

1966 Present : Alles, J.

THE ATTORNEY-GENERAL, Applicant, and **BANDULATHA**,
Respondent

S.C. 49/66-Application in Revision in M. C. Matara, 23989

Ceylon (Parliamentary Elections) Order in Council (Cap. 381)-Sections 54 and 58 (1)- Trial of offence of personation-Exclusive jurisdiction of District Court- Criminal Procedure Code, ss. 11,152 (3), 166 (3).

The offence of personation in terms of sections 54 and 58 (1) of the Ceylon (Parliamentary Elections) Order in Council, read with section 11 of the Criminal Procedure Code, is triable only by a District Court after non-summary proceedings have been taken by the Magistrate. It is not triable summarily by a Magistrate, whether he purports to assume jurisdiction under section 162 (3) or under section 166 (3) of the Criminal Procedure Code.

APPLICATION to revise an order of the Magistrate's Court, Matara.

Ranjit Abeysuriya, Crown Counsel, for the Attorney-General. Nihal Jayawickrama, for the accused-respondent.

Cur adv. vult.

March 18, 1966. **ALLES, J.-**

This is an application by the Attorney-General to revise the order of the Magistrate of Matara who summarily tried an offender under section 58 of the Ceylon (Parliamentary Elections) Order in Council and, on her pleading guilty to the charge, sentenced her to pay a fine of Rs. 250/-. The Attorney-General submits that in trying the accused-respondent summarily the Magistrate acted without jurisdiction and, consequently the entire proceedings are invalid.

The prosecution was sanctioned by the Attorney-General on 24th June, 1965 under the provisions of section 58 (3) of the Order in Council and proceedings were instituted against the accused-respondent on 13th July, 1965 in the Magistrate's Court on the following charge :

" That she did on the 22nd day of March, 1965, at Polling Station No. 64-B, MR/Weligama, Methodist Vidyalaya, within the jurisdiction of the Magistrate's Court of Matara, at an election held for the purpose of electing a member of the House of Representatives to represent electoral district No. 64, Weligama, vote in person as some other person, to wit, Jayaweera Kurundu Patabendige Banduwathie of Maha Veediya, Weligama, and that she has thereby committed the offence of personation in terms of section 54 (1) and is thereby guilty of a corrupt practice punishable under section 58 (1) of the Ceylon (Parliamentary Elections) Order in Council, Chapter 381 of the Legislative Enactments of Ceylon. "

Under section 58 (1) of the Order in Council, a person who commits the offence of personation shall be guilty of a corrupt practice, and shall on conviction by a District Court be liable to rigorous imprisonment for a term not exceeding twelve months. The Magistrate appears to have been influenced by the fact that the accused-respondent was a young school girl, 17 years of age, and did not wish to send her to jail and decided to impose a fine of Rs. 250/-, which according to him was the minimum sentence that could be imposed for the offence. In doing so, the Magistrate has failed to appreciate the seriousness of the offence and has misdirected himself on the question of sentence. The law requires that the sanction of the Attorney-General has to be obtained as a condition precedent to the institution of a prosecution for a corrupt practice ; the offence of personation is triable only by a District Court and in 1964, by Ordinance No. 10 of 1964, the punishment for the offence was altered

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conviction, a sentence of imprisonment is mandatory-all indications that the Legislature takes a serious view of the offence of personation. Our Courts too have regarded the offence as being one of a grave nature (vide the observations of Dias, S.P.J. in *Attorney-General v. Podisingho* [1 (1950) 51 N.L.R. 355 at 391.] and thereference by Howard, C.J. in *Attorney-General v. Sinnathamby* [(1918) 49 N.L.R. 385.]).

The Magistrate, while conceding that the offence is one that is only triable by a District Court and that normally he should take non-summary proceedings, has proceeded to charge the accused-respondent under section 166 (3) of the Criminal Procedure Code, and after obtaining her consent to be tried by him, taken summary proceedings. In acting under section 166 of the Criminal Procedure Code, the Magistrate has acted without jurisdiction. Section 11 of the Criminal Procedure Code enacts in clear and unambiguous language that " 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. " The offence of personation is only triable by a District Court after non-summary proceedings are taken by the Magistrate. By adopting the procedure which he has done in this case, the Magistrate has circumvented the imperative provisions of section 58 (1) of the Order in Council read with section 11 of the Criminal Procedure Code. A similar situation arose in the case of *Attorney-General v. Sinnathamby* (supra) which was a case referred to a Bench of three Judges by Howard, C.J. The question that arose in that case was 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. Wijeyewardene, A.C.J. who delivered the order of the Court said that the Court competent to try the accused under section 58 (1) will only be a District Court according to the provisions of section 11 of the Criminal Procedure Code, and that a person who is tried under section 152 (3) 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. " The same view in regard to the functions of a Magistrate except under section 152 (3) of the Criminal Procedure Code had been expressed earlier by Jayatileke, J. (as he then was) in the case of *Ratnayake v. The Inspector of Police, Moratuwa* [(1945) 46 N.L.R. 78.]

Section 166 of the Criminal Procedure Code enables a Magistrate who conducts a non-summary inquiry to take summary proceedings provided the Magistrate, for the reasons set out in section 166 (1), is of the opinion that the case may properly be tried by him and provided further that the accused consents to be tried by him. Under section 152 (3) the consent of the accused is not necessary. Under both sections, the punitive powers of the Magistrate are enlarged, but in both cases, the Magistrate acts as a Magistrate except, that under section 152 (3) it is a condition precedent that the Magistrate should also be a District Judge. This is unnecessary under section 166.

In view of the decision of the Divisional Court in Attorney-General v. Sinnathamby (supra) the offence of personation cannot be tried summarily by a Magistrate, who is also a District Judge, under the provisions of section 152 (3) of the Criminal Procedure Code. A fortiori it will not be open to a Magistrate to take summary proceedings for this offence under section 166 of the Criminal Procedure Code. In both cases, the Magistrate would be trying the case as Magistrate. The Magistrate has acted in direct violation of the law which requires a trial before a District Court for the offence of personation. He has therefore acted without jurisdiction and the entire proceedings are ab initio invalid.

In view of this conclusion, it is unnecessary for me to consider the further submissions of Mr. Jayawickrema that I should not interfere with the sentence imposed on the accused-respondent in the exercise of my discretionary powers in revision, since the Attorney-General has not appealed from the order of the Magistrate within the prescribed time. Nor is it necessary for me to consider whether the sanction of the Attorney-General is in order. As Crown Counsel submitted, he was not seeking to support the conviction, and consequently whether the sanction was in order or not, it does not affect the present application.

I quash the proceedings in this case and set aside the sentence passed on the accused-respondent. I direct the Magistrate to hold a preliminary inquiry against the accused-respondent on the charge of personation and conclude the inquiry in accordance with the provisions of the law. The fine already paid by the accused-respondent should be returned to her.

Proceedings quashed.

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