personal character or conduct of the petitioner, for the purpose of affecting his return at the said election. " The objection was taken that since the petition did not set out the facts as required by Rule 4 (1) (*b*) of the 3rd Schedule to the Order-in-Council, the action must be dismissed. It was held by Tambiah J. that the requirements of Rule 4 (1) (*b*) of the 3rd Schedule had been complied with and that if the respondent required further particulars he was entitled to make his application for particulars in terms of Rule 5. Act No. 9 of 1970 repealed Rule 4 (1) as well as Rule 5 and introduced section 80B as well as 80A and 80C which I have already referred to earlier. Section 80B (*c*) states that a petition " shall contain a concise statement of the material facts on which the petitioner relies ". These words would appear more or less to take the place of the words in the old Rule 4 (1) (*b*) " shall briefly state the facts and grounds relied on to sustain the prayer ". The scope of the words in section 80B (*c*) arose for consideration in the case of *Wijewardena v. Senanayake* [3] 74 N. L. R. 97. In dealing with the meaning to be attached to the words in section 80B (*c*) the following observation was made by His Lordship the Chief Justice :—

" In a case in which a petitioner relies on the commission of a corrupt or illegal practice by the successful candidate or his agent, paragraph (*d*) of s. 80 expressly specifies the facts which the petitioner must state with regard to the commission of the alleged corrupt or illegal practice. But this specification of what are material facts in that class of case does not in my opinion relieve the petitioner of the duty to specify material facts in a case in which he seeks to avoid an election on a different ground. For instance, a petitioner cannot merely state that the successful candidate was disqualified for election, for such a statement would specify only the ground for the avoidance of the election, but not any fact on which he relies to establish that ground ; in this example, if the material fact is that the respondent was at the time of his election a public officer or a government contractor, or was not a citizen of Ceylon, or was the subject of some disqualifying conviction, s. 80B (*c*) requires that fact at least to be stated. So also, in the case of a charge of general intimidation, a petitioner must

[1] *(1931) 33 N. L. R. 65.* [2] *(1965) 67 N. L. R. 538.* [3] *(1971) 74 N. L. R. 97.*

specify at the least the nature of the alleged intimidation ; whether it consisted of actual violence, or of threats of violence, or of some other kind of intimidation, and when and where such intimidation is alleged to have occurred. A petitioner cannot be permitted merely to specify a ground of general intimidation in an election petition with the hope that he can substantiate it with evidence subsequently secured. "

He went on to say further that he agreed with the trial Judge in that case that the amendment of 1970, which repealed Rule 5 and required a concise statement of material facts to be made in the petition were intended to secure that the respondent will know from the petition itself what facts the petitioner proposes to prove in order to avoid the election and will thus have a proper opportunity to prepare for the trial. These observations fortify us in the view we have expressed above about the content and fullness which the law requires the petition to have after the 1970 amendment.

The principle that a petitioner should not be allowed an amendment which has the character of a separate charge of which there was no notice to the respondent from the petition finds considerable support from the passage from Halsbury's Laws of England (Simonds Edition) Vol. 14, page 258 as well as from some cases cited to us by the learned counsel for the petitioner. In the above passage from Halsbury's Laws of England it is stated :—" The High Court has no jurisdiction to allow an amendment of a petition after the time prescribed by the Statute by the introduction of a fresh substantive charge ; nor to convert an offence under one statutory provision into an offence committed against another related provision, although the facts might support the latter ." We shall have occasion to refer to the principle enunciated in this passage again when we deal with the specific amendment which the learned Election Judge allowed in this case and the submissions made by the learned counsel for the petitioner before us in support of the correctness of that amendment. In *Maude v. Lowley*[1] (1874) 9 C.P. 165 (also 29 Law Times Reports 924), the Court was called upon to consider a similar question where the law provided in section 7 of the Corrupt Practices (Municipal Elections) Act 35 and 36 Vict C. 60, as follows :—" No person who is included in a register for a borough or ward thereof as a burgess or citizen shall be retained or employed for payment or reward by or on behalf of a candidate at an election for such borough or ward thereof as a canvasser for the purposes of the election. " The petition alleged that the respondent had employed persons who were on the register of burgesses for the North Ward. An amendment was allowed containing the additional words " and in other wards of the said borough ". Lord Coleridge C.J. indicated that section 7 referred to two different offences, the employment of voters living within the ward, and the employment of voters living without the ward

[1] *(1874) 9 C. P. 165 ; 29 L.T. 924.*

and that as the original petition specified one of the offences and, as amended, it specified both of the offences in the 7th section, the Court had no jurisdiction to allow the amendment. In *Manchester*, 4 O'M & H 121 the charge in the petition pointed to illegal hiring for the purpose of conveyance of voters. Such illegal hiring was an offence under section 14 if committed by the candidate or his Election Agent but this was not alleged. It was an illegal practice under section 7 if an Agent was guilty of entering into a contract for hiring. As the petitioner pointed at an offence under section 14 and not one under section 7 it was held by Cave J. that it would be wrong to allow a virtual amendment of the petition at that stage. In *Beligammana v. Ratwatte*[1] 38 C.L.W. 29 where the parcticulars furnished in respect of the alleged commission of a corrupt practice on a specified date related to a period before such date it was ordered by the Court to be struck out. It was also held by Basnayake J. that an application to amend an election petition by adding a fresh charge long after it was filed should not be allowed. In *Muttiah Chettiar v. Ganesan*[2] A.I.R. 1958 Madras 187 at 194 Ayyangar J. said "In the first place the election petition did not contain any general statement which could cover contracts other than the one specified in it. We doubt whether an allegation in general terms, such as the one suggested by learned counsel for the respondent, would have satisfied the requirement of section 83 (1) which requires that an election petition should state 'the material facts' on which the petitioner relied for the relief that he sought. The following observations of Mr. Baron Pollock on the Lancaster Division Election Case (5 O'M & H page 39) appear to be apt and in point in their application to the instant case. The Court was there dealing with fresh instances of corrupt practice sought to be brought in by way of particulars furnished in respect of the charges already made. The learned Baron said "the present petition had been drawn up in a general form and no one had a right to gain an indirect advantage by reason of it being so drawn . . . . it would have been dealing extremely harshly if time and advantage were given to the petitioners by reason of the general form in which the petition had been drawn. That was not the intention of the Act, and they must see that they did nothing contrary to it. The intention of the Act was, as shown by section 40, to limit the time within which charges could be made. The additional particulars must be struck out."

In *Bajpai v. Teriloki Singh*[3], A.I.R. 1957, S.C. 444 it was held that new instances of a corrupt practice alleged in the petition may be introduced by an amendment of particulars. Section 83 (1) of the Representation of the People Act of India which corresponds to our Section 80B (c) reads :—"83 (1). An election petition shall contain a concise statement of the material facts on which the petitioner relies . . . . " It was held upon the English authorities and considerations that were before our Court in *Thilakawardena v. Obeyesekera* and

[1] *38 C. L. W. 29.*
[2] *A. I. R. 1958 Madras 187 at 194.*
[3] *A. I. R. 1957 S. C. 444.*

Wickremasuriya v. William de Silva (supra) in interpreting Rule 4 (1) (*b*) which required facts and grounds to be stated, that section 83 (1) was satisfied if the grounds on which the election is sought to be set aside alone are stated. Section 83 (3) of the Indian Act which gives the power to the Court to allow amendment of particulars is worded differently from our section 80C (1) and permits it to order further and better particulars in regard to any matter. Any matter was interpreted to " comprehend the grounds on which the election is sought to be set aside ". In the course of the judgment it was stated " And even when there is no list filed, as in the present case, it would be competent to the Tribunal to allow an amendment giving for the first time instances of corrupt practice, provided such corrupt practice has been made a ground of attack in the petition ". This is not possible under our provisions and may be due to the fact that the particulars are not part of the petition but in a list to be attached to it. It was also held that the general power to allow amendments of pleadings under the Civil Procedure Code, namely, Order 6, Rule 17, applied. In *Wijeyewardena v. Senanayake* (supra) at page 101 the learned Chief Justice said " On this point also, Counsel for the petitioner stressed the fact that the phraseology of s. 80B is very similar to that of the corresponding Indian Section, and argued that we should follow Indian decisions. The answer to this argument is that the history of the Indian law on this matter is different from the history of our law, and that to apply Indian decisions would be to ignore the intention of the Legislature in amending our Law in 1970 ". In the case of *Jayasena v. Ilangaratne* [1], 73 N. L. R. 35, at 41, Sirimane J. observed " I would like to say a word here about the particulars which a party is required to file in election cases. They must be accurate and precise so as to leave the other party in no doubt as to the charges he has to meet. The particulars, in an election petition, take the place of a charge sheet or an indictment in a criminal case. A petitioner should not, in my view, be permitted to rely at the end of the case on some item of evidence elicited, e.g., in the cross-examination of a witness, to put forward a case based on a charge different from that set out in the particulars ."

In this connection it is important to bear in mind that sections 181 and 182 of the Criminal Procedure Code in regard to alternate offences have no application to election petition proceedings and it is not open to a petitioner to make one allegation in the hope of securing through the Court a finding of guilty against the respondent in respect of a related allegation though not the one originally made. It must be noted that even under the Criminal Procedure Code the general rule is that for every distinct offence of which any person is accused there shall be a separate charge and it is because of the existence of the special provisions of sections 181 and 182 that a person may be found guilty of a cognate or minor offence although he is charged with another. Such a provision is absent in Election Law and there is therefore no warrant for a

[1] (1970) 73 *N. L. R. 35 at 41.*

Court to find a respondent guilty of an election offence which has not been alleged in the original petition, even though it may contain some of the identical ingredients, but not all, of the offence which was originally alleged in the petition. Even in regard to the provisions of the Criminal Procedure Code, sections 181 and 182, our Courts have been inclined to take a very strict view. This is illustrated in the case of *The King v. Piyasena* [1], 44 N.L.R. 58 at 60 in which Soertsz J. said " This section, however, postulates a case in which a doubt arises from the nature of the fact or series of facts and not from a failure to appreciate the value of unambiguous facts or from an inaccurate view of the position in law arising from these facts ". Similarly, in the case of *The Queen v. Vellasamy and four others* [2], 63 N. L. R. 265, it was held by Basnayake C.J. that a person who is indicted on a charge of murder cannot be acquitted of murder and, at the same time, without due amendment of the indictment and being afforded an opportunity of answering the charge, be convicted under section 198 of the Penal Code of causing disappearance of evidence of the commission of murder or culpable homicide not amounting to murder, and that such a conviction is not covered by the provisions of section 182 of the Criminal Procedure Code. This being the view taken by our Courts even with the presence of express provision in the Criminal Procedure Code for convicting an accused of certain offences of which he is not charged when he faces his trial, that provision could not by analogy assist a petitioner at an election petition trial to have the respondent found guilty of an election offence which has not been alleged in the original petition even though the two offences may be alike.

It will thus be seen that the passage in Halsbury's Laws of England quoted above as well as the decisions in the above cases with the one exception of *Bajpai v. Triloki Singh* point unmistakably in one direction, namely, that the petitioner cannot be allowed through the medium of amendment of particulars or furnishing of particulars, to make allegations of fresh instances of corrupt or illegal practices not already set out in the petition. So far as our law is concerned these decisions will apply even with greater force after the far reaching amendments brought about by Act No. 9 of 1970. In regard to the decision in *Bajpai v. Triloki Singh*, on which counsel for the petitioner strongly relied, not only is it outweighed by the preponderance of authority against the principle laid down therein but its applicability has to be considered having regard to the differences in the law itself. In the first place, while the Indian Courts have interpreted " material facts " in section 83 (1) of the Representation of the People Act to mean the grounds on which that election is sought to be set aside, we have now taken the view, after considering the Indian provisions, that stating the ground alone is not a compliance with the requirement in Section 80B (*c*) for the petition to contain " a concise statement of the material facts on which the petitioner relies ". Secondly, the amendment of 1970 has

[1] *(1942) 44 N. L. R. 58 at 60.* [2] *(1960) 63 N. L. R. 265.*

done away with Rules 4 and 5, the consequence being that in Ceylon a petition has to contain the complete case against the respondent and there is no scope for subsequent addition of allegations by way of amendment after the expiry of the date for filing a petition. Thirdly, the list to be attached to a petition containing the particulars, which can be considered to be subordinate to the petition itself and which can be subsequently amended has no place in our law.

The only reasonable view which we can take therefore is that section 80C (1) permits the Election Judge to allow the amendment of particulars in a petition within a very limited area. If one analyses this section the limits within which such amendments can take place may be summarised in the following way :—

(1) the amendment must relate to a corrupt or illegal practice already specified in the petition,

(2) the amendment must be necessary in the opinion of the Court for ensuring a fair and effective trial of the petition, and

(3) even if the amendment proposed complies with these two requirements the Court shall not allow such amendment if it will result in the introduction of particulars of any corrupt or illegal practice not previously alleged in the petition.

It seems to us that the third limitation is the most important of the three because, while the first and second leave some latitude to Court, the third does not. This is confirmed by the very language of the section because, while even the permitting of any amendment at all is discretionary, the words used being " may allow ", the prohibition not to allow an amendment which results in a new allegation of a corrupt practice is imperative. All the words are suggestive of a provision which does not prejudice a respondent to the petition and the indication from the last limitation is that on no account should the new particulars result in the respondent being surprised by a fresh allegation.

The Order-in-Council contains various grounds for setting aside an election after a trial of an election petition. The genus of a corrupt practice which can form the ground for setting aside an election embraces several species each of which substantially differs from the other. Each species of a corrupt practice again contains various categories or limbs differing considerably in detail each of which can by itself constitute a ground for invalidating an election. Thus the broad genus of corrupt practices includes a large variety of election offences such as personation, treating, undue influence, bribery, making or publishing a false statement regarding the character of a candidate for the purpose of affecting the return of a candidate and making or publishing a false statement of the withdrawal of a candidate for the purpose of promoting or procuring the election of another candidate. Each of these species is sub-divided, in the case of undue influence, into four categories under section 56 and, in the case of bribery, into nine categories under section 57. Each of these categories being a sufficient ground for setting aside an election

what the particular corrupt practice is on which a petitioner relies to set aside the election of a candidate and of which notice is given to that candidate before the final date for filing an election petition depends on the particulars of the corrupt practice as specified in the petition. As we have pointed out earlier, these particulars may often be insufficient for the purpose of giving the candidate a clear picture of what the charge is that he has to meet and it is for that reason that section 80C (1) permits an amendment or amplification of particulars. This necessity flows from the wording of section 80B (*b*) itself which requires a petitioner to set forth full particulars of any corrupt or illegal practice that he alleges but specifically mentions only—

(*a*) the names of parties alleged to have committed such corrupt or illegal practice, and

(*b*) the date and place of the commission of such practice.

There may in fact be many other particulars not stated in the petition which are necessary for the respondent in order to meet the allegations adequately. Numerous instances can be given of insufficient particulars supplied in terms of section 80B (*d*) but it seems hardly necessary to do so here.

Mr. Ranganathan submitted that there were several essential differences between the elements required to found an allegation under section 56 (1) and those required to establish an allegation under section 56 (4). He analysed these differences as follows :—

(1) Section 56 (4) was not present in the original Order-in-Council while section 56 (1) was.

(2) Section 56 (4) was introduced by a special amendment of 1964 and it is important to note that it did not replace section 56 (1) but was introduced in addition to it, implying thereby that the offence defined by section 56 (4) is distinct from that defined under section 56 (1).

(3) The first essential element in section 56 (4) is the relationship of employer and employee between the person issuing the threat and the one who is threatened whereas under section 56 (1) no such relationship is required.

(4) Section 56 (4) refers to a case where the employer threatens to terminate an employee whereas under section 56 (1) the threat can originate from any person who has no relationship to the person threatened.

(5) The threat under section 56 (4) is confined to termination of employment or the denial of any benefit which the employee has enjoyed or is enjoying or will in the ordinary course enjoy whereas under section 56 (1) the threat can extend to any temporal or spiritual injury, damage, harm or loss upon or against the person threatened.

(6) Under section 56 (4) the threat is made by the person himself directly whereas under section 56 (1) the threat can be issued directly or indirectly, by himself or by any other person.

(7) Duress which impeded or prevented the free exercise of the franchise is not an element in section 56 (4) while it is one in section 56 (1).

This analysis shows that there are essential differences in the elements that go to prove an offence under section 56 (4) and those that are required to prove an offence under section 56 (1). It also shows that the appellant who came into Court prepared to meet the allegation under section 56 (4) received a surprise when he had also to meet an allegation under section 56 (1). In order to absolve himself from an allegation under section 56 (4) he need only have satisfied the Court that he had no contract of employment with the person or persons alleged to have been threatened nor that he was the latter's employer in any sense of the term, while that defence would have been wholly inadequate to meet the charge under section 56 (1). The difference in the ingredients between the two offences and the surprise we refer to were amply proved by the result, namely, that the Election Judge found him not guilty of the original charge under section 56 (4) but found him guilty of the amended charge under section 56 (1).

Mr. Shinya endeavoured to meet this argument of Mr. Ranganathan by submitting that it was the same incident based on the identical facts that was alleged in the amended charge and that, because the same facts constituted the corrupt practice of undue influence under both sections 56 (1) and 56 (4), the Election Judge was right in law in allowing the amendment. If at all there was an amendment, he submitted, it was an amendment not by the addition of fresh particulars but by the subtraction of some particulars. It seems to us that Mr. Shinya would have been in a stronger position to make this submission had his application to the Election Judge only resulted in a substitution of section 56 (1) in place of section 56 (4) and not an addition thereto. Secondly, Mr. Shinya's submission does not meet the argument of Mr. Ranganathan that the defence to the allegation under section 56 (4) would not have availed the first respondent in respect of the allegation under section 56 (1). Quite apart from these considerations, the conclusion we reached earlier in regard to the scope and meaning of the amendment or amplification of particulars referred to in section 80C (1) does not enable us to agree with the submission of Mr. Shinya. Independently of the construction of the section too, as we have pointed out earlier, the weight of authority from judicial decisions in this country as well as India and England, is entirely in favour of the view put forward by Mr. Ranganathan. We therefore think that there is substance in his contention that the learned Election Judge was in error in allowing the said amendment. Indeed we feel that he may not have fallen into this error if he had the benefit of the argument which was so ably and lucidly presented before us by

Mr. Ranganathan. While this concludes the matter so far as the two allegations against the first respondent are concerned, in deference to the exhaustive submissions made by counsel for the respondent that, on the evidence available, the finding of the Election Judge was not rationally possible, we would wish to make a few observations on that aspect.

Four witnesses were called by the petitioner in support of the first allegation against the first respondent apart from the petitioner, namely, Aron Singho, David, Mrs. de Silva and Noor. Several criticisms were made by counsel for the respondents, on the learned Election Judge's approach to this evidence. He submitted that the testimony these witnesses gave in the evidence in chief was whittled down considerably in cross-examination almost to the extent of it being withdrawn and he complained that the learned Election Judge acted solely on the evidence in chief without taking into consideration the serious inroads made into this evidence in their cross-examination and that he was therefore guilty of a serious misdirection. He brought to our notice a large number of passages in the evidence of the witnesses to illustrate the criticism he made. In order to contain this judgment within reasonable proportions we shall not enumerate these passages. Suffice it to say that this contention had substance at least so far as one or two witnesses were concerned. However, this seems to us to be the province of the judge of facts against whose finding there is ordinarily no appeal to this Court. Nor can we say in the instant case that the misdirection is of such a serious nature as to characterise the finding as one which is not rationally possible on the evidence. Even if the occasion arose therefore we would have been slow to set aside his finding.

The second criticism was that the learned Election Judge's finding was influenced largely by the contents of two documents which were wrongly admitted. One of these was the letter P2 dated 24.5.70 sent by the petitioner to the Medical Superintendent, Government Hospital, Kandy, complaining against his allowing the use of the Conference Room in the hospital to the first respondent to address a meeting of the hospital staff, minor, clerical, nurses and others and requesting that he too, the other candidate for the Kandy Electorate, be allowed the same facility to enable him to address a meeting of the hospital staff. As we do not consider the criticism directed at the other document P3 to have much substance, it is sufficient if we deal with the submissions regarding P2. In the complaint made by the petitioner to the Medical Superintendent the suggestion was implicit that the Medical Superintendent had allowed the facility of holding a political meeting to the first respondent and that he thereby placed the petitioner at an unfair disadvantage. The letter also contained the following paragraph :—

> "You presided at this meeting. Mr. Tilak Ratnayake, a member of the Hospital Committee, addressed this meeting. Mr. E. L. Senanayake, the Minister of Health, also addressed this meeting and

made certain promises and also indicated to those present the consequences that would flow if the Hospital employees in the Kandy Electorate did not vote for him. The employees were also directed to attend the meeting by you on pain of disciplinary action."

Counsel for the respondents agreed that the letter was admissible to support the petitioner's evidence that he sent a letter complaining of a political meeting being held in the hospital premises but contended that it was irrelevant for the purpose of corroborating the testimony of the witnesses as regards a threat issued by the first respondent. His contention was based on the further submission that the links in the chain of evidence, which was led to show that the source of the information conveyed to the petitioner was a listener in the audience which the first respondent addressed on the 23rd May, were broken and that therefore the contents of the letter in the passage quoted was hearsay. The contents of the speech being hearsay—the writer himself not having attended the meeting—he contended that the Election Judge was in error in making use of them to corroborate the oral testimony of the witnesses that threats were uttered by the first respondent. One of the broken links referred to was that witness Noor having said at a certain stage that he conveyed to the petitioner the contents of the first respondent's speech on the 23rd before the letter P2 was written, later said he did so on the 24th evening after the letter was written. Witness Noor himself not having attended the meeting, the other broken link referred to was that there was no specific evidence that anyone in the audience at the hospital meeting conveyed such a thing to Noor. We think that if the learned trial Judge accepted without hesitation the evidence of the petitioner, Noor having seen him both on the 23rd and 24th to inform him of the meeting, the trial Judge's finding that Noor must have conveyed the information to the petitioner before he wrote P2 is not an unreasonable one, particularly because the intrinsic evidence in the letter supports the petitioner that he had heard of some sort of threats or compulsion before he wrote P2. Yet another criticism made by counsel of P2 was that it contained at least three untrue or incorrect statements, namely, that the Medical Superintendent compelled the hospital employees to attend the meeting under threat of disciplinary action, that he presided at the meeting and that nurses attended the meeting and for that reason that no weight should have been attached by the Election Judge to the rest of the contents. It is correct that the three matters referred to are either unsupported or contradicted by the evidence but there was in our view some justification for the Election Judge to consider P2 as lending some support to the alleged threat by the first respondent. We also agree with the Election Judge that, the petitioner being an experienced Proctor, he would have been restrained in making allegations in the letter for several reasons, even though he did make his point that the speech of the first respondent referred to the consequences which would flow if the hospital employees did not vote for the first respondent.

The final criticism made by Mr. Ranganathan was that, even assuming that the alleged words were uttered, a threat is not the necessary construction that a Court should give to those words. Here we must say that the trial Judge was in a serious difficulty. He had before him very reliable evidence, which was not seriously contradicted by the first respondent, that the latter did address a meeting at the hospital whether by accident or by arrangement. He felt fully justified in considering the action of the first respondent, as the Minister of Health at the time, in addressing this political meeting at the hospital as being improper. Even with this background of impropriety, had there been a conflicting version in regard to the sequence of the words or the context in which they were uttered, he would have had some material on which he may well have taken the view that the words did not amount to a threat. Unfortunately, the first respondent and his witness said that there was no reference at all to the subject of permanent and temporary employees, which version the Election Judge did not find it possible to accept. In these circumstances, in construing the words as a threat the learned Judge may well have thought that there was good reason for the first respondent and his witness to dissociate themselves entirely from the words attributed to the first respondent. This is of course a question of fact which this Court cannot reverse. Had the correct allegation been therefore made against the first respondent in the first instance this Court would not have been entitled to interfere with the finding of fact by the Election Judge.

Passing now to the charge against the 2nd respondent, it becomes necessary to refer preliminarily to a submission of learned counsel for the appellant to the effect that section 67 (3) deals only with the conveyance of *voters* to or from the poll and that voters in this context mean persons who are entitled to vote at an election. It is submitted on this basis that there must be proof that the persons so conveyed were in fact entitled to vote and that the petitioner has failed to prove in regard to this charge that the persons alleged to have been conveyed were voters as thus understood.

This submission is based on the contention that the word " voters " in section 67 (3) (*a*) cannot be given the meaning contained in the interpretation clause wherein a voter is defined as " a person who, whether his name does or does not appear in a register of electors, applies to vote, or votes, at an election ". This meaning it is said cannot be given to the word " voters " in section 67 (3) (*a*) for the reason that a voter acquires the character of a voter in terms of this definition only when he applies to vote or votes and that till he does so he is a future voter or an intending voter but not a voter within the definition. Since on this basis it is submitted that the meaning in the interpretation clause is inapplicable to the word " voters " in section 67 (3) (*a*), it is submitted that the word should be given its dictionary meaning, which

is that a voter is a person who is entitled to vote. Consequently it is submitted that this charge should fail in the absence of proof that the persons conveyed were on the electoral register.

This argument does not commend itself to us. Much of the difficulty it involves seems to arise from the very restricted meaning placed upon the words in the definition by Counsel for the respondent. A person who applies to vote or votes does not necessarily mean one who is in the very act of applying to vote or of voting. In the context of section 67 (3) (*a*) the word " voter " clearly refers both to one who intends to vote and to one who has already voted. To hold otherwise would be to make the section unworkable and render it nugatory, for there could then never be an offence of conveying a voter to or from the polls. One would either be conveying a future voter to the polls or a past voter from the polls but never a person who is in the act of applying to vote or of voting. Such an interpretation must be avoided if a reasonable result can be achieved without doing violence to the language of the section or of the interpretation clause, and in our view such an interpretation is reasonably possible. There are numerous sections in the Order-in-Council itself which can bear no meaning whatever if such a restricted view is taken of the interpretation clause. For example section 39 (4) which gives the presiding officer power to regulate the number of *voters* admitted to vote at a polling station can bear no meaning if a person becomes a voter only in the act of applying to vote or of voting. In this context as in so many others in the Ordinance a person intending to vote can reasonably be described as a voter without doing any violence to the Interpretation Clause.

We do not think therefore that the Interpretation Clause ought to be so narrowly construed, and the need to look elsewhere for the meaning of the word "voter" as used in section 67 (3) (*a*) does not therefore arise.

Since the appellant's contention on this legal question fails it becomes necessary to pass on to the learned Judge's findings on the charge itself.

The charge in question is that the 2nd respondent as an agent of the 1st respondent and/or with his knowledge or consent at Asgiriya used motor car number 1 Sri 710 for the purpose of conveying voters to and/or from the polls in violation of section 67 (3) of the Order-in-Council. The principal witnesses called by the petitioner on this count were a Police Officer (one Van Rooyen) and two other witnesses named Henry and Kodagoda. For the respondents the principal witness was Rev. P. Chandananda Thero, Deputy High Priest of the Asgiriya Chapter. This witness was called by the respondents in order to prove that at the time when the car was alleged to have been used for the purpose of conveying voters, namely, on the morning of polling day, the car was in fact garaged in the premises of the Asgriya Temple, and his evidence, if accepted, provided a complete answer to the charge.

There has been strong complaint on behalf of the respondents in regard to the manner in which the Court approached the evidence of this witness, and secondly, in regard to the extent of the questioning of the witness by Court and the use made of the answers to such questioning. In order to examine this complaint it becomes necessary to outline the stages in the trial leading up to the presentation of this charge.

It would appear from the proceedings that, although in the petition the charge had been made that this car had been used for the conveyance of voters, no particulars in regard to this had been set out in the petition. The petition merely states that car number 1 Sri 710 was used by the 2nd respondent acting as agent of the 1st respondent and/or with his knowledge or consent at Asgiriya for the conveyance of voters to and/or from the polls.

At the commencement of the trial on 1st September 1970 learned Counsel for the respondents stated that, before learned counsel for the petitioner opened his case, he would like to make an application relating to this item of the petition. He asked for particulars firstly whether the charge made against the 2nd respondent was whether he had conveyed voters to and from the poll. He wanted to know further the time at which this incident was alleged by the petitioner to have taken place. He also requested particulars in regard to the other charge of conveying voters.

To this learned counsel for the petitioner replied that he had not yet examined the witnesses in question and that, as there was still time for that charge to come up, he would hear the witnesses and give those particulars the following day. He stated also that he relied on one transaction only in regard to each of these charges.

In the course of his submissions on this application it may be noted that counsel for the respondents observed : " If the time of the incident is mentioned it may be open to the respondents or any one of them to say ' well you say that my car was at such and such a place. No. I can say that my car was somewhere else in Colombo. That is my application '."

After this discussion the Court in its order recorded the fact that learned counsel for the petitioner undertook to furnish the required particulars the following day. Moreover, immediately before the commencement of the evidence, learned counsel for the petitioners reiterated that the particulars asked for would be given the following day.

The trial proceeded on the 2nd and 3rd of September but these particulars were not furnished and, on the 4th of September learned counsel for the respondents wanted to know the number of occasions on which car number 1 Sri 710 was alleged to have gone to the polling station. He was told that it went several times—roughly 10 to 12

times—but that the petitioner was relying on one instance and that he would confine himself to one charge and " all the rest would be shorn off ". It will be noted that still no time was mentioned as the time of the alleged conveyance.

It was only on the 12th of September that the time of the alleged conveyance was first stated. This was in the course of the evidence of Kodagoda, one of the witnesses on this charge, and he stated that he first saw this car that day between 8.45 and 9 a.m.

This was the last date of the presentation of the petitioner's evidence and the case for the petitioner was closed that same day. That same day during the cross-examination of this witness, counsel for the respondents put to him the suggestion that the car was in the garage of the Asgiriya Temple from about 8.45 or 9 a.m. till about 1.30 in the afternoon.

The case for the respondents opened on 17th September and during the morning session, before the tea interval that day, an application was made on behalf of the respondents to file a further list of witnesses containing the name of the priest, Rev. P. Chandananda Thero.

The purpose of this list was to prove that the car was in the temple garage at the time material to the charge, as now particularised. It is correct that counsel for the respondents when questioned as to why this name was being listed at this stage stated that it was due to inadvertence that it was not put on the original list. Yet against the background which I have adverted to, of the time being mentioned for the first time on the date on which the petitioner's case was closed, there were extenuating circumstances in favour of the respondents when they sought to list this witness at this stage. Moreover it is clear also that the version that the car was in the temple premises at that time was not an after-thought for there was cross-examination upon this basis the very same day on which the time was first mentioned.

It would no doubt have been more satisfactory for the petitioner to have listed this witness out of an abundance of caution at the very commencement of the trial, but the circumstances adverted to would sufficiently indicate that the special importance of this witness clearly emerged only after specific evidence of the time of the alleged conveyance of the voter transpired. Moreover, when the learned Judge allowed this list (which in fact contained only the priest's name) he made the remark that " the weight that will be attached to their evidence is nil ".

This remark made by the learned Judge has been the subject of serious complaint by counsel for the appellant. This remark of course is not to be literally understood as being an indication by Court that whatever the witness said would be totally discounted, but it was nevertheless a strong expression by the Court when made in regard to the testimony

of a witness who had not yet been heard. Such a remark would no doubt lend added strength to any justifiable complaint against the learned Judge's approach to the evidence of the witness.

It is correct that on 6th September 1970, as Mr. Shinya pointed out, learned junior counsel for the respondents had in a letter to the Registrar indicated that counsel for the respondents would not raise objections to the petition on grounds of inadequacy of security. Apart however from questions of adequacy of security or of pleading, the petitioners were under a clear duty to furnish to the respondents at least at the very commencement of the trial the time of the transport alleged. Had this been done, the petitioner's comment of belatedness regarding the filing of the list containing the name of the monk would have had much more to commend it.

When eventually the monk was called and stated that the car had been in the garage of the temple from about 8.30 or 9 in the morning till 1.30 in the afternoon that day, he was severely cross-examined and it was put to him that his evidence that the car was in the garage during that period was false. He resolutely repudiated this position and maintained throughout the cross-examination that the car could not have been removed from the garage without his knowledge.

After the evidence in chief, cross-examination and re-examination of this witness had been concluded and the witness had as yet made no concessions regarding the possibility of the car being removed from the temple premises without his knowledge, the Court addressed a series of questions to this witness, worded in emphatic language and quite plainly indicating to the witness that in the Court's view there must surely exist the possibility that the car might have been removed without the witness' knowledge.

Although the witness in answer to earlier questions by Court stated that he had no duties to perform that morning, he was asked: "What I want to know from you is, is it possible that Mr. Ratnayake would have taken the car out from the garage without your knowledge when you were attending to other duties or when you were going out, and thereafter come back, leave the car and go away?." The witness said that this was not possible having regard to the position of the garage in relation to the temple. The next quesion by Court, which consisted of a series of question rolled together, was: "You will agree that you have to go for your meal, you have to go for your toilet, in which case it may have been possible for the car to be taken? You were not watching it right through, there was no reason why you should watch that car right through that morning, or the garage?". To this the witness replied that if it was necessary, or if he wanted to do it he could have done it. Again the Court asked him: "What I want to ask you is that it may be possible for you not to have noticed this garage or the car during this entire period? You may quite justifiably

think that the car was there from the time it was put into the garage until it was taken out ? You may quite honestly believe so ? " to which he answered : " I so believe it ". It is clear from this questioning and the answers given that the witness was seeking to re-assert that it was not possible for the car to be taken out without his knowledge but that when the Court questioned him in the form " you will agree . . . . " and the Court's view was thus put to him the witness said " If it was necessary he could have done it ". Upon a review of this questioning one is left in serious doubt as to whether the witness may have made even the slight concession he did but for the fact that he was questioned in such a manner as to indicate to him that it was clearly the Court's view that a continuous observation of the car throughout the morning was impossible. Even witnesses who are able to stand their ground in the face of the severest cross-examination at the hands of opposing counsel, are, in view of the deference with which they treat the court, inclined to treat with the greatest regard suggestions of this nature when they come from Court and are couched in compelling language, and it is a rare witness who will steadily maintain his version in the face of such questioning by the Court. In any event whatever concession the witness made in answer to these questions was a reluctant concession, as the Court itself has observed elsewhere in this case. Moreover, even the Court at that stage did not consider that the witness had changed his position, for the Court observed, when counsel for the respondents sought to ask a question after this examination by Court, that " he has explained it to the best of his recollection, as far as I can understand his evidence the car was not taken out from the garage from 8.30 to 1.30 . . . . ".

We shall now address our mind to the cirticisms made by counsel in regard to the questioning of this witness by the Court. While the widest powers in regard to examination of witnesses are undoubtedly conferred on the Court by section 165 of the Evidence Ordinance, these powers are not without certain limitations. There are certain unfortunate circumstances in the particular facts of this case which in our view bring this case within the scope of these limitations. That such limitations exist is well settled both here and abroad—vide *The Queen v. David Perera* [1] (1962) 66 N.L.R. 553 at 556-7 ; *The Queen v. Mendis Appu* [2] (1960) 60 C.L.W. 11 ; and *Sunil Chandra Roy v. The State* [3] (1954) A.I.R. Calcutta 305 at p. 317. One of the well-recognised limitations of the powers of the Court under this section is that the Court " must not question the witness in the spirit of beating him down or encouraging him to give an answer—vide Monir, Evidence, 4th Ed. Vol. II, p. 949 ; *Sunil Chandra Roy v. The State* [4] (1954, A.I.R. Calcutta 305). While in the present case there would perhaps be room for saying that the questioning is not quite of this nature, the additional circumstances to which we shall refer remove any uncertainty on the question whether this was not a case

[1] *(1962) 66 N. L. R. 553 at 556-557.*
[2] *(1960) 60 C. L. W. 11.*
[3] *(1954) A. I. R. Calcutta 305 at 317.*
[4] *(1954) A. I. R. Calcutta 305.*

in which the limitations inherent in section 165 came into play, and whether it was a case in which the powers granted by section 165 were properly applied.

In the first place, athough the view of the Court immediately after the cross-examination was "as far as I can understand his evidence the car was not taken out from the garage from 8.30 to 1.30", this is not the view expressed by Court in the judgment itself in regard to the effect of this evidence. On the contrary the learned Judge in his judgment has stated that although the witness "in examination in chief was positive that the 2nd respondent's car was in the garage adjoining the residing quarters from 8.30 or 9 a.m. until 1.30 p.m. . . . . ", the witness in answer to court "reluctantly conceded that if the 2nd respondent wanted to take the car out of the garage he could have done so as he was not watching the car or the garage during the entire period." This fact, set out prominently in the Court's examination of the evidence of the monk, had at the stage of the judgment a great influence upon the mind of the judge in causing him to disbelieve his evidence. This is all the more unfortunate because if it had indeed been the view of the learned Judge that the monk had made this concession and that it so seriously affected his evidence, there has been much prejudice to the case of the respondents when immediately after the questioning by Court counsel for the respondents suggested a question no doubt to clear up this matter but refrained from persisting in it in view of the Court's observation at that time :—"as far as I can understand his evidence the car was not taken out from the garage from 8.30 to 1.30."

In any event although answers to such questions so strongly put by the Court may well be used as the basis of the Court's assessment of the witness in question one would hesitate to consider such a course permissible where the questions which counsel for the respondent sought to put consequent on the Court's questioning, which could well have had the effect of clearing up the entire matter, were abandoned in view of an observation of Court which eventually turned out to be reversed in the judgment.

Moreover it will be remembered in the present case that the concessions which the witness made were concessions under the pressure of a view expressed by Court in terms suggesting that that was the only reasonable view, namely that the car could possibly have been taken without the witness being aware of it. It is remarkable however that although this view has been so strongly put to the witness in the course of the Court's questions to him, the Court has in its judgment expressed a diametrically opposite view, for the Court has observed : "If in fact the car was removed from the garage during the morning session it is unlikely that the reverend priest would not have been aware of the fact." As that indeed turns out to be the view eventually taken by the Court itself upon this matter, one can well see that the answer to the question "you will agree that you have to go for your meal, you have to go

for your toilet, in which case it may have been possible for the car to be taken ? You were not watching it right through, there was no reason why you should watch the car right through that morning or the garage ? " was quite understandably given by the witness with reluctance. In the result then an answer obtained from a witness in consequence of a view strongly put to him as representing the Judge's view has unjustifiably, as it turns out, been taken as a principal basis for disbelieving the witness. Moreover the basis so strongly put to the witness in the Judge's examination of him and to which the witness reluctantly agreed has turned out to be a view quite opposite to that which the Judge eventually formed. Counsel for the respondent complained, with justification, that if that was the view of the Court, it was unfair to the witness, the Anunayake Thero, to almost compel him to agree to a proposition which the learned Judge himself did not believe to be a possibility.

One other matter in this connection is that the answer " I so believe it " to another multiple question " What I want to ask you is that it may be possible for you not to have noticed this garage or the car during this entire period ? You may quite justifiably think that the car was there from the time it was put into the garage until it was taken out ? You may quite honestly believe so ? " seems to have been misunderstood by the Judge, for when the witness said " I so believe it " he was answering the latter parts of this multiple question and not in that answer conceding that it may have been possible for him not to have noticed the car or the garage during the entire period. In the judgment however the learned Judge has observed that the witness admitted that he may have believed the car to be inside the garage when in fact it was not there. This again is an unwarranted assertion for which there is no evidence.

Before leaving this matter it is useful also to observe that although there were circumstances to which we have already referred indicating that the time of this alleged act of transport was in fact mentioned only on the date of the closing of the petitioner's case and that the position was promptly put to the witness that the car was in fact in the temple garage that morning, the learned Judge has expressed the view that the defence of the 2nd respondent was built up as the case proceeded. The expression of this view despite the presence of these circumstances has strengthened the criticism of counsel, in regard to the remark of the Election Judge at the time of allowing summons on the Anunayake Thero, that the weight of his evidence will be nil. All these reasons taken cumulatively would appear to indicate that although the questions addressed to the witness by the learned Judge might taken by themselves be considered to fall within the wide ambit of the Court's powers under section 165 still in the present case the questioning by the Court is not such an exercise of the powers of Court as is permitted by section 165.

As the unfavourable view taken by the learned Judge of the evidence of the Priest formed, in our opinion, on wrong and incorrect grounds, has been a material element in his finding in respect of this charge, that finding cannot be allowed to stand.

We pass now to the charge against the 3rd respondent which alleges that the 3rd respondent acting as agent of the 1st respondent and/or with his knowledge or consent used motor car number CN-1836 on polling day for the purpose of conveying voters.

The petitioner's case on this count was confined to an allegation that the 3rd respondent transported a voter known as Jean Jesuri to the Anniewatte Polling Booth in this car. The evidence would indicate that the 3rd respondent was seen in this car when the voter Jean Jesuri alighted from the car near the polling booth and went into the booth. It is common ground that the car was not driven by the 3rd respondent. The 3rd respondent's version on this question is that he had been to the house of a friend of his in Anniewatte, and that on his way home from this house he had met one Jemsi who gave him a lift in his car. The car stopped near the polling booth in order to enable a passenger in this car to alight but he denied that he had anything to do with the conveyance of that passenger to the polls.

The learned Judge has for cogent reasons held the evidence of this witness to bo unsatisfactory. He has held further that the presence of the 3rd respondent in the car at the relevant time was not innocent. He has further held that it has been established beyond doubt that a voter was conveyed in this car and also that the presence of the 3rd respondent, a strong supporter of the 1st respondent, in the car, cannot be explained on any other basis than that he conveyed a voter to the poll. The learned Judge's decision to reject the evidence of the 3rd respondent is a finding of fact with which we do not wish to interfere even though we may not agree with some of the reasons. There remains however the further vital question whether the rejection of the testimony of the 3rd respondent necessarily proves the charge against him.

We are here confronted at once with the degree of proof necessary to prove a charge under Election Law. The view that has been consistently taken in our Courts following also the English practice is that charges in election petitions must be established beyond reasonable doubt. In the case of *Ilangaratne v. G. E. de Silva*[1], 49 N.L.R. 169, Windham J. held that only those charges in respect of which the evidence satisfied the Court beyond reasonable doubt could be considered to be proved. In regard to certain other charges 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,

[1] *(1948) 49 N. L. R. 169.*

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 ". In the case of *Aluvihare v. Nanayakkara* [1], 50 N.L.R. 529 Basnayake J. held 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. In the *Warrington case* [2], *1 O'M & H.* 42 Baron Martin in giving judgment for the respondent stated :—" I adhere to what Mr. Justice Willes said at Lichfield, that a Judge to 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 ". All these decisions were referred to in the case of the Badulla Election Petition *Premasinghe v. B. A. H. Bandara* [3], 69 N.L.R. 155 in which it was held by G. P. A. Silva, J. in dismissing the petition that, 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 ; that 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 that there is no justification to make a distinction in the onus of proof in respect of these different corrupt practices. In dealing with the question of agency he stated : " 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 ."

The principle laid down in these cases makes it clear that a petitioner undertaking to prove a charge in an election petition has to discharge the same burden that a prosecutor has in a criminal case. When the evidence against the respondent is direct, the testimony of the witnesses must carry conviction to the trial Judge. When the evidence is circumstantial, not only must the Judge be satisfied beyond reasonable doubt that the evidence of the witnesses is true but he must also be satisfied that the inference he draws from the totality of the circumstances adduced compel him to draw only one conclusion, namely, that the respondent concerned committed the election offence complained of. If he has either a reasonable doubt as to the truth of the testimony of a witness relied on by the petitioner to prove the charge or even after being satisfied of the truth of that testimony, if he is able to draw the inference that the respondent may or may not have committed the

[1] *(1948) 50 N. L. R. 529.* [2] *1 O'M. & H. 42.*

[3] *(1966) 69 N. L. R. 155.*

offence, or, in other words, that it is equally possible that the respondent or anyone else may have committed the offence, applying the same test as in a criminal charge, it will be obligatory on the Court to find that the charge is not proved. To express the principle in another way, if the proved circumstances do not exclude the hypothesis that, the offence may well have been committed by someone other than the respondent, even though one inference from the circumstances is that the respondent himself committed the offence, the Court has no alternative but to give the respondent the benefit of such doubt and to find him not guilty.

With these principles in mind we shall examine whether, as a matter of law, the learned Election Judge was justified in this case in coming to the following conclusion :—" The circumstantial evidence in my view establishes beyond reasonable doubt that Jemsi or whoever was the driver of the car was acting on the instructions of the 3rd respondent in conveying Jean Jesuri to the polls. The charge against the 3rd respondent has been proved ." The items of evidence as accepted by the learned Judge on which the conclusion whether the 3rd respondent was guilty of the charge or not had to be decided were :—

(1) That the 3rd respondent was a strong supporter of the successful candidate

(2) That he was found in car No. CN-1836 in which Jean Jesuri was conveyed to the polling station

(3) That Jean Jesuri was a voter

(4) That the 3rd respondent evaded the Police

(5) That when he finally made a statement to the Police, he did not mention the name of the driver of the car that transported the voter but referred to him as a friend

(6) That the Judge disbelieved his evidence in Court in regard to the circumstances in which he stated that he happened to be in this car at the time.

The charge against the 3rd respondent was that in contravention of Section 67 (3) of the Ceylon (Parliamentary Elections) Order-in-Council of 1946 as amended by Act No. 9 of 1970, acting as an agent of the 1st respondent he used or employed motor car No. CN-1863 to convey a voter to the poll. In order to establish the charge that he *used* or *employed* the vehicle in question to convey a voter to the poll, apart from his being present in the car at the time, which no doubt is a highly relevant item of evidence, it must be proved that he had some control of the car or that the driver was acting under his instructions at the time. To give a few illustrations, the clearest case would be if the car in which a voter was conveyed was driven by the person who is charged with the offence. An equally strong case would be if the owner of the car was seated in the car when it was driven to the polling station with a voter and he is charged with the offence. A third case would

be where the owner, even though not present in the car happened to be a strong supporter of a candidate and the driver who conveyed a voter is proved to have been employed by the owner and the latter, when faced with the charge offers no explanation or offers an explanation which is false. A similar strong case would be made out when a supporter of a candidate is in the car driven by someone else and the latter has no connection whatsoever with the car. This last illustration brings us very close to the case before us which confronts us with the point of departure from guilt to innocence or at least from guilt to the presence of a reasonable doubt as to guilt. The circumstances which give rise to this position are :—

(1) The car does not belong to the 3rd respondent

(2) The car was not driven by the 3rd respondent

(3) No connection has been established between the 3rd respondent and the driver, whoever the driver may have been

(4) 3rd respondent's evidence that Jemsi drove the car not being contradicted by any evidence to the contrary that it was not Jemsi who drove the car

(5) Jesuri was the voter who was conveyed

Independently of the 3rd respondent's evidence the following facts were established in addition

(6) Jesuri's name appeared in the voters' list as a voter in the same household as Jemsi

(7) The Police traced the owner of the car and on a statement made by this registered owner the Police questioned Jemsi

(8) Jemsi is the brother-in-law of the owner of the car.

The Court, having to decide the case against the 3rd respondent on circumstantial evidence, was now confronted on the one side with the case of the petitioner which raised a strong suspicion or even a prima facie case against the 3rd respondent that, being a strong supporter greatly interested in securing a victory for his candidate, was found in a car which admittedly transported a voter, beset however with the difficulty that no connection was established between the 3rd respondent and the owner or the 3rd respondent and the driver, whoever the latter may be. On the other side was present the circumstance that the car belonged to one Hashim, whose brother-in-law was Jemsi, who lived in the same household as Jesuri, the voter, and who was traced as a result of a statement made to the Police by the owner of the car. If Jemsi was in fact the driver, why then, one at least of the reasonable probabilities from the evidence would be that he conveyed the female voter Jesuri who was a member of the household to the polling station and that he was driving the car belonging to his brother-in-law, either generally or at least specially on this day. It is more likely that he was generally driving the car—we do not know whether as driver or virtual owner or in terms of any other arrangement—because the Police

questioned the owner Hashim some considerable time after the day of the poll and, even at that time, the police were led to Jemsi as a result of Hashim's statement. We cannot of course speculate on the statement made to the Police by Hashim but it is perhaps legitimate for us to assume that, after a complaint was made to the police of an illegal conveyance of a voter on election day, the police would have been interested to know from the registered owner whether he drove the car or, if he did not, who drove it. The question then arises, in a case based on circumstantial evidence, whether the Court, in satisfying itself whether the totality of the circumstances relied on by the petitioner point to the irresistible conclusion of the guilt of the 3rd respondent, when confronted with the other set of circumstances (briefly, that the voter was conveyed in a car belonging to one Hashim who, quite independently of the 3rd respondent, directed the Police to Jemsi who happened to live in the same household as the voter Jesuri) could come to the conclusion in law that these circumstances were consistent only with the 3rd respondent having used the car to convey a voter and inconsistent with the reasonable hypothesis that Jemsi may well have used his brother-in-law's car to transport a householder in his own house to the poll. The further question would arise whether it was not possible in those circumstances or even probable that Jemsi would not have driven his brother-in-law's car to take a householder of the same house in which he lived to the poll rather than that the 3rd respondent would have borrowed or hired the car from Hashim and engaged a driver, whose identity or connection with the 3rd respondent the petitioner has not even suggested, to take voter Jesuri to the poll. Here we are not even taking into consideration the evidence of the 3rd respondent that Jemsi was the driver on which evidence, it must be noted, the Judge made no specific adjudication, his words being " Jemsi or whoever was the driver of the car ". It is not for us to make such adjudication but we must say that the fact that Jemsi was traced by the Police, not as a result of a statement by the 3rd respondent, but as a result of a statement made by Hashim and that Jemsi lived in the same household as Jesuri are both independent circumstances that support the evidence of the 3rd respondent that Jemsi it was who drove the car which conveyed the voter. Had these independent items of corroboration been considered by the learned Judge in their proper perspective attaching to them the significance that was due, we feel that he may have been compelled to accept the evidence of the 3rd respondent that Jemsi drove the car even after rejecting the rest of his evidence because that item of evidence received corroboration while the rest of his evidence did not and it was not contradicted by any evidence of the petitioner to the contrary. Unfortunately, this aspect, which is so vital a matter for decision in the circumstances of this case has escaped the consideration of the learned Judge and he does not appear to have thought it necessary to arrive at a definite finding as to whether Jemsi drove the car or not or even to address his mind to the question of the reasonable probability or otherwise of

Jemsi having driven the car. That he did not appreciate the importance of this is indicated by the expression " Jemsi or whoever was the driver of the car" in dealing with this matter in the judgment. For, if Jemsi drove the car the reasonable possibility is inescapable that the car was not used or employed by the 3rd respondent but by Jemsi himself to transport a member of his household, and, on the analysis of the evidence which we have pointed to, that probability cannot be excluded. In other words, in the set of circumstances before Court one conclusion emerges if Jemsi drove the car and another if someone else drove the car and the responsibility of the 3rd respondent would very much depend on a conclusive finding whether it was Jemsi or not Jemsi who drove the car. The rest of the learned Judge's finding on this charge is therefore vitiated by the failure to make an adjudication on this decisive factor.

Yet another way of testing whether the circumstances deposed to in the case led to a reasonable hypothesis that Jemsi drove the car would be to ask oneself the question whether, if Jemsi was prosecuted in a criminal Court for the corrupt practice of using a car for the conveyance of the voter, there would be at least a prima facie case against him. What, in that event, would have been the items of evidence against him ? The prosecution would place the following evidence :—

(1) Dodanwela to speak to Jemsi driving car No. CN-1836 to the polling booth and dropping the voter Jesuri

(2) G. B. de Silva to speak to Jesuri having been transported in the said car whose driver he could not identify, the purpose of his evidence being to support Dodanwela that the car used was that bearing No. CN-1836 and that Jesuri was the person transported

(3) Police evidence that the owner of the car was traced from the registration number and that, on a statement made by him the police questioned Jemsi

(4) Production of the voters' list to show that Jemsi lived in the same house as Jesuri.

We think that the first two items of evidence would have established the conveyance of a voter by the name of Jesuri and that the first item of evidence stating that Jemsi drove the car, receiving circumstantial support from the third and fourth item, would have established a prima facie case calling upon the accused Jemsi for an explanation. If that be so, these same circumstances established in the instant case with a different object, namely, to prove beyond reasonable doubt that the car was used by the 3rd respondent must necessarily fail because the petitioner's case cannot surmount the reasonable possibility of another hypothesis, namely, that the car was used by Jemsi to transport Jesuri. In order to come within the principle of having to exclude every reasonable hypothesis of innocence in a case based upon circumstantial

evidence, it is not necessary for an accused person to show that the circumstances giving rise to the hypothesis of innocence will go as far as to establish a prima facie case of that hypothesis. It is only necessary to show that such reasonable hypothesis cannot be excluded. *A fortiori*, if it can be shown that the circumstances go that far, there is no question of finding an accused person guilty in a case based on those very circumstances. In the present case therefore, if we follow the principle referred to above which, as we have stated earlier, would apply to the proof of charges in election cases, we have no alternative but to disagree with the decision of the learned Election Judge in respect of the charge against the 3rd respondent on a matter of law.

Had there been evidence of other circumstances such as that the 3rd respondent had been seen in this car on other trips or that the 3rd respondent had hired out this car or borrowed this car from its owner on that day, or even that the 3rd respondent had been seen in the car before he was seen with the voter, there could perhaps have been room for an argument that the driver must be inferred to have been acting under the direction or on the instructions of the 3rd respondent. To draw this inference in the absence of such circumstances merely from the fact that the 3rd respondent was an agent of the candidate would thus appear to ignore the legal requisites for the proof of this serious election offence. Even more is this the case where the proved circumstances open up the possibility of a reasonable inference that the car was not under the direction and control of the 3rd respondent. In our view the important implications flowing from the possibility of the driver being himself a member of the voter's household compellingly called for their consideration by the learned Election Judge.

It may also be noted that the learned Judge has made a point of the fact that the respondents have failed to call Jemsi as a witness. It would appear that in making this observation the learned Judge was misplacing the burden of proof, for the burden lay upon the petitioner to establish that the use of the car for the conveyance of the voter to the poll was by the 3rd respondent. One of the facts necessary to establish this was that the driver was under the control or acting under the instructions of the 3rd respondent. Counsel for the 3rd respondent (as well as for the 1st respondent) at the trial had clearly indicated in the cross-examination of the petitioner and also in a statement to Court that his position was that Jemsi was the driver and that Jemsi transported his sister-in-law Jesuri who was a member of the same household as Jemsi to the poll. The charge against the 3rd respondent being based on circumstantial evidence, the petitioner should have realised at this stage that in order to establish the charge he had to place evidence before Court sufficient to exclude any reasonable hypothesis of innocence of the 3rd respondent and that, if the 3rd respondent established, or even created in the mind of the Judge a reasonable doubt, that Jemsi may have driven the car, the reasonable possibility that Jemsi conveyed the voter in his household to the polling station could not be eliminated.

Thus it was the petitioner's duty to prove the charge by showing that, in addition to the fact of Dodanwela being in the car, the driver was one under Dodanwela's control or acting under his instructions. In order to establish this essential element, therefore, it was the petitioner who had to place evidence that Jemsi was not the driver. The burden was therefore on the petitioner to call Jemsi or to establish the fact by other means as he himself could not say in his evidence whether it was Jemsi or anyone else who drove the car. Moreover, the petitioner would have had no difficulty in calling Jemsi because, if that was the truth, Jemsi had only to deny that he drove the car. In any event the 3rd respondent could scarcely have been expected to call Jemsi if Jemsi was the driver as his evidence would have incriminated him when he admitted that he committed the illegal act of conveying a voter to the poll. There is thus, in addition to the erroneous decision in regard to the proof of the charge against the 3rd respondent, an error in law in misplacing the burden of proof in arriving at the decision that the charge was proved.

For the reasons stated above the learned Election Judge's finding in respect of the charge against the 3rd respondent too must be set aside.

We accordingly reverse the determination of the Election Judge and hold that Edward Lionel Senanayake was duly elected and returned as the Member for the Kandy Electoral District at the General Election held on the 27th of May, 1970.

The Petitioner-Respondent will pay to the 1st Respondent-Appellant his costs of appeal.

The 2nd and 3rd Respondents gave evidence which was unacceptable to the Election Judge and have not assisted the Court. We are therefore not disposed to grant them any costs.

In view of the Election Judge's conclusions on the facts relating to the charge against the 1st Respondent and our own observations thereon it cannot be said that the petitioner came into Court in the first instance without any probable grounds. We therefore grant to the 1st Respondent only half of his taxed costs in respect of the proceedings at the trial.

Sgd. G. P. A. SILVA,
Senior Puisne Justice

Sgd. G. T. SAMERAWICKRAME,
Puisne Justice

Sgd. C. G. WEERAMANTRY,
Puisne Justice.

Appeals allowed.