

1941

Present : Hearne J.

PIYADASA v. GOONESINHA

In re WRIT OF QUO WARRANTO.

Municipal Election—General undue influence—Right of voter violated in determined and unscrupulous way—No free and fair opportunity of election—Election void.

Where, at an election the right of the voter to go to the poll was violated in a most determined and unscrupulous way,—

Held, that the constituency had not a free and fair opportunity of electing the candidate which the majority might have preferred and that the election was void.

AS the result of an application for a writ of *quo warranto* to have the election of the respondent as Municipal Member for the Maradana South Ward of the Colombo Municipality set aside, a rule *nisi* was granted and Soertsz J. ordered an inquiry into the question whether the respondent's election had been procured by general undue influence and general bribery.

C. S. Barr Kumarakulasingham (with him M. M. Kumarakulasingham, S. Saravanamuttu, and H. W. Jayawardene), for the petitioner.—The issues raised in this case affect the whole constituency, or to put it higher they affect the whole public life of this country, especially as the liberty of the voter and the liberty of the franchise are involved. The scope of this inquiry has been restricted to two main issues by Soertsz J. when he ordered the inquiry, namely, as to whether the respondent's election had been obtained by (a) general undue influence and/or (b) bribery. Evidence has been led only on the first issue.

Undue influence is the using of any violence or threatening any damage, or resorting to any fraudulent contrivance to restrain the liberty of a voter so as either to compel or frighten him in voting or abstaining from voting otherwise than he freely wills (*Lichfield case*, 1 O'M. & H. 25). The evidence led clearly establishes the fact that the freedom of voting

has been seriously impaired. There have been acts of violence and intimidation not only on the day of the election but also on days previous to it. These have been directed not against each and every person but particularly against the ordinary voter. If these acts have resulted in men of ordinary nerve being prevented from voting then the election has been vitiated (*Salford case*, 1 O'M. & H. 140). Even though the majority has polled the election may be invalid (*Drogheda case*, 1 O'M. & H. 255). In this case the vast number of impersonations show that there was in fact no real election.

An election is a voluntary voting of the people. Where acts of violence, intimidation and impersonation prevent a substantial number of persons from voting, then there is no election (*Dudly case*, 2 O'M. & H. 120, 121).

A Municipal election can be avoided at common law, where there is no fair and free opportunity for the exercise of the franchise; where there is in fact no electing at all (*Woodward v. Sarsons and Sadler*¹).

C. V. Ranawake (with him *D. D. Athulathmudali, Dodwell Gunawardana, V. F. Gunaratne* and *S. R. Wijayatilake*), for the respondent.—To constitute intimidation at common law, the intimidation must be so general and extensive in its operation that it cannot be said that the polling was a fair representation of the opinion of the constituency in which the intimidation took place. Where intimidation is confined to particular districts, so that it can be demonstrated that it could not have affected the result of the election, the return ought not to be avoided. *Durham case*, 2 O'M. & H. 152.

The disturbances previous to the election were purely of a local nature and were not so widespread as to affect the entire electorate. Nor is there evidence to show that the supporters of the respondent were responsible for these disturbances. Partial intimidation cannot avoid an election. *Thornbury case*, 4 O'M. & H. 66.

To put intimidation upon a parallel with bribery and treating, it must be spread over such an extent of ground, it must permeate through the community to such an extent that the tribunal considering the case is satisfied that freedom of election has ceased to exist in consequence. There must be a "communism of intimidation" *Drogheda case*, 1 O'M. & H. 252; *Staleybridge case*, 1 O'M. & H. 66.

In the *Nottingham case*, 1 O'M. & H. 245 violent and tumultuous proceedings took place at the election—gangs of men armed with sticks hired on behalf of one of the candidates created alarm which had some influence upon the election and the windows of dwellings were smashed by the mob but it was held that no such case of general riot prevailed as would make the election altogether void on that account. See also *North Louth* 6 O'M. & H. 124.

A mere casual affray or accidental disturbance, if from its extent not calculated to overawe the electors cannot be considered as affecting the freedom of election—*North Meath & East Clare, Rogers Vol. 2, p. 341*.

Rioting, to avoid an election, must be such that a man of ordinary nerve would be prevented by it from voting. *Nottingham case*, 1 O'M. & H. 245. The evidence that voters were prevented from registering their votes is very meagre.

Cur. adv. vult.

¹ *L. R. 10 C. P. at 743.*

September 3, 1941. HEARNE J.—

An application was made to this Court for a mandate in the nature of a writ of *quo warranto* to oust the respondent, Mr. A. E. Goonesinha, from the office of Municipal Member for Maradana South Ward of the Municipality of Colombo. A rule *nisi* was granted and, after hearing legal objections to the grant of the rule, Soertsz J. ordered an inquiry into the question of whether the respondent's election had been procured by general undue influence and general bribery. No witnesses were called to support the latter charge.

The evidence adduced by the petitioner related to alleged activities on the part of the respondent's supporters before polling day, December 14, 1940, and during that day.

The incidents that are said to have taken place before December 14 fall under three main heads.

(a) Attempts to wreck meetings had in support of the candidature of Dr. A. P. de Zoysa, the defeated candidate.

(b) Attempts to intimidate voters in their houses.

(c) Looting of boutiques displaying the white flag of Dr. de Zoysa.

The evidence in regard to (a) is meagre.

In regard to (b) I am satisfied that the charge has been conclusively established in two specific instances.

(1) Mrs. Case had previously been a supporter of the respondent. Her evidence was to the effect that, prior to the present election, she had promised to vote for Dr. de Zoysa and had received a white card from him: that "men of the Labour Party" called at her house on December 13 and tried to induce her to part with her white card and to accept in its place a red one, in order that she might vote for the respondent: and finally that, when she refused, she was abused in most indecent language. The suggestion was made that the witness was acting maliciously because her appeals for financial help to the respondent had been refused. This, however, I do not accept. She is a woman who is earning her living in humble circumstances but she appeared to be straightforward and her evidence was convincing.

(2) Krishna Kutty is the president of Colombo Branch No. 5 of the Malayalee Mahajana Sabha. In his evidence he stated that 10 or 15 men came to the boarding house which he manages in Forbes road and informed him that all Malayalees, who voted for Dr. de Zoysa, would be killed. Krishna Kutty did in fact go to the poll and he did not make a complaint at any police station after the alleged threats had been uttered. Much has been made of these two circumstances. But his evidence had the ring of truth and I accept it without reserve.

In regard to (c) there is a mass of credible evidence that on December 12 a preconceived attack was made on the boutiques of Malayalees in Forbes road and that bottles, coconuts and other articles, capable of being used as missiles, were looted and thrown into the road where Dr. de Zoysa had an election office. There is no doubt that the miscreants had the object of alarming the Malayalee community any deterring its members who, there is every reason to think, were solidly behind

Dr. de Zoysa, from going to the poll. The respondent admitted that they are opposed to him on political grounds and the boutique-keepers said that they were denounced as "Kochchi Zoysa's men."

I have, advisedly, mentioned in bare outline the incidents, prior to December 14, which were calculated to prevent and did, in my opinion, prevent a free and fair exercise of the franchise: for, independently of what had previously occurred, the happenings on the day of the election itself were such as to make it an utter sham, a mere travesty of that freedom of choice which is essential to the validity of an election.

Polling took place at St. Joseph's College. Arrangements were made for the voters to enter by one of the gates of the college and to approach the polling booth by a road in the form of a semi-circle. It was flanked on its left by a row of sheds and a tent where Dr. de Zoysa had his headquarters. On the right was the playing field on which the respondent had pitched his tents close to the roadway opposite the booth.

The polling station consisted of two sections, one for men and the other for women. To each section there were two entrances which converged to form a single entrance, so that the approach to each of the two sections, viewed from the road in front of the booth, presented the appearance of a large inverted Y. It had originally been intended, in order to regulate the passage of voters, to place policemen at the points of access from the roadway to the arms of the two Y's and also at the points of junction of the arms. It was, however, only at the latter points that control was exercised and, as will appear, this was only for a time.

The voters did not proceed direct to the polling booth. For the purpose of assisting the election officers, they first visited the headquarters of the two candidates where they received cards, Dr. de Zoysa's supporters white cards and the respondent's red ones. The consequence was that the voters, on receipt of their identification cards, met in front of the booth, mingled and besieged the entrances. The barricades between the entrances and on either side of them were in danger of being swept away. It was at this stage that the police abandoned the entrances to their fate and concentrated on preventing the voters trespassing beyond the barricades. In the particular task they set themselves they succeeded. I do not criticise the arrangements. That is not part of my function, but it is necessary to take note of the conditions which prevailed. The net result was that the flow of voters into the entrances was, at an early stage, left uncontrolled.

Many of the respondent's supporters had arrived in the grounds of St. Joseph's College long before Dr. de Zoysa's supporters and had taken up positions outside and, for a time, within the entrances. There can be no doubt that they had the right to enter the polling booth before the late arrivals. If they had done so and had then left by the "out" gate, no legitimate complaint could possibly have been made. The trouble, however, was that included in the crowd opposite the entrances was a body of the respondent's partisans—gang would be the more appropriate word—who made it their business to annoy, insult and intimidate those who had come to vote for Dr. de Zoysa, and even to impede them in their efforts to enter the polling station.

Counsel for the respondent sought to make light of the revolting obscenities that were hurled at those who came with white cards by saying that they formed part of the ordinary language of the street corner in Ceylon: while the respondent himself, in the teeth of police evidence insisted that the crowd was under control.

Apart from their individual experiences to which nine voters testified, I had the advantage of hearing the evidence of several witnesses whose independence and integrity were unchallenged. Inspector Jayatilleke said that the "police had no chance at all with the crowd" and Mr. Baker emphatically described it as "disorderly". Miss Rowan said that the crowd showed a determination not to let any one pass, that the women she brought to vote for Dr. de Zoysa were pushed, that they were frightened by men "who were jumping about like devil dancers" and that some of them, in consequence, returned home without recording their votes. Mrs. Bartlam said that voters who came with red badges were left alone, while those who wore white rosettes were not only molested and pushed but were refused entrance by red jacketed women. These women were so obstreperous that they appeared to her to be under the influence of drink. Mr. Tranchell, an Ayurvedic Physician (his impartiality was attacked) said that he recognized amongst them prostitutes from the streets. When Mrs. Bartlam visited the houses of voters they refused to accompany her to the poll (Wimaladasa, the boy who was stabbed, had the same experience) and on her return to the grounds of St. Joseph's College she found the same "stationary" crowd in front of the booth, pursuing "the same methods and tactics".

I stress the word "stationary" for, in my opinion, several of the women in red jackets and of the men in red shirts were not voters at all. On the contrary they were a picked body of non-voters who stationed themselves at the entrance and whose prearranged function it was to harass, intimidate and obstruct.

In view of the overwhelming evidence against the women in red, the respondent took on himself the responsibility of saying that there were only 3 or 4 such women and that whenever he saw them there was nothing in their behaviour of which complaint could be made: against this there is the evidence of Dr. Nadarajah, the Chief Presiding Officer and Mr. Baker, the Superintendent of Police. Dr. Nadarajah saw several women in red jackets "in the front of the crowd" who were jeering, shouting and creating a disturbance. He noticed one of them pushing voters away from the entrance to the women's section and removed her. Speaking generally he said that the "people in red were aggressive. I did not see any person wearing white colours behaving in this way. There were complaints about voters not being able to come in. The complaints made to me were against the people wearing red". The witness spoke with restraint and is, in my opinion, thoroughly reliable. Mr. Baker said that the "women in red were the most aggressive in the crowd" and described how, at one time, they all but invaded Dr. de Zoysa's tent.

The respondent admitted that several voters left and that the presence of a large number of persons in red was a prominent feature of the election

but, speaking of the men, he refused to admit that there were more than four of them who belonged to his red shirted Volunteer Corps. This Corps is admittedly composed in part of habitual criminals and ex-convicts convicted of offences of violence. But Mr. Cader, one of the respondent's witness, was certain that there were forty of these volunteers on duty. They were, undoubtedly, with the red Amazons, the backbone of the "stationary" crowd. The respondent's division of 40 by 10 is not a little significant.

Shortly after 1 o'clock Mr. Baker noticed that stones were being thrown. His attention was first directed "to the people in the centre of the ground", in the vicinity of the respondent's tent, but this in itself is not conclusive that the stone throwing started there nor was it claimed to be. Witnesses for the petitioner, however, stated that stones came from the direction of the respondent's tents as well as from behind the boundary wall of St. Joseph's College at the back of Dr. de Zoysa's tents, and that the whites then retaliated. This I believe. A witness, Mr. A. J. A. Cader, called by the respondent, who described himself as the Manager of the Ceylon Mercantile Agency, Ltd., made a sorry attempt to account for the latter. He said he had seen six or seven persons throwing stones whose attire suggested that they were sympathisers, not with the respondent, but with Dr. de Zoysa. When he "saw" them they were apparently, like marionettes, suspended in the air, half concealed by a twelve-foot wall. He did not mention this phenomenon to anybody for six months! It is a piece of palpable, impudent perjury. Dealing with the stone throwing in his affidavit, all that the respondent said was this. "I concede there were two or three minor incidents. One such incident was the stoning of a lady supporter of mine, Mrs. I. G. S. de Silva, who is a relative of the defeated candidate. As a result of the stoning a row took place during my absence at lunch but it was quelled immediately." Dr. de Zoysa denied that Mrs. de Silva was related to him and although an affidavit of hers was filed, she lacked the courage to enter the witness box or the respondent lacked the courage to invite her to do so. "A minor incident" he called it. The situation was so alarming that Mr. Baker sent for a party of police from the depot which was employed "to clear the crowd in the central portion of the grounds three or four times in the afternoon". It was a menacing, ill-humoured crowd which consisted mainly of the respondent's supporters. Many of them, Mr. Baker thought, were non-voters. The number of non-voters who attended the election may be gauged by the fact that, while 3,336 out of an electorate of 4,854 polled, Inspector Jayatilleke estimated that at 11 A.M. there were about 5,000 persons in the grounds of the College, while another witness remarked that, in the afternoon, "half Colombo appeared to be there".

I do not doubt the veracity of certain respectable witnesses called by the respondent. Their experiences, fortunately for them, were happy and, if it was known that they had come to vote for the respondent, they were not likely to be otherwise. But it is my opinion that Inspector Rajendra, called by the respondent, was dishonest in that he deliberately suppressed the truth.

There was personation on a very extensive scale. The Chief Presiding Officer estimated that three hundred challenges were upheld. Mr. de Jong,

one of the respondent's witnesses, and his Agent at the election, admitted that more reds personated whites than *vice versa*. The Chief Presiding Officer said that they constituted 75 to 80 per cent. of the persons who were excluded. Mr. F. A. de Silva, one of the sub-presiding officers, who was not anxious to help the petitioner and who was in some respects not a candid witness was constrained to admit that several would-be personators could not even give the names and addresses of those whom they attempted to personate, and that they were predominantly "reds".

Many other matters were canvassed. Counsel for the respondent seized on a chance remark made by a police witness about "Congress", to suggest that Mr. Givendrasinghe was responsible for the disturbances at the election. It is only fair to say that there is not a shred of evidence to support the suggestion. It is unfortunate that this should have happened. The evidence which the respondent was subsequently invited to give regarding Mr. Givendrasinghe in the course of which he put his own character in issue, made much of the former's cross examination, which I should otherwise have ruled out, relevant.

But I do not propose to review any more of the evidence. I have said enough to indicate that in my opinion the election result cannot be allowed to stand. The right of a voter to go to the poll without molestation or fear of molestation was violated in a most determined and unscrupulous way. I am satisfied that there was no real electing by the constituency at all, in the sense that it had not "a free and fair opportunity of electing the candidate which the majority might have preferred".

The rule *nisi* will be made absolute with costs to the petitioner. I formally declare the election to be void.

Rule made absolute.
