1948 *Present :* **Wijeyewardene A.C.J., Jayetileke S.P.J., and Nagalingam J.**

THE ATTORNEY-GENERAL, Petitioner, *and* SINNATHAMBY *et al.*, Respondents.

APPLICATIONS FOR REVISION IN (*a*) M. C. CHAVAKACHCHERI 25,641 (59), (*b*) M. C. CHAVAKACHCHERI 25,727 (70), (*c*) M. C. CHAVAKACHCHERI 25,673 (71), (*d*) M. C. CHAVAKACHCHERI 25,507 (110), (*e*) M. C. CHAVAKACHCHERI 25,371A (148), (*f*) M. C. POINT PEDRO 10,093A (87).

Personation—Parliamentary elections—Not triable summarily—Criminal Procedure Code, ss. 10, 11, 152 (3)—Ceylon (Parliamentary Elections) Order in Council, s. 58 (1) (a).

The offence of personation punishable under section 58 (1) (*a*) of the Ceylon (Parliamentary Elections) Order in Council, 1946, cannot be tried summarily by a Magistrate under the provisions of section 152 (3) of the Criminal Procedure Code.

The Attorney-General v. Dharmasena (1948) 49 N. L. R. 95, not followed.

APPLICATIONS in revision reserved by Howard C.J. for the decision of two or more Judges in the following terms :—

" The same points are involved in all these appeals which are instituted by the Attorney-General in revision. The respondent in each of these cases was charged with personation, an offence punishable under section 58 (1) of the Ceylon (Parliamentary Elections) Order in Council, 1946. At each trial the accused pleaded guilty. Thereupon the Magistrate made the following order ' Police does not press for punishment. I sentence accused to imprisonment till 2 P.M. ' The Attorney-General maintains that the sentence is totally inadequate because :—

(*a*) Personation is a serious offence and is treated as such by section 58 (1) of the Ceylon (Parliamentary Elections) Order in Council which provides for a higher punishment for personation than for other corrupt practices referred to in the same section ;

(*b*) The sentence imposed by the Magistrate is hardly likely to act as a deterrent to other would-be impersonators.

I am in these circumstances asked to enhance the sentence passed in these cases by the Magistrate.

" I agree with Mr. Fernando that personation is a very serious offence and that the sentences passed by the Magistrate are not only inadequate, but farcical. The fact that the Police does not press for punishment is irrelevant. It has, however, been contended by Mr. Kumarakulasingham on behalf of the various respondents that the Attorney-General cannot ask the Court to enhance these sentences by way of revision. The insufficiency of punishment was an error of law inasmuch as a minimum punishment has been prescribed and has not been imposed, therefore the Attorney-General should have

appealed. In this connection I have been referred to the case of *The Attorney-General v. Kunchihamby*[1] the headnote of which is as follows :—

> 'Insufficiency of punishment is an error in law when a minimum amount of penalty has been prescribed and has not been imposed. The proper remedy of the prosecutor in such a case is by way of appeal under section 338 of the Criminal Procedure Code.
>
> 'The Supreme Court, when considering whether it should exercise its powers of revision under section 357 of the Criminal Procedure Code, would regard with disapproval delay on the part of the petitioner.'

"Section 58 (1) provides that every person on conviction by a District Court of personation shall be liable to a fine of not less than two hundred and fifty rupees and not exceeding one thousand rupees or to rigorous imprisonment for a term not exceeding twelve months. Mr. Kumarakulasingham therefore maintains that the Magistrate, when he ordered the respondents to be imprisoned till 2 P.M., imposed an illegal sentence. Mr. Fernando, however, has invited my attention to the amendments effected to section 15 of the Criminal Procedure Code (Cap. 16) by section 2 of the Criminal Procedure Code (Amendment) Ordinance, No. 47 of 1938, Section 2 of this amending Ordinance introduces a new sub-section 15B which is worded as follows :—

> 'Any Court may, in any circumstances in which it is empowered by any written or other law to sentence an offender to imprisonment, whether in default of payment of a fine or not, in lieu of imposing a sentence of imprisonment order that the offender be detained in the precincts of the Court until such hour on the day on which the order is made, not being later than 8 P.M., as the Court may specify in the order.'

"Section 15 (1) (*a*) of the Criminal Procedure Code refers to 'Imprisonment of either description'. In my opinion the words 'sentence of imprisonment' in section 15B would include a sentence of rigorous imprisonment. In these circumstances I am of opinion that the sentence imposed by the Magistrate was not an error in law and hence the case of the *Attorney-General v. Kunchihamby* (*supra*) does not apply and I am at liberty to hear the application of the Attorney-General by way of revision.

"Section 58 (1) of the Order in Council refers to conviction by the District Court ; so, clearly, that Court is the only Court entitled to exercise jurisdiction unless jurisdiction is imposed on another Court by some other provision of the law. The Magistrate has purported to exercise jurisdiction as Additional District Judge under section 152 (3) of the Criminal Procedure Code. This provision is worded as follows :—

> 'Where the offence appears to be one triable by a District Court and not summarily by a Magistrate's Court and the Magistrate being also a District Judge having jurisdiction

[1] *(1945) 46 N. L. R. 401.*

to try the offence is of opinion that such offence may properly be tried summarily, he may try the same summarily following the procedure laid down in Chapter XVIII, and in that case he shall have jurisdiction to impose any sentence which a District Court may lawfully impose.'

This provision must be read with sections 10 and 11 of the Criminal Procedure Code. Section 10 deals with offences under the Penal Code and is worded as follows :—

'Subject to the other provisions of this Code any offence under the Penal Code may be tried by the Supreme Court or by any other Court by which such offence is shown in the eighth column of the second schedule to be triable.'

Section 11 deals with offences under other laws and is worded as follows :—

'Any offence under any law other than the Penal Code shall when any court is mentioned in that behalf in such law be tried by such court. When no court is mentioned it may be tried by the Supreme Court or by any other court mentioned in the second schedule : Provided that—

(*a*) No District Court shall try any such offence which is punishable with imprisonment for a term which may exceed two years or with a fine which may exceed one thousand rupees ; and

(*b*) Except as hereinafter provided no Magistrate's Court shall try any such offence which is punishable with imprisonment for a term which may exceed six months or with a fine which may exceed one hundred rupees.'

"It will be observed that in section 11 the words 'subject to the other provisions of this Code' are omitted. From the absence of these words which occur in section 10 Mr. Fernando argues that section 152 (3) of the Criminal Procedure Code has no application and hence the Magistrate could not try the case as Additional District Judge. Mr. Fernando has in this connection referred me to Sohoni's Code of Criminal Procedure in India. The Indian sections corresponding to sections 10 and 11 of our Code are sections 28 and 29 respectively. Section 29 was amended by Act XII of 1923 by the insertion of the words 'subject to the other provisions of this Code'. On the other hand it has been held recently by Dias J. in *The Attorney-General v. Dharmasena* [1] that the offence of personation created by section 58 (1) (*a*) of the Ceylon (Parliamentary Elections) Order in Council, 1946, may be tried summarily by a Magistrate under the provisions of section 152 (3) of the Criminal Procedure Code. This decision seems to conflict with the decision in *Jayasekera v. Dissanayake* [2]. In *Attorney-General v. Dharmasena* (*supra*), Dias J. at page 96 also held that where a person has been lawfully convicted by a Magistrate wielding powers under section 152 (3) that person is one "who is convicted of a corrupt

[1] *(1948) 49 N. L. R. 95.* [2] *(1911) 14 N. L. R. 408.*

practice " and the legal disabilities follow as a necessary consequence. In my opinion the word ' convicted ' in sub-section (2) of section 58 of the Order in Council refers back to the words ' Conviction by a District Court ' in sub-section (1). The proposition formulated by the learned Judge seems to me of doubtful validity. In these circumstances, having regard to the decision in the *Attorney-General v. Dharmasena* (*supra*), I am of opinion that the question arising for adjudication is a question of doubt and I reserve it under section 48 of the Courts Ordinance for the decision of two or more Judges of this Court."

T. S. Fernando, Crown Counsel, with *A. C. Alles, Crown Counsel,* for the Crown in Applications Nos. 59, 70, 71, 87, 110, and 148.

M. M. Kumarakulasingham, with *S. Thevaratnam,* for the accused-respondents in Applications Nos. 59, 70, 71, 110, and 148.

S. Subramaniam, for the accused-respondent in Application No. 87.

Cur. adv. vult.

July 2, 1948. WIJEYEWARDENE A.C.J.—

These applications come before us on a reference made by His Lordship the Chief Justice under section 48 of the Courts Ordinance in view of the decision in *The Attorney-General v. Dharmasena.* [1]

The question that has been reserved for our decision is whether a Magistrate who is also a District Judge could avail himself of the jurisdiction conferred on him by section 152 (3) of the Criminal Procedure Code and try summarily a person charged with the offence of personation created by section 58 (1) (*a*) of the Ceylon (Parliamentary Elections) Order in Council. That section enacts that any person who commits such an offence of personation " shall be guilty of a corrupt practice, and shall on conviction by a District Court be liable . . . . . to a fine not less than Rs. 250 and not exceeding Rs. 1,000 or to rigorous imprisonment for a term not exceeding twelve months or to both such fine and such imprisonment ".

In order to ascertain the scope of section 152 (3) of the Criminal Procedure Code it is necessary to examine sections 10 and 11 of the Code, as it is these sections which indicate the appropriate Court or Courts of trial when a person is charged with an offence. Section 10 deals with offences under the Penal Code and Section 11 with other offences.

Section 10 enacts :—

" Subject to the other provisions of this Code any offence under the Penal Code may be tried by the Supreme Court or by any other Court by which such offence is shown in the eighth column of the First Schedule to be triable ".

It is the presence of the words " subject to the other provisions of the Code " in Section 10 that prevents a conflict between that section and Section 152 (3) and thus enables the Magistrates to act under the latter section in the case of offences under the Penal Code which are triable by a District Court.

[1] *(1948) 49 N. L. R. 95.*

Section 11 enacts in unqualified and imperative terms :—

" Any offence under any law other than the Penal Code shall, when any Court is mentioned in that behalf in such law, be tried by such Court."

It will be noted that that part of Section 11 does not contain the words, " subject to the other provisions of the Code " occurring in Section 10 or the words " except as hereinafter provided " occurring in the proviso (*b*) to Section 11 which deals with offences punishable under a law other than the Penal Code, when the law is silent about the Court of trial.

Now, as mentioned earlier, Section 58 (1) (*a*) of the Ceylon (Parliamentary Elections) Order-in-Council refers to a conviction by a District Court, and, therefore, the Court competent to try an accused under that section will only be a District Court according to the provisions of that part of Section 11 of the Criminal Procedure Code cited by me. An accused who is tried under Section 152 (3) of the Criminal Procedure Code is tried by the Judge as a Magistrate and not as a District Judge, though the section gives the Judge the punitive powers of a District Judge (vide *Ratnayake et al. v. The Inspector of Police, Moratuwa* [1]).

I am, therefore, of opinion that the accused in these cases could not have been tried by the Magistrates under Section 152 (3) of the Criminal Procedure Code.

I would quash the convictions and remit the cases for *non-summary* proceedings to be taken.

JAYETILEKE S.P.J.—I agree.

NAGALINGAM J.—I agree.

Convictions quashed.