

1948

Present : Dias J.

In re AMARASENAIN THE MATTER OF THE TRIAL OF ELECTION PETITION No. 13 OF 1947
(ELECTION FOR COLOMBO SOUTH ELECTORAL DISTRICT)

Election petition—Person found guilty of corrupt practice—Has Court a discretion whether to report him?—Right to canvass finding—Certificate of indemnity—Ceylon (Parliamentary Elections) Order in Council, 1946, Sections 58 and 82.

Where at the hearing of an election petition any person has been found guilty of a corrupt or illegal practice it is obligatory on the Court to report him to the Governor-General in terms of section 82 (1) (b) of the Order in Council.

Such person, if not a party to the petition, is entitled to canvass the finding of the Election Judge.

There is no provision in the Order in Council for a certificate of indemnity to a witness.

THIS was an order made in regard to a witness in the trial of Election Petition No. 13 of 1947.

T. W. Rajaratnam, for the witness R. M. G. Amarasena.

A. I. Rajasingham, for the petitioner.

M. Tiruchelvam, Crown Counsel, for the Attorney-General on notice as *amicus curiae*.

Cur. adv. vult.

September 7, 1948. DIAS J.—

On the last occasion when this matter was before the Court, the witness R. M. G. Amarasena appeared in person and obtained time to show cause. I have now had the advantage of a full argument on the questions involved.

Amarasena gave evidence for the petitioner in the recent election petition inquiry of *Saravanamuttu v. de Mel*¹. On his own admission he abetted various persons to impersonate at the polls. He is a self-confessed accomplice. The Court held that Amarasena was a truthful witness, and that his testimony was corroborated in various material particulars. His story, which the Court accepted, is that he had been engaged by the respondent, de Mel, to help in the election campaign. Amarasena had no idea that he would be called upon to do anything illegal. He helped the respondent from September 1, 1947, up to the day of the election which took place on September 20, 1947. On the night of September 19, Amarasena says he was awakened from his sleep in the respondent's house late at night and was taken before de Mel, who persuaded him to assist in the large scale impersonations which took place on the following day. The witness admits that he realized that he was asked to do something wrong and illegal, but owing to his loyalty

¹ (1948) 49 N. L. R. 529.

to his master he did what he was asked to do. Amarasena says that thereafter he decided to expose the truth. The fact of the matter, however, is that de Mel who had promised Amarasena liberal rewards did not keep his word. This incensed Amarasena who went to the petitioner and exposed de Mel. The evidence proves that de Mel made determined attempts to induce the witness not to implicate him. Amarasena, however, declined to be corrupted further. The Election Judge held that Amarasena is guilty of the "corrupt practice" of abetting the commission of personation within the meaning of section 58 (1) (a) of The Ceylon (Parliamentary Elections) Order in Council, 1946.

The question for decision is whether a person in such a situation must be reported to the Governor-General in terms of section 82 (1) (b) ?

Under section 82 (2) Amarasena has been called upon to show cause why he should not be so reported. The only submission made on his behalf is that, although Amarasena has been proved at the trial of the election petition to have been guilty of a "corrupt practice", having regard to the fact that he spoke the truth, and helped the cause of justice by helping to expose a colossal conspiracy and fraud, the Court has a discretion as to whether such a person should or should not be reported.

I desire to state that if I have such a discretion, I would draw a distinction between a repentant and unrepentant sinner, even though Amarasena's repentance was originally actuated by revenge. The various attempts subsequently made by the respondent to make him give false evidence made him decide that honesty, even though belated, was the best policy.

I am satisfied, however, that I have no such discretion in the matter. The words of section 82 are :

82 (1) At the conclusion of the trial of an election petition, the Election Judge *shall also* report in writing to the Governor—

(a)

(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.

If the contention of counsel for the witness is sound, the word "shall" must be construed to mean "may". I do not think this is a permissible construction. Whenever a statute declares that a thing "shall" be done, the natural and proper meaning is that a peremptory mandate is enjoined. Section 82 must be read together with the earlier section 81. These two sections together impose a duty on the Election Judge. Under section 81 "He *shall* certify" his determination to the Governor. Under section 82 "He *shall also* report" certain things to the Governor. It is clear that under section 81 the Election Judge has no discretion whatever. Therefore, when section 82 proceeds to say that the Election Judge "shall *also*" do something else, those words can only mean that it is his imperative duty to perform the duty enjoined by section 82.

All the necessary conditions have been satisfied. Amarasena has been proved at the trial of the election petition to be guilty of the corrupt practice of abetting persons to commit the offence of impersonation. In

fact, he admits this. He has been given an opportunity of giving and calling evidence to show why he should not be reported. He has shown no cause which justifies me in refraining from reporting him. The Court cannot distribute favours. If the law operates harshly in regard to a person like Amarasena, or if the effect of the law is to dissuade persons from coming forward and giving evidence, the remedy is in the hands of Parliament to amend the law. The Judge cannot do this. I, therefore, hold that the witness Amarasena must be reported, although I do so with regret.

Various other matters have been argued. As they are of practical importance, I shall say something about them.

In a proceeding under section 82 (2) where a person, not being the candidate or a party to an election petition, shows cause, is the counsel for the petitioner (or the respondent as the case may be) entitled to be heard? This question was answered in the affirmative in the case of *The Borough of Worcester*¹. I think we should follow the same rule in Ceylon.

The question was raised whether the person showing cause under section 82 (2) could canvass the finding of the Election Judge? I am of opinion that he may do so. Take a proceeding under section 439 of the Criminal Procedure Code. The jury adds a rider to the verdict stating that a witness has given false evidence. The trial Judge thereupon causes an indictment to be drafted, and the witness is charged before the same jury on that indictment. The finding is *prima facie* proof of guilt, but this presumption can be rebutted. In my opinion it is open to the witness to lead evidence to prove that the verdict of the jury or the finding of the Election Judge is unjustified on the facts. Cf. *In re James Appuhamy*², *Pedris v. The Manufacturers Life Insurance Co., Ltd.*³.

Another matter which was referred to is whether in this Island it is open to the Election Judge to give a "certificate of indemnity" to a witness as may be done in Britain. Under *The Corrupt and Illegal Practices Prevention Act, 1833*⁴ it is provided by section 59 that a witness at an election petition inquiry shall not be excused from answering any question relating to any offence at or connected with such election on the ground that the answer thereto may criminate or tend to criminate himself or on the ground of privilege. It is, however, provided that a witness who answers truly all questions which he is required by the Election Court to answer "shall be entitled to receive a certificate of indemnity under the hand of a member of the Court stating that such witness has so answered". But section 59 (3) goes on to provide that "Nothing in this section shall be taken to relieve a person receiving a certificate of indemnity from *any incapacity* under this Act or from any proceeding to enforce such *incapacity* (other than a criminal prosecution)". There are no similar provisions in the Ceylon Order in Council. Amarasena when giving evidence might under section 132 of the Evidence Ordinance have refused to answer certain questions on the ground that his answers might criminate him or tend directly or indirectly to criminate him, or expose

¹ (1906) 5 O'M & H. at p. 216.

² (1948) 49 N. L. R. 261.

³ (1917) 19 N. L. R. at pp. 323-327.

⁴ 46 & 47 Vict. c. 51.

or tend directly or indirectly to expose him to a penalty or forfeiture. Let us assume he took this plea and was thereupon compelled by the Court to answer. The only protection he thereby obtains under section 132 (2) is that the evidence he gave under pressure from the Court cannot "subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer". It would not, in my opinion, save him from being reported under section 82 of the Order in Council.

Reference was also made to section 73 of the Order in Council which entitles the Court to refrain from making a report under certain circumstances. That section has reference only to candidates and does not apply to a witness like Amarasena.

I am indebted to Crown Counsel, Mr. M. Tiruchelvam, for the assistance he rendered to the Court as *amicus curiae*.

Witness reported.

