1967 *Present :* **H. N. G. Fernando, C.J. Abeyesundere, J., and Sri Skanda Rajah, J.**

P. H. WILLIAM DE SILVA, Appellant, *and* P. P. WICKREMASURIYA, Respondent

ELECTION PETITION APPEAL NO. 5 OF 1966—DEVINUWARA (ELECTORAL DISTRICT NO. 70)

Election Petition No. 3 of 1965

Election petition—Corrupt practice—False statements about conduct of candidate—Evidence—Police reports of election meetings—Admissibility—Evidence Ordinance, ss. 35, 159—Corrupt practices committed by several persons—Should each finding be examined by Court on appeal ?—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 82, 82 C (1).

A police constable's report of a speech made by a candidate's agent at an election meeting, such as has been held in *Wimalasara Banda v. Yalegama* (69 N.L.R. 361) to be not admissible in evidence under section 35 of the Evidence Ordinance in proof of any fact stated in the report, may, however, be used in terms of section 159 of the Evidence Ordinance to refresh the memory of the police constable when he gives direct evidence as to statements made by the agent at the election meeting. Section 159 of the Evidence Ordinance expressly contemplates that a witness may read a document and may subsequently, if his memory is refreshed thereby, testify from his refreshed memory to facts he then recollects.

Where an Election Judge has made a report under section 82 of the Parliamentary Elections Order in Council against a number of persons found by him to have committed corrupt practices as agents of a candidate, and the appeal preferred by the candidate is dismissed after consideration of only one instance of corrupt practice, it cannot be contended that the Court should examine the validity in law of all the other findings of corrupt practices. The right of appeal conferred on a party to an election petition was not intended to be utilised merely for the purpose of seeking the review of a finding prejudicial to some person who is not such a party.

ELECTION Petition Appeal No. 5 of 1966—Devinuwara (Electoral District No. 70).

Colvin R. de Silva, with *E. R. S. R. Coomaraswamy*, *F. R. Dias Bandaranaike*, *Desmond Fernando*, *Suriya Wickremasinghe*, *Nihal Jayawickrama*, and *P. O. Wimalanaga*, for the Respondent-Appellant.

C. Ranganathan, *Q.C.*, with *P. Navaratnarajah*, *Q.C.*, *J. W. Subasinghe*, *K. Thevarajah*, and *T. Suntheralingam*, for the Petitioner-Respondent.

Cur. adv. vult.

LXIX—18
1*—H 4811—1,023 (6/67)

January 16, 1967. H. N. G. FERNANDO, C.J.—

The appellant was elected as a Member of Parliament for the Electoral District of Devinuwara at the General Election held in March 1965. Upon an election petition filed by an opposing candidate, who is hereinafter referred to as " the petitioner ", the Election Judge declared the election to be void on the ground that corrupt practices had been committed by persons who were agents of the appellant. The five corrupt practices which were held to have been committed consisted in each case of the making of false statements affecting the character or conduct of the petitioner.

It was proved at the trial that the petitioner had been the Member of Parliament for Devinuwara until the dissolution in December 1964, and had been a Member of the Sri Lanka Freedom Party, which party was one of the member parties which had formed the Coalition Government holding office immediately prior to 3rd December 1964. It was also in evidence that a number of members belonging to the Sri Lanka Freedom Party had on 3rd December 1964 " crossed over " to the opposition benches, and had by casting their votes on that day contributed to a defeat of the Government in Parliament, which had the consequence that Parliament was dissolved on 18th December 1964. At the subsequent nomination of candidates for a General Election, the petitioner was nominated as a candidate of a new party, the Sri Lanka Freedom Samajawadi Pakshaya, which was formed after the dissolution.

The charges which were held by the Election Judge to have been established related to statements alleged to have been made to the effect that the petitioner had " crossed over " and/or voted against the former Government in consideration of a bribe alleged to have been accepted by him.

At the hearing of the appeal it was argued on behalf of the appellant on various grounds that the findings of the Election Judge holding that five of the charges were established were all erroneous in law. But after hearing Counsel for the petitioner in support only of the finding upon one charge, we called upon Counsel for the appellant to reply with reference only to that charge. At that stage we were satisfied that the appellant had failed to substantiate the contention that the one charge had not been duly established. We accordingly upheld the determination of the Election Judge declaring the election of the appellant to have been void, and dismissed the appeal with costs. We now state our reasons.

What has been referred to in the argument as charge No. 8 in the particulars furnished by the petitioner relates to a speech alleged to have been made by one Yassassi Thero at a meeting held on 18th March 1965. It was not disputed at the trial that a meeting was held on that date, that it was a meeting in support of the candidature of the appellant, that Yassassi Thero spoke at that meeting, and that Yassassi Thero was an agent of the appellant. There was also ample evidence to prove these

facts. What was in dispute at the trial, and particularly in dispute at the appeal, was the question whether Yassassi Thero had in fact made any statement affecting the character or conduct of the petitioner.

The only witness called on behalf of the petitioner in proof of the fact that Yassassi Thero did make a statement affecting the character or conduct of the petitioner was one Police Constable Hendrick. At a very early stage in his examination-in-chief Hendrick was shown a typed report purporting to contain particulars of a meeting held at Wehella on 18th March 1965 and of notes of speeches said to have been made *inter alia* by Yassassi Thero. The report bore the signature of P.C. Hendrick and of an Inspector of Police, but both these signatures were undated. It bore also the stamp of the Criminal Investigation Department and a signature of an officer of that Department, sufficient to establish that the report had been received in the office of the Criminal Investigation Department on 27th March 1965.

P.C. Hendrick testified that he had attended the meeting on 18th March 1965 and had made notes at that meeting, and had thereafter on the same day instructed one P.C. Gunasena to type four fair copies of the notes : that he had thereafter read the typed script, compared it with his notes and found it to be correct : that the document P57 produced at the trial was one of the four copies typed on that occasion. There was other evidence to establish that P57 was one of the four typewritten copies delivered by Hendrick to the Inspector, and that P57 itself was a copy subsequently transmitted to the C. I. D. P.C. Hendrick on the invitation of the Counsel for the petitioner read aloud at the trial the note in the report P57 which purported to be a note of a statement made by Yassassi Thero at the meeting.

Hendrick was thereafter asked by Counsel whether, after reading P57, he was able to recollect what Yassassi Thero had stated at that meeting. Having answered this question in the affirmative, Hendrick stated (in two answers) that Yassassi Thero had said that " he (the petitioner) had taken a bribe of Rs. 50,000 from the newspapers and voted against the Government ".

In the context in which this statement was made, and to which I have briefly referred above, there is no question that the statement if made affected the conduct of the petitioner in his capacity as a Member of Parliament. Indeed the contrary was not seriously contended at the trial.

It is clear from the judgment of the learned Election judge that he regarded the report P57 as being " an official record " admissible under s. 35 in proof of the fact that Yassassi Thero did make the statements attributed to him in the Report P57. The statement thus actually attributed to him in P57 was the following : " When a motion was introduced in Parliament to make Buddhism the state religion he took' a bribe of Rs. 50,000 from the newspapers people, opposed the motion and broke up the Government.". It was precisely that statement which was charged

against Yassassi Thero in the particulars furnished by the petitioner, and which the trial judge held in his judgment to have been made by Yassassi Thero.

The majority of the bench of three judges which decided the appeal in the Rattota petition (see S. C. Minutes of 20th December 1966)[1] has held that a Report such as P57 is not an official record within the meaning of s. 35 of the Evidence Ordinance, and is accordingly not admissible in evidence under that section in proof of any fact stated in such a report. I adhere to the ruling in the Rattota case, which also was the basis upon which the appeal in the Dedigama Election Appeal was dismissed (although reasons were not there stated—see S. C. Minutes of 1.11.66). If therefore the report P57 was the sole or substantial means by which it was established in the instant case that a false statement as to the character or conduct of the petitioner had been made by Yassassi Thero, the finding of the learned Election judge upon the charge now being considered cannot be sustained.

I have pointed out however that although P.C. Hendrick first read aloud the report P57, he was expressly asked thereafter whether he could, having read the report, recall what had been said at the meeting, and that Hendrick did then claim to recollect a part of the alleged statement. I cannot agree with the submission that because the record of the trial contains a reproduction of sentences from P57, this was not a case of the refreshing of memory. Section 159 of the Evidence Ordinance expressly contemplates that a witness may read a document and may subsequently, if his memory is refreshed thereby, testify from his refreshed memory to facts he then recollects. That is precisely what Hendrick did in this case. The questions and answers put to him in cross-examination show that even in the contemplation of cross-examining Counsel, Hendrick was able to remember, after reading P57, something of what he had heard stated by Yassassi Thero :—

"*Q.* Apart from the document you have produced you have an independent recollection of matters spoken to by speakers at this meeting ?

A. Other than what is in P57 I have no recollection as to what the speakers stated at that meeting.

Q. And that is to say your recollection today of what was said at the meeting is dependent on that note ?

A. Yes."

It is clear from the record that even though Counsel for the petitioner claimed that the report P57 was admissible under s. 35, he also desired to elicit direct testimony from P.C. Hendrick as to what Yassassi Thero had stated at the election meeting. Hendrick, having read P57, said that he could recall what had been stated : at that stage, Counsel asked him what he remembered, and he was permitted without objection to testify in two answers to the substance of Yassassi Thero 's statement. Hendrick thus gave evidence in terms of s. 159 ; and when he was

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

permitted to do so, it must be presumed that both the Court and opposing counsel were satisfied that his memory had been refreshed by reference to a writing made soon after the transaction to which he testified. The learned trial Judge in fact stated that he accepted as true Hendrick's evidence as to the time when P57 was prepared, namely on the very day of the election meeting. He also stated that he believed Hendrick's evidence as to what Yassassi Thero had said at the meeting. There was thus a finding of fact, based on Hendrick's evidence, that Yassassi Thero did make the false statement attributed to him in Hendrick's evidence. That statement, though not as full as that specified in item 8 of the particulars, affected the personal character or conduct of the petitioner and was made for the purpose of affecting the petitioner's return. The Election Judge therefore duly held that Yassassi Thero, an agent of the appellant, had committed a corrupt practice. The determination that the election of the appellant was void had to be confirmed on this ground at least. Hence it was not necessary for us to consider whether or not the other charges had been duly established.

Counsel for the appellant suggested that, because the Election Judge has made a report under s. 82 of the Parliamentary Elections Order in Council against persons found by him to have committed corrupt practices, we should consider the validity in law of those findings. We did not accede to this suggestion on the ground that a person so reported has no right of appeal to this Court unless he be either the petitioner or the respondent in an election petition, and on the further ground that in our view the right of appeal conferred on a party to an election petition was not intended to be utilised merely for the purpose of seeking the review of a finding prejudicial to some person who was not such a party. I now find much assistance in s. 82 C, sub-section (1) of which provides that where the Supreme Court confirms in appeal the determination of an Election Judge, the Court *shall transmit* to the Governor-General the report of the Election Judge made under s. 82. Where, as in the instant case, we are confirming a determination that the election of the appellant was void, we do not appear to have any power to withhold or nullify the report made by the Election Judge. Such a power exists only in a case where the determination of an Election Judge is reversed on appeal.

I think fit, however, to comment on one incidental matter. The Election Judge disbelieved the evidence of Inspector Ganegoda because of an impression that the Inspector was trying to assist the appellant's case. It seems to me that there was no valid reason for forming such an impression, which appears to have resulted from a misunderstanding on the part of cross-examining counsel of some evidence earlier given by Ganegoda and from incautious answers to leading questions based upon the misunderstanding.

ABEYESUNDERE, J.—I agree.

SRI SKANDA RAJAH, J.—I agree. *Appeal dismissed.*