1954 *Present :* **Swan J.**

IN RE S. A. WICKREMASINGHE

Election Petition No. 18 of 1952, Hakmana

IN THE MATTER OF A NOTICE ON DR. S. A. WICKREMASINGHE TO SHOW CAUSE WHY HE SHOULD NOT BE REPORTED TO THE GOVERNOR-GENERAL

Ceylon (Parliamentary Elections) Order in Council, 1946, as amended by Parliamentary Elections (Amendment) Act, No. 19 of 1948—Sections 81 and 82—Point of time at which election judge becomes functus—*" At the conclusion of the trial "—Corrupt or illegal practice—Notice on parties who are to be reported—May be given after judgment and issue of certificate—Persons who can be reported.*

By sections 81 and 82 of the Parliamentary Elections Order in Council, 1946, as amended by Act No. 19 of 1948 :—

" 81. At the conclusion of the trial of an election petition the election judge shall determine whether the Member whose return or election is complained of, or any other and what person, was duly returned or elected, or whether the election was void, and shall certify such determination in writing under his hand.

Such certificate shall be kept in the custody of the Registrar of the Supreme Court to be dealt with as hereinafter provided.

82. At the conclusion of the trial of an election petition the election judge shall also make a report under his hand setting out—

(*a*) Whether any corrupt or illegal practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at the election, or by his agent, and the nature of such corrupt or illegal practice, if any ; and

(*b*) the names and descriptions of all persons, if any, who have been proved at the trial to have been guilty of any corrupt or illegal practice ;

Provided, however, that before any person, not being a party to an election petition nor a candidate on behalf of whom the seat is claimed by an election petition, is reported by an election judge under this section, the election judge shall give such person an opportunity of being heard and of giving and calling evidence to show why he should not be so reported.

Such report shall be kept in the custody of the Registrar of the Supreme Court, to be dealt with as hereinafter provided ."

Held : (i) The words " at the conclusion of the trial " in sections 81 and 82 denote a point of time when the trial is finally concluded by the delivery of the judgment. With reference to the issue of the certificate as to the validity of the election and the making of the report as to corrupt or illegal practice, the words mean within a reasonable time of the trial being concluded. What would be a reasonable time would depend upon the circumstances of the particular case.

(ii) It is not necessary for the certificate and report to go together. A person may be asked and allowed to show cause under the proviso to section 82 after the issue of the certificate and prior to the sending of the report. The jurisdiction of an election judge continues until the election inquiry is over and the final report is sent.

(iii) An election judge is not entitled to make a report under section 82 (*b*) in respect of an election offence which was not in issue at the trial, i.e., either in the particulars filed by the petitioner or in the recriminatory case of the respondent. A person, therefore, who was only a witness in the case cannot be reported.

IN the matter of a notice on a witness to show cause why he should not be reported to the Governor-General under Section 82 (*b*) of the Parliamentary Elections Order in Council.

S. Nadesan, with *C. Manohara*, for the party noticed.

H. N. G. Fernando, Acting Solicitor General, with *Walter Jayawardene*, Crown Counsel, as *amicus curiae*.

Cur. adv. vult.

January 13, 1954. SWAN J.—

At the trial, during the cross-examination of Dr. S. A. Wickremasinghe, learned counsel for the respondent put certain questions to the witness regarding some statements appearing in his Election Manifesto. Objection was taken to these questions by Mr. Nadarasa, who appeared for the petitioner, on the ground that they were not relevant. Inasmuch as the questions were put in order to shake the credit of the witness I overruled the objection. From the answers given by Dr. Wickremasinghe to those questions it appeared to me that he had, in a paragraph entitled "*Service for himself and his Family*", made and published certain statements in relation to the personal character and conduct of the respondent, Mr. C. A. Dharmapala, which were false in fact, and which were presumably intended to affect the result of the election. At the conclusion of the trial, having determined that the respondent was duly elected, I caused notice to be issued on Dr. Wickremasinghe calling upon him to show cause why he should not be reported to the Governor-General under section 82 (*b*) of the Ceylon (Parliamentary Elections) Order in Council, 1946, as amended by the Parliamentary Elections (Amendment) Act, No. 19 of 1948, for having committed the corrupt practice set out in section 58 (1) (*d*) of the Order in Council.

On the returnable date, to wit, 27.11.53, Dr. Wickremasinghe appeared and said he had cause to show. Mr. Nadesan on his behalf stated that his first objection would be that the election court had no jurisdiction to report a person in respect of whom no charges were made in the particulars. He also stated that he would lead evidence, and/or make submissions, to prove that no election offence had been committed by Dr. Wickremasinghe. In connection with the latter he wanted to know whether I had, in coming to the conclusion that the evidence at the trial afforded *prima facie* proof of the commission of an election offence, acted on the testimony of the respondent. As I intended calling the case on 1.12.53 I told Mr. Nadesan that I would give him the desired information on that day. When the case was called in Chambers on 1.12.53, in view of the insinuations made in paragraph 3 of the two affidavits tendered on 27.11.53, I told Mr. Nadesan that he had no right to ask for, nor

was I obliged to give him the information he desired to have. But I referred him to certain passages in the evidence and in the address of counsel for the respondent which should have left him in no doubt on the point. I particularly did so in order to give him an opportunity of satisfying me that the evidence upon which I acted did not prove, or was not sufficient to prove, the commission of an election offence. I was glad to note that in the course of this inquiry Mr. Nadesan frankly admitted that he had no right to ask me upon what material I acted.

I shall now deal with the preliminary objection taken by Mr. Nadesan. As developed at the inquiry my want of jurisdiction to report Dr. Wickremasinghe is urged on two grounds :—

(1) that I had no jurisdiction at the trial to take cognizance of any corrupt or illegal practice in respect of which no specific charge was made at the trial ;

(2) that as election judge I am now *functus* and therefore have no jurisdiction to make a report against Dr. Wickremasinghe.

I shall deal with the latter point first, but before I do so I desire to make a few observations on certain matters to which Mr. Nadesan adverted in the course of his very able address. He said that it was not proper for counsel who appeared for the respondent to have put questions to Dr. Wickremasinghe for the ostensible purpose of shaking his credit but with the ulterior object of exposing the commission of an election offence. If section 82 (*b*) of the Order in Council imposes on the Election Judge the duty of reporting any person who has been shown at the trial to have been guilty of any corrupt or illegal practice I should think it was immaterial how the evidence was obtained, provided it was relevant. If, in point of fact, the questions put to Dr. Wickremasinghe were admissible in order to show that his evidence was unworthy of credit because he was capable of saying things which he knew to be untrue, or the truth of which he did not investigate before he said them, I do not think it matters with what ulterior object the questions were put. As the learned Solicitor General remarked, one might even say that it was the duty of counsel to assist the court in the detection of an election offence.

Mr. Nadesan also submitted that to call upon a person who was only a witness in the case, and who was suddenly confronted with certain matters, and whose answers might suggest that he was guilty of an election offence to show cause why he should not be reported, was contrary to the principles of natural justice. He contended that before a man could be asked to plead he should be charged, or at least know the nature of the offence of which he was accused, so that he might take stock of the situation and advise himself, or seek advice, as to what he should say, and what questions he should put to the witnesses who might testify against him. If, as I have already said, it is the duty of the election court to report every person who has been shown at the trial to have been guilty of an election offence, I do not think that the procedure that has been adopted in this case could be said to violate any principle of natural justice. Assuming that I had jurisdiction to take cognizance of any corrupt or illegal practice

brought to light in the course of the trial all I have found is that there is *prima facie* proof that Dr. Wickremasinghe had committed a corrupt practice. With the notice calling upon him to show cause there was also served on him a copy of the passage in his Manifesto which contained the offending statements. When he appeared on notice he was informed :—

(1) that it was open to him to prove that the evidence upon which I acted, though admitted without objection, was nevertheless inadmissible and irrelevant and could not be acted upon.

(2) that he could show that, even if the evidence was admissible and relevant, it did not disclose that he had committed a corrupt practice.

(3) that he could lead evidence to prove that the statements upon which the present charge is based are not false, or that they do not relate to the personal character and conduct of the respondent, or that they were not made or published for the purpose of affecting the return of the respondent.

With all these matters left open to the party noticed I cannot see how he can complain. I certainly do not think any fundamental principle of justice has been violated.

I shall now deal with Mr. Nadesan's contention that I am *functus*. His submission is that an election judge is *functus* immediately he sends his certificate to the Governor-General under section 81. His argument, briefly stated, is that under section 78 I was nominated by the Chief Justice to try the Hakmana Election Petition. That invested me with jurisdiction. My jurisdiction came to an end when the election trial was over. That took place when under section 81 I made my determination whether the respondent was duly elected or not, and sent my certificate to the Governor-General.

During the course of this inquiry I intimated to Mr. Nadesan that I had on 8.12.53 made an interim report to the Governor-General which was lodged with the Registrar the same day. This, according to Mr. Nadesan, concluded the matter. The circumstance that it was only an interim report did not make any difference according to him. In fact his argument was that the report under section 82 should be sent along with the certificate under section 81.

I shall at this stage reproduce sections 81 and 82 of the Order in Council as amended :—

81. " At the conclusion of the trial of an election petition the election judge shall determine whether the Member whose return or election is complained of, or any other and what person, was duly returned or elected, or whether the election was void, and shall certify such determination in writing under his hand.

Such certificate shall be kept in the custody of the Registrar of the Supreme Court to be dealt with as hereinafter provided.

82. At the conclusion of the trial of an election petition the election judge shall also make a report under his hand setting out—

(*a*) whether any corrupt or illegal practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at the election, or by his agent, and the nature of such corrupt or illegal practice, if any ; and

(*b*) the names and descriptions of all persons, if any, who have been proved at the trial to have been guilty of any corrupt or illegal practice ;

Provided, however, that before any person, not being a party to an election petition nor a candidate on behalf of whom the seat is claimed by an election petition, is reported by an election judge under this section, the election judge shall give such person an opportunity of being heard and of giving and calling evidence to show why he should not be so reported.

Such report shall be kept in the custody of the Registrar of the Supreme Court, to be dealt with as hereinafter provided. "

Mr. Nadesan's first point is that the phrase " *at the conclusion of the trial* " means *simultaneously with* or *immediately after*. He drew my attention to the fact that there is no provision in the rules for judgment to be reserved. The practice in England is for judgment to be delivered just after the case is closed. It would be difficult to adopt that practice in Ceylon. The learned Solicitor General said that he was not aware of a single election case in Ceylon where judgment was delivered forthwith. Mr. Nadesan himself admitted that it was well-nigh impossible after a protracted trial for judgment to be given at the close of the proceedings.

As long as there is nothing in the Order in Council or the rules that compels an election judge to deliver judgment forthwith I do not see why an election judge should not take time to consider his judgment. In my opinion the trial includes the judgment, and the phrase *at the conclusion of the trial* denotes a point of time when the trial is finally concluded by the delivery of judgment.

Mr. Nadesan was prepared to concede this, but the point upon which he insisted was that the certificate and report must follow *simultaneously with* or *immediately after* the conclusion of the trial. In my opinion the words " at the conclusion of the trial " in the context and with reference to the issue of the certificate and the making of the report mean within a reasonable time of the trial being concluded. What would be a reasonable time would depend upon the circumstances of the particular case.

The next point he urged was that the certificate and report must go together, and a person must be asked and allowed to show cause before the issue of the certificate and the sending of the report. He contends that as I have already sent a certificate I cannot now send a report. That, he said, was the practice in England.

But the words of the English Enactment are not quite the same as ours. Paragraph 13 of Section 11 of the Parliamentary Elections Act 1868 (31 and 32 Vict. C 125) states :—

> " At the conclusion of the trial the judge who tried the petition shall determine whether the member whose return or election is complained of, or any and what other person was duly returned or elected, or whether the election was void, and shall *forthwith* certify in writing such determination to the Speaker, and upon such certificate being given such determination shall be final to all intents and purposes."

And paragraph 14 is :—

> " Where any charge is made in an election petition of any corrupt practice having been committed at the election to which the petition refers, the judge shall, in addition to such certificate, and *at the same time* report in writing to the Speaker as follows :—
>
> (*a*) Whether any corrupt practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at such election, and the nature of such corrupt practice ;
>
> (*b*) The names of all persons (if any) who have been proved at the trial to have been guilty of any corrupt practice ;
>
> (*c*) Whether corrupt practices have, or whether there is reason to believe that corrupt practices have, extensively prevailed at the election to which the petition relates."

I may here mention that by 42 and 43 Vict. C 75 provision was made for election petitions to be tried by two judges, and that by the Corrupt and Illegal Practices Prevention Act 1883 (46 and 47 Vict. C 51) provision was made that before a person, not being a party to an election petition nor a candidate on whose behalf the seat is claimed, is reported he should be noticed and be given an opportunity of being heard and of calling evidence in his defence to show cause why he should not be reported (see section 38).

The words to be noted in section 11 (14) are " *at the same time* ". We have not taken over those words. They might mean *at the conclusion of the trial* or *at the time of determination and certification*. The use of the words *at the same time* may imply that in England there is a narrower limitation as to the time. In any event the limitation of time in Ceylon cannot be less than in England.

The manner in which election cases are heard in England makes it possible for a judge to certify his determination at the same time. In England persons have been called upon to show cause and have actually shown cause before the final judgment. The learned Solicitor General however cited a number of cases where cause was shown after judgment, and one ease where even notice to show cause was issued after judgment.

I shall now refer to the local decisions in which conflicting views have been expressed as regards notice on parties to be reported. In *Lateef v. Saravanamuttu* [1] the question arose incidentally. It arose on a consideration of section 79 of the State Council Elections Order in Council of 1931. That section is substantially the same as section 82 of the present Order in Council except that it provided for notice on all persons who were to be reported and not only " any person not being a party to an election nor a candidate on behalf of whom the seat is claimed ". In this case Mrs. Saravanamuttu was returned at a bye-election. At the previous election her husband Dr. Saravanamuttu had been returned. He was however unseated. The determination that his election was void was on 8.3.1932, and the certificate under section 78 (which corresponds to section 81) was entered accordingly. Notice was issued on Dr. Saravanamuttu to show cause why he should not be reported. After inquiry he was reported on 22.3.1932. The learned Solicitor General who appeared for the Attorney General argued *inter alia* that under section 78 the Judge was required at the conclusion of the trial to certify whether the election was valid or not, and under section 79 to make a report. This report had to be forwarded at the same time as the certificate, namely at the conclusion of the trial. Dalton J. in the course of his judgment said :—

> " Article 79 (2) has been adapted from the provisions of 46 and 47 Vict. C. 51 section 38. The purport of the provision seems to be that no one should be reported for any corrupt or illegal practice who has not had an opportunity of being heard in his own defence. There would appear to be no uncertainty as to the practice followed in England as set out in the cases to which the Acting Solicitor General has referred. There is no suggestion there that any further proceeding subsequent to judgment is denoted. The indications are all to the contrary. One might infer that any person entitled to notice duly received such notice before judgment . . . On this matter I am in entire agreement with the argument of Mr. Illangakoon and have no doubt that under the provisions of the Order in Council the certificate and report are required to be issued at the same time, namely at the conclusion of the trial. In practice in England in reported cases one finds the certificate and report contained in one document . . . I concluded however . . . that there was some uncertainty on that occasion as to what practice should be followed in view of the provisions of Article 79 (2) which sets out that before a person is reported . . . he should be given an opportunity of being heard."

In *Saravanamuttu v. Joseph de Silva* [2] judgment was delivered on 22.12.1941 declaring the election void. The learned judge thereafter called upon Mr. Goonesinghe and two others to show cause why they should not be reported. These proceedings are to be found in the same volume at pages 243 to 253. Discussing section 78 de Kretser J. said :

> " The natural conclusion is that both the judgment and the report are contemporaneous and follow immediately upon the conclusion of the trial, the trial being as in the Civil Procedure Code something

[1] *(1932) 34 N. L. R. 369.* [2] *(1941) 43 N. L. R. 294.*

different from the judgment. As far as I have been able to gather this is what happens in England, and Dalton J. supports that view in *Lateef v. Saravanamuttu* (supra).

The next point to be noted is that the election judge determines whether the election was void and his determination is final. Now his determination may be based purely on corrupt or illegal practices committed by an agent of the candidate. It seems to follow that his determination that an agent has committed an electoral offence is final also. It would lead to the most awkward consequences if after a candidate had been unseated his agents were allowed to prove that no offence had been committed."

The learned judge however said that he did not agree in every respect with Dalton J. and pointed out that Dalton J. was not right when he stated that no proceedings are taken in England subsequent to judgment, giving by way of illustration the *Cheltenham* case [1] and the *East Dorset* case [2].

In *Illangaratne v. G. E. de Silva* [3] Windham J. took the view that where a person is to be reported he should be noticed and permitted to show cause before a decision is given as to the validity of the election. In this connection he said :—

"I have no doubt at all on the authorities. In particular I would refer to the case of *Lateef v. Saravanamuttu* . . . that the finding of the Election Judge under Article 81 and the report to the Governor-General under Article 82 (1) ought to be made simultaneously. Furthermore since such a report must be made by the election judge in the case of any person found to have committed an election offence it would be futile for such a person to be allowed to show cause why he should not be reported at a stage after he had been found guilty of the election offence."

In *re James Appuhamy* [4] Windham J. nevertheless took the view that section 82 (2) was sufficiently wide in its terms to allow a party noticed to show cause even after the court had given its judgment and issued the certificate under section 81. He added however :—

" Obviously by far the more satisfactory course would be to give an applicant such an opportunity before judgment for the reasons which I have in my ruling delivered during the course of the same petition—*Illangaratne v. G. E. de Silva* [3]."

In *re Amarasena* [5] Dias J. held that where a person was found guilty at an election trial of a corrupt practice it was obligatory on the court to report him but that such a person if not a party to the petition was entitled to canvass the finding of the Election Judge.

[1] *6 O'M. & H. 194.*
[2] *6 O'M. & H. 22.*
[3] *(1947) 49 N. L. R. 87.*
[4] *(1948) 49 N. L. R. 261.*
[5] *(1948) 50 N. L. R. 523.*

In *re Fred de Silva* [1] Nagalingam J. issued notice after he had delivered judgment in the election trial. I shall refer to this case later but for the present I am citing it as authority in support of the proposition that notice to show cause can be issued after judgment.

In my opinion, on the language of sections 81 and 82, it is not necessary for the certificate and report to go together. At the conclusion of the trial the election judge has, in addition to determining whether the member whose return or election is complained of, or any other or what person was duly returned or whether the election was void, to do certain other things, namely :—

(1) to certify such determination in writing under his hand ;

(2) to make a report under his hand setting out whether any corrupt or illegal practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate or by his agent, and the nature of such corrupt or illegal practice, if any, *and*

(3) to make a report under his hand setting out the names and descriptions of all persons, if any, who have been proved at the trial to have been guilty of any corrupt or illegal practice.

If the report is negative then the certificate and report can go together. So also if the person or persons to be reported need not be noticed under the proviso. But if notice is necessary the report cannot be sent until the party noticed has been heard and given an opportunity of giving and calling evidence to show why he should not be reported.

The fears entertained by Mr. Nadesan that the Appellate Court, in the event of an appeal, might deal with the matter before the report is made are imaginary and not real. The election judge must send a report. Until he does so the Registrar will not list the appeal for hearing. If the appeal is inadvertently listed for hearing before the report is sent the Appellate Tribunal will on looking into the record realize that the appeal is not ripe for hearing and adjourn the matter. In this particular case the interim report sent on 8.12.53 will make anybody realize that the appeal cannot, and should not be heard till my further report is sent.

Assuming that I had jurisdiction to take cognizance of the corrupt practice in respect of which I have noticed Dr. Wickremasinghe to show cause why he should not be reported I hold that my jurisdiction as election judge continues until the inquiry is over and my final report is sent.

I shall now consider the other point taken by Mr. Nadesan, namely, whether an election judge can make a report in respect of an election offence which was not in issue at the trial, that is either in the particulars

[1] *(1949) 51 N. L. R. 55.*

filed by the petitioner or in the recriminatory case of the respondent. That objection was foreshadowed at the trial but I did not then have the advantage of a calm and dispassionate argument as I have been privileged to have at this inquiry. Mr. Nadarasa did not seem to be interested or pretended not to be. When I asked him whether Mr. Nadesan would care to address me he said that would be done later, if and when I decided to call upon Dr. Wickremasinghe to show cause why he should not be reported.

In this inquiry the learned Solicitor General prefaced his reply with the remark that as only one side was represented he thought the matter should be fully discussed from the other point of view, so that I might see whether the view taken by Nagalingam J. in *re Fred de Silva* [1], by which I confess I was influenced when I decided to issue notice on Dr. Wickremasinghe, was the correct view.

Mr. Nadesan has amply demonstrated by reference to text-books and case law that in England nobody is reported except with reference to a corrupt or illegal practice that has been in issue at the trial. The learned Solicitor General concedes that this is so, but has sought to explain why the position in Ceylon is not the same. He maintains that the jurisdiction of an election judge in Ceylon to report in respect of corrupt and illegal practices is wider than in England. He bases his argument on the fact that there is nothing in the Order in Council of 1946 corresponding to paragraph 14 of section 11 of the English Statute which limits the report to corrupt or illegal practices in respect of which a charge has been made in the election petition. If there is a recriminatory case the same condition would apply. He contends that these words were not omitted by accident *but of set purpose*. The omission was designedly made so as to go with or compensate for the omission of paragraph 14 (*c*) of section 11 and paragraph 15, namely the need to report " whether corrupt or illegal practices have, or whether there is reason to believe that they have extensively prevailed at the election to which the petition relates " and the special report to the Speaker " as to any matter arising in the course of the trial an account of which in his judgment ought to be submitted to the House of Commons ". His submission is that we have dropped the provision for these additional reports and widened the scope of the first part of the paragraph. I am unable to agree with this contention. If the Order in Council was, more or less, a copy of the English Statute then the omission of certain phrases and certain clauses may induce one to conclude that there was a purpose behind the omission. But the 1946 Order in Council is based on the State Council Elections Order in Council of 1931 which was not copied from any particular English Statute but was a new piece of Legislation so far as Ceylon was concerned.

If one looks carefully at the various sections of the Orders in Council of 1931 and 1946 one is unable to find anything that directly says or indirectly suggests that an election judge in Ceylon is vested with greater powers in the matter of reporting persons found guilty of election offences than the election courts in England. I can see nothing in these Orders

[1] *(1949) 51 N. L. R. 55.*

in Council which justifies the conclusion that we have departed from the law of England in this respect, and I can see no reason for the alleged departure.

Let me now examine the present Order in Council which, as I have already pointed out, is based on the Order in Council of 1931.

Section 78 (1) says that an election petition shall be tried by the Chief Justice or a Puisne Justice nominated for the purpose by the Chief Justice, and section 78 (2) says that the Chief Justice or the person so nominated is referred to in the Order as the election judge.

In order to find out what an election judge has to try we have to look at section 77 which sets out the grounds for avoidance of an election. Section 79 states who may present a petition and section 80 the relief that may be claimed.

In order to get the correct angle from which to read and interpret section 82 (*b*) one must start with section 77 and then read sections 78, 79, 80, 81 and 82 (*a*). First of all let us consider what is the jurisdiction of the Chief Justice or a Puisne Justice nominated by him in the trial of an election petition ? Obviously it is to try the matters in issue. If the submission of the learned Solicitor General *from the other point of view* is correct the election judge is invested with purely judicial functions in respect of the corrupt or illegal practices in issue between the parties, but as regards corrupt and illegal practices at the election with inquisitorial functions as well. That is the wider jurisdiction to which the learned Solicitor General referred.

The point taken by Mr. Nadesan was not taken in the case of *Fred de Silva*[1]. There the argument turned on the meaning of the words "*any candidate*" in section 82 (*a*) and "*any person*" in the proviso. Mr. Nadesan conceded that *any candidate* included both the successful candidate and the unsuccessful candidate but contended that the limitation was elsewhere, namely that the election judge could only report persons in respect of corrupt or illegal practices in issue at the trial and proved at the trial.

I have considered this matter very carefully and have come to the conclusion that Mr. Nadesan's contention is correct. To take any other view would mean that an election judge is not free to control the conduct of the trial but must allow the admission of evidence that is irrelevant to the immediate issues, because it is his duty to follow up a clue in order to detect and report on every corrupt and illegal practice that may have been committed at the election.

The notice is discharged. Dr. Wickremasinghe will not be reported in spite of the fact that I thought that there was *prima facie* proof at the trial that he was guilty of a corrupt practice.

Notice discharged.

[1] (*1949*) *51 N. L. R. 55.*