

**GENERAL SECRETARY OF THE UNITED NATIONAL PARTY  
v.  
THE COMMISSIONER OF ELECTIONS AND OTHERS**

COURT OF APPEAL  
RANARAJA, J.  
CA NO. 259/97  
JULY 08, 1997

*Writs of Certiorari and Mandamus – Quashing election and holding fresh elections for Negombo Municipal Council – Local Authorities Elections Ordinance S. 69 – Failure of election officers to do their statutory duty affecting rights of petitioner – Burden of proof – Evidence Ordinance s. 114 – Grounds for setting aside election – Conduct of the election.*

At the election held on 21.3.97 the Peoples Alliance (P.A.) secured 23,456 votes and the United National Party (U.N.P.) 22,922. Thus the P.A. was entitled to return 12 (including two bonus seats) and the U.N.P. 10 members.

As provided by the Local Authorities Elections Ordinance the Commissioner nominates a Public Officer as Returning Officer and, (as are necessary), Assistant Returning Officers (s. 27). The Returning Officers take steps to conduct the elections in the manner provided by the Ordinance. The Presiding Officer has to keep order in the polling station by regulating the number of voters to be admitted at a time and excluding all others except the candidates, polling agents, police officers on duty and others officially employed at the polling station (section 50 (3)). The Presiding Officer must also see that no person commits an offence by interfering with the voters or the officers from carrying out their lawful functions. Any person who misconducts himself in the polling station can be removed by a police officer on the orders of the Presiding Officer.

The acts alleged to prove failure to conduct the election in accordance with the provisions of the Ordinance were –

(a) A group of P.A. supporters led by the 4th respondent Ananda Munasinghe entered polling station No. 13 at St. Peter's Madya Maha Vidyalaya, threatened the staff and U.N.P. polling agents, took the ballot paper book marked ballots in favour of the P.A. punched them and inserted them in the ballot box.

(b) A large number of P.A. supporters forcibly entered polling station No. 17, St. Joseph's Mixed School took a ballot paper book from the custody of an Election Officer, marked the ballots in favour of the P.A. and stuffed approximately 150 ballot papers in the ballot box.

(c), (d), (f), (g), (j) alleged acts similar to (a) and (b) above.

(e) All polling agents of the U.N.P. at polling station Nos. 28, 29, and 30 were chased away by the P.A.

(h) A large number of P.A. supporters entered polling station No. 39, Ethukala Sinhala Mixed School, took two ballot paper books and punching machines and ran away.

(i) Similar to (e) above.

(k) When ballot boxes for the polling stations Nos. 13, 17, 33, 39, 41, 42 and 44 were opened, there were increases in the ballots contained therein when compared to the figures certified by the senior Presiding Officers. As a result of reports submitted by the S.P.O's 208 ballots were taken out of the ballot boxes from polling stations 13, 17 and 33. There were 162 votes in excess of the number cast at polling stations 39, 41, 42 and 44.

In view of the above alleged acts, the conduct of the said election is illegal and a nullity and of no legal effect.

#### Held:

1. If the petitioners are able to establish that the Elections Officers failed to perform their statutory duty and as a result their rights were affected, in the absence of any other remedy provided by the Ordinance, they should be entitled to have the result of the election quashed by way of Certiorari.

2. The burden of proof was on the petitioner to prove that the Election Officers who conducted the election omitted or failed to comply with the provisions of the Ordinance in the proper manner or at the proper time.

3. There is no justification for regarding the motive of an elector or any matter which influences that motive as being part of the conduct of the poll.

4. (a) Section 69 has to be narrowly construed to cover only instances where the public officers conducting the election fail to comply with the provisions of the Ordinance.

(b) Acts of general bribery, general intimidation or other misconduct or other circumstances whether similar to those enumerated or not, which influence the motive of voters form no part of the conduct of the elections.

(c) The Legislature has deliberately refrained from adopting the provisions of the Presidential Elections Act (section 91 (a) ), Parliamentary Elections Act (section 92 (1) (a) ) and Provincial Councils Election Act (section 92 (1) (a) ) in the Local Authorities Ordinance.

5. To succeed in an application the petitioner must prove, if not beyond reasonable doubt, at least to a high degree of probability the three limbs of section 69 namely –

(a) that the Election Officers failed to comply with the provisions of the Ordinance.

(b) that the elections were not conducted in accordance with the principles laid down in these provisions and

(c) that the result of the election was thereby affected.

(d) that the non-compliance was of such degree and magnitude that it could reasonably be said that as a result of such non-compliance the electorate had not been given a fair opportunity of electing the candidate of its choice.

6. None of the alleged unlawful acts was committed by the Election Officers. On the other hand those officers have thwarted any attempts by the alleged P.A. supporters to falsify ballots into the ballot boxes by invalidating these votes at the count. The incidents took place over a short period of time leaving the officials no time to call for extra protection.

**Cases referred to:**

1. *Martin Perera v. Madadombe* 73 NLR 25, 28.
2. *Rex v. Electricity Commissioners ex p. London Electricity Joint Committee Co. (1920) Ltd.* (1924) 1 KB 171.
3. *Premasinghe v. Bandara* 69 NLR 155.
4. *Pilapitiya v. Chandrasiri and Others* (1978 - 79 - 80) 1 Sri LR 361.
5. *Rajapaksa v. Gunasekera* (1984) 2 Sri LR 1.
6. *De Silva v. Ivan Appuhamy* (1993) 2 Sri LR 401.
7. *Walker Sons & Co. (UK) Ltd. v. Gunatilake and Others* (1978 - 79 - 80) 1 Sri LR 231.
8. *Re Kensington North Parliamentary Election* (1960) 2 All ER 150.
9. *Morgan v. Simpson* (1974) 3 All ER 722, 728.
10. *Grill v. Read and Holmes* (1874) 2 O' M & H 77.
11. *Woodward v. Sarsons* (1875) LR 10 CP 733.
12. *Medhurst v. Lough and Gasquet* (1901) 171 LR 210.
13. *Gunn v. Sharpe* (1974) 2 All ER 1058.
14. *Munasinghe v. Corea* 55 NLR 265.

**APPLICATION** for writs of certiorari and mandamus.

*K. N. Choksy* P.C. with *D. H. N. Jayamaha* and *Ronald Perera* for petitioner.

*S. Sri Skandarajah* S.S.C. for 1st, 2nd and 28th respondents.

*Asoka Gunasekera* for 6th respondent.

*Cur. adv. vult.*

July 22, 1997

**DR. RANARAJA, J.**

### **The Facts**

The petitioner is the General Secretary of the United National Party. He has filed this application praying *inter alia*, for (a) a Writ of Certiorari quashing the declaration of the final result of the election of Mayor, Deputy Mayor and members to the Negombo Municipal Council, held on 21.3.97, (b) a Writ of Mandamus directing the 1st respondent Commissioner of Elections and the 2nd respondent Returning Officer, to hold an election to the Negombo Municipal Council, in due compliance with the provisions of the Local Authorities Elections Ordinance.

At the said Election, the People's Alliance received 23,456 votes, the United National Party 22,922, the Nava Sama Samaja Party 1,201 and the Janatha Vimukthi Peramuna 638 votes, respectively. Accordingly the P.A. was entitled to return 12 members, including the two bonus seats, and the U.N.P. 10 members.

### **Conduct of the Election**

The conduct of a Local Authorities Election is a statutory process. In that it has to be **held** in the manner provided by the Local Authorities Elections Ordinance (section 24). The Commissioner has to nominate a public officer as Returning Officer and a number of other public officers as Assistant Returning Officers as are necessary to exercise, perform or discharge the powers, duties and functions conferred or imposed on, or assigned to them (section 27). The Returning Officers themselves are required to **conduct** a contested election in accordance with the provisions of the Ordinance. (section 37 (3) (a) ). The Returning Officers appoint Presiding Officers to preside at each polling station in his electoral area. (section 40 (1) ). The Returning Officers have to take steps to ensure that the elections are **conducted** effectually in the manner provided by the Ordinance. (section 44 (e)). It is the duty of the Presiding Officer to keep order in the polling station 'by regulating the number of voters to be admitted at a time, and excluding all others except the candidates, polling agents, Police officers on duty and others officially employed at the polling station.

(section 50 (3) ). The Presiding Officer must also see that no person commits an offence by interfering with the voters or the officers from carrying out their lawful functions. Any person who misconducts himself in the polling station can be removed by a Police officer on the orders of the Presiding Officer. **Every person who contravenes the provisions of section 76 or 78 shall be guilty of an offence and on conviction** after summary trial before a Magistrate, be liable to a fine not exceeding five hundred rupees or to imprisonment of either description for any term not exceeding six months, or both such fine and such imprisonment; in addition to being **disqualified for a period of five years** reckoned from the date of **conviction from being elected or from sitting or voting as a member of any Local Authority.** (section 83).

**Alleged Acts Constituting a failure to conduct the election in accordance with the provisions of the Ordinance.**

It is alleged by the petitioner that:

- (a) A group of P.A supporters, led by the 4th respondent, Ananda Munasinghe, entered polling station No. 13 at St. Peter's Madya Maha Vidyalaya, threatened the election staff and U.N.P polling agents, took the ballot paper book, marked ballots in favour of the P.A, punched them and inserted them in the ballot box.
- (b) A large number of P.A supporters forcibly entered polling station No. 17, St. Joseph's Mixed School, took a ballot paper book from the custody of an Election Officer, marked the ballots in favour of the P.A and stuffed approximately 150 ballot papers in the ballot box.
- (c) A group of P.A supporters, led by the 4th respondent, forcibly entered polling station No. 18, Harischandra Maha Vidyalaya, took ballot paper books from the Elections Officer, marked the ballot papers in favour of the P.A, punched them and inserted them in the ballot box. They had also threatened the elections officers for stopping female members of the crowd attempting to impersonate other voters.
- (d) A group of P.A supporters, led by P.A candidate Milton Appuhamy, entered polling station No. 26, Bolawalana Maha Vidyalaya, Hall

- No. 1, forcibly took books of ballot papers, marked them in favour of the P.A and stuffed them in the ballot box.
- (e) All polling agents of the U.N.P at polling stations Nos. 28, 29 and 30 at St. Anne's Maha Vidyalaya, Halls Nos. 1, 2 and 3 respectively, were chased away by P.A supporters.
- (f) A large number of P.A supporters, led by the 4th respondent, forcibly entered the polling station No. 33 at Tamil Roman Catholic School, took ballot papers from the Elections Officers, marked the ballots for the P.A and put them in the ballot box. The persons accompanying the 4th respondent, impersonated other voters and cast 12 votes.
- (g) A large number of supporters of the P.A, led by the 4th respondent, forcibly entered polling station No. 37, Dalupotha Methodist Junior School, Hall No. 2, took several ballot paper books, marked 33 ballots for the P.A and stuffed in the ballot box.
- (h) A large number of P.A supporters entered polling station No. 39, Ethukala Sinhala Mixed School, took two ballot paper books and punching machines and ran away.
- (i) A large crowd of P.A supporters entered polling station No. 41 at Daluwakotuwa St. Anne's Balika Vidyalaya, Hall No. 2, chased away the U.N.P polling agents and the elections officials.
- (j) A large number of P.A supporters, led by the 4th respondent, forcibly entered polling station No. 42, Daluwakotuwa Anthony Maha Vidyalaya, took several ballot paper books, marked them for the P.A and stuffed in the ballot box. One such ballot paper allegedly picked up by one Jeewananda has been produced marked Y1.
- (k) When ballot boxes for the polling stations Nos. 13, 17, 33, 39, 41, 42 and 44 were opened, there were increases in the ballots contained therein when compared to the figures certified by the Senior Presiding Officers. As a result of reports submitted by the S.P.Os, 208 ballots were taken out of the ballot boxes from polling stations Nos. 13, 17 and 33. There were 162 votes in excess of the number cast at polling stations 39, 41, 42 and 44.

- (f) The Chief Post Master, Negombo, had reported to the Police that an armed gang had entered the post office and removed 572 poll cards on 20.3.97.

It is submitted that as a result of the aforesaid alleged acts, the conduct of the said election is illegal and a nullity and of no legal effect and the purported result thereof liable to be quashed in pursuance of the provisions of section 69 of the Local Authorities Elections Ordinance.

### Section 69 of the Local Authorities Elections Ordinance

Section 69 provides:

"No election shall be invalid by reason of any failure to comply with the provisions of this Ordinance relating to elections if it appears that the election was conducted in accordance with the principles laid down in such provisions, and that such failure did not affect the result of the election."

Chief Justice H. N. G. Fernando, analysing this section in *Martin Perera v. Madadombe*<sup>(1)</sup> stated:

"Although section 69 does not positively declare that an election will be invalid for any specified reason, I can assume for the present purpose, that such a declaration is implied in this section; on this assumption the declaration thus implied may properly be stated thus:

"If there is in the case of any election a failure to comply with any provisions of this Ordinance relating to elections,  
**and**

If it appears that the election was not conducted in accordance with the principles laid down in such provisions **and** if it appears that thereby the result of the election was affected, the election shall be invalid".

His Lordship proceeded to state some of the principles underlying sections 24 to 68 of the Ordinance, following which, he observed that where it is clear to a court that a particular election has not been conducted in accordance with one or other of the principles referred to, and if it **further** appears that the result of the election was affected

in consequence, the Writ of Quo Warranto may issue on the ground that the member elected at the election was not duly elected.

### Is a Writ of Certiorari available to quash the result of the Election?

It was argued by learned Senior State Counsel on the formula set out by *Atkin, L.J. in Rex v. Electricity Commissioners, ex P. London Electricity Joint Committee Co., (1920) Ltd.* <sup>(2)</sup>, that the petitioners had no right to a Writ of Certiorari. The formula is stated thus:

"Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the **duty to act judicially**, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs".

It was argued that the functions of the elections officers are purely ministerial and therefore not amenable to a Writ of Certiorari. The law has developed since the decision in **Electricity Commissioners** (*supra*). The Primary purpose of Certiorari in modern administrative law is to quash an *ultra vires* decision. That is, where a public body acts in a way that is not permitted, or exceeds the powers that the Courts recognize the body as possessing, whatever the source of the power. The effect of Certiorari is to make it clear that the statutory or other public powers have been exercised unlawfully, and consequently to deprive the public body's act of any legal basis. – *Clive Lewis – Judicial Remedies in Public Law, p. 145*. When an order is quashed, it is the legality of the order itself, and not the decision to make it, with which the law is concerned. – *Wade & Forsyth – Administrative Law, 7th Ed. p. 634*. The modern function of Certiorari is to provide an appropriate form of relief to a successful applicant; the task of setting the boundary of the Court's public law power of review is now determined by the notion of the need for judicial supervision of public functions. *De Smith, Woolf and Jowell – Judicial Review of Administrative Action, 5th Ed. p. 693*.

As Chief Justice Fernando, observed in *Martin Perera* (*Supra*) "The first condition in the declaration to be implied in section 69 is that there must be a **failure to comply** with some provision of the Ordinance. This expression is appropriate to a case where a public

**officer does not perform an act or duty which some provision of the Ordinance requires him to perform**, because if so, the officer clearly fails to comply with that provision".

It is clear that if the petitioners are able to establish that the elections officers failed to perform their statutory duties and as a result their rights were affected, in the absence of any other remedy provided by the Ordinance, they should be entitled to have the result of the election quashed by way of certiorari.

### **The Burden of Proof**

Analysing the expression "failure to comply", His Lordship in **Martin Perera** (*Supra*), expressed the view that there is no statute in which the expression is used otherwise than for the purpose of referring to a case where a person has omitted to do some act required by law or has not done such an act in the proper manner or at the proper time.

In this context it is relevant to consider section 114 of the Evidence Ordinance, which provides that the "Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. The court may presume that judicial and official acts have been regularly performed".

When there is general evidence of acts having been legally and regularly done, Courts tend to dispense with proof of circumstances, strictly speaking essential to the validity of those acts, and by which they were probably accompanied in most cases, although in others the assumption rests solely on grounds of public policy. – Coomaraswamy. *The Law of Evidence* Vol. 2, Bk 1, p. 407.

The burden was on the petitioners to prove that the Elections Officers who conducted the election omitted or failed to comply with the provisions of the Ordinance in the proper manner or at the proper time.

Although the petitioner has nowhere alleged direct complicity of the elections officers in the alleged unlawful acts committed by the

P.A supporters, it was argued, that the failure on the part of the elections officers at the relevant polling stations to take meaningful steps to prevent such unlawful acts being committed, constituted non-compliance with the provisions of the Ordinance.

The 1st respondent, Commissioner of Elections has filed affidavit, stating what action was taken by him and the respective presiding officers, who presided at the affected polling stations, following the incidents referred to that allegedly took place. The 1st respondent has averred in reply that:

- (a) A gang of persons had arrived at polling station No. 13 at about 3.40 p.m. forcibly taken ballot papers bearing numbers 21436 to 21450 and 21455 to 21500, which had been marked and stuffed into the ballot boxes. The situation had returned to normal by 3.50 p.m. and the poll continued with 12 more voters casting their vote. On the report of the Presiding Officer, the stuffed votes were correctly identified and invalidated at the count.
- (b) A gang of about 15 to 20 persons had entered polling station No. 17, forcibly taken ballot papers bearing numbers 026585 to 026600 and 026801 to 026808, marked them and stuffed them into the ballot box. On the report of the Senior Presiding Officer, the stuffed votes were identified and invalidated at the count. The allegation of the petitioner that voters who came to vote after the said incident were not given ballot papers, as there was none available, has been denied.
- (c) About 15 persons had entered polling station No. 18 at about 3 p.m., forcibly removed ballot papers Nos. 027501 to 027550 and 027451 to 027500, marked and stuffed them into the ballot box. These were removed from the count on the report of the Senior Presiding Officer.
- (d) It is denied that any incidents as alleged by the petitioner took place at polling stations Nos. 28, 29 and 30.
- (e) An unknown gang of persons had entered polling station No. 33, forcibly taken ballot papers bearing Nos. 050151 to 050300, marked and stuffed them into the ballot box, which were

subsequently invalidated at the count on the report of the Senior Presiding Officer.

- (g) The Senior Presiding Officer has reported that an unknown gang of persons had entered polling station No. 39 and removed two ballot paper books and a punching machine.
- (h) During a confrontation that took place between U.N.P and P.A supporters at polling station No. 41, ballot papers bearing Nos. 63682 to 63700 were misplaced. The S.P.O. has not reported any stuffing of ballot boxes.
- (i) An unknown gang of persons had at about 1.45 p.m., entered polling station No. 42, forcibly removed ballot papers bearing Nos. 065626 to 065650 and 065598 to 065600 marked them and stuffed into the ballot boxes. However they were identified and invalidated at the count on the report of the S.P.O.

The averments in the affidavit of the 1st respondent have been corroborated by copies of reports of the relevant S.P.O's and the averments in the affidavits of the respective counting officers. The petitioner has not filed counter affidavit challenging the averments of the elections officers.

Thus, what court has before it are the affidavits filed by the petitioner and others who claim to have had knowledge of the incidents, with supporting documents on the one hand and the affidavits of the officers who conducted the election and documents in support, on the other. None of the affirmants of either side has been subject to cross-examination.

There are two further reasons why the burden of proving the three limbs of section 69 lie on the petitioner. Firstly, in any democratic election to choose their representatives, the wish of the voters must prevail. Once the result of an election has been declared, it can be invalidated only on grounds provided by law. The burden is on those who seek to set aside the result to prove those grounds.

Secondly, the format of applications for equitable relief is such that the rules of the Supreme Court provide for the petitioner to support his petition with other original documents or certified copies thereof.

When the petitioner fails to do so, the application is liable to be rejected in limine. It is only where the petitioner has made out a case for relief at the threshold stage that notice will issue on the respondent.

### The Standard of Proof

Before considering the standard of proof necessary to discharge the burden on the petitioner, it is essential to consider the scope of section 69. His Lordship the Chief Justice in *Martin Perera (supra)* having identified the three limbs of that section went on to state:

"But just as much as the **motive** which influences an elector to vote for a particular candidate is not part of the conduct of the election, the more remote activity of influencing (whether by fair or illegal means) the choice of the election forms no part of the conduct of an election."

"I note in this connection that section 24 of chapter 262 refers to the manner in which an election **shall be held**. Even if the word "**held**" may have a wide connotation which can include within its scope the activity of influencing voters, the word "**conducted**" used in s. 69 does not have so wide a meaning. In s. 41 also, the language is that the poll **shall be conducted**, and the provisions of ss. 42 to 65 refer to matters properly within the scope of the conduct of the poll. But here again **there is no justification for regarding the motive of an elector or any matter which influences that motive as being part of the conduct of the poll.**"

In *Martin Perera (supra)* the election of the respondent to the Village Council was challenged by Quo Warranto on the ground of general undue influence, bribery or treating under the Ordinance. There, it was held, that in the absence of any provision to declare invalid an election to a local authority on the ground of general undue influence, bribery or treating, it is not within the jurisdiction of court to find the respondent has forfeited his seat, even if the acts of general undue influence, bribery or treating are proved in a proceeding for a Writ of Quo Warranto. This conclusion was arrived at by Court on the basis that the legislature had clearly provided for candidate, who gains a seat by general undue influence, bribery or treating, to be unseated only if he is **convicted** of such an offence.

From the decision in *Martin Perera (supra)* the following principles emerge: (1) section 69 has to be narrowly construed to cover only instances where the public officers conducting the election fail to comply with the provisions of the Ordinance. (2) Acts of general bribery, general treating, general intimidation or other misconduct, or other circumstances whether similar to those enumerated or not, which influence the motive of the voters form no part of the conduct of the elections. (3) The legislature has deliberately refrained from adopting the provisions in the Presidential Elections Act (section 91 (a) ), Parliamentary Election Act (section 92 (1) (a) ) and Provincial Councils Elections Act (section 92 (1) (a) ) in the Local Authorities Elections Ordinance.

In considering the standard of proof, sections 91 (b), 92 (1) (b) and 92 (1) (b) of the three acts just referred to have great relevance, as the words used in those sections are similar to those in section 69 of the Ordinance. Logically the standard of proof applicable in an election petition filed under the three sections in the said Acts cannot be any different from that in an application for equitable relief under section 69 of the Ordinance.

Silva, J. in *Premasinghe v. Bandara*,<sup>(3)</sup> having reviewed the earlier decisions on the burden of proof in Election cases, laid down the following principles:

- (1) that any charge laid against a successful candidate by a petitioner in an election petition should be proved beyond reasonable doubt before a court could satisfy itself of such charge;
- (2) that suspicion, however strong it may be, does not amount to proof of any charge;
- (3) that even a high degree of probability is not sufficient to constitute the proof required to establish a charge; and
- (4) that a court should be slow to act on one witness's word against another's, even if the word of the person who supports a charge rings true, when that constitutes the only evidence of such charge.

This decision was followed by Samarakoon C.J. in *Pilapitiya v. Chandrasiri and others*<sup>(4)</sup>. In similar vein, Sharvananda, J. in *Rajapaksa v. Gunasekara*<sup>(5)</sup> observed: "charges of corrupt practice are quasi criminal in character and the allegation thereto must be sufficiently clear and precise and must be proved by evidence of a conclusive nature. The burden of proving the alleged corrupt practice is on the petitioner and the allegations must be proved beyond reasonable doubt. If any reasonable doubt arises, after the evidence has been scrutinized, in respect of any of the ingredients of the charge, the benefit thereof should go to the person charged." (p.9).

In the context of the Local Authorities Elections Ordinance, where a recount was sought by way of mandamus, in *De Silva v. Ivan Appuhamy*<sup>(6)</sup>. Fernando, J. observed: "a fancied possibility of error is not sufficient to vitiate a count, there must be material pointing to probability of error, based upon grounds from which such an inference could reasonably be drawn".

On the authorities cited, by which this Court is bound, vide *Walker Sons & Co., (UK) Ltd. v. Gunatilleke and others*<sup>(7)</sup> to succeed in an application, the petitioner must prove, if not beyond reasonable doubt, at least at a high degree of probability, the three limbs of section 69, namely –

- (a) that the elections officers failed to comply with the provisions of the Ordinance,
- (b) that the elections were not conducted in accordance with the principles laid down in these provisions, and
- (c) the result of the election was thereby affected.

Learned Counsel for the petitioner submitted that the English law is less exacting in the requirement of the degree of proof in respect of the provisions of section 16 (3) of the Representation of the People Act, 1949, which has some similarity to section 69 of the Ordinance.

*Streatfeld, J.* in *Re Kensington North Parliamentary Election*<sup>(8)</sup> was of the view that it is for the Court to make up its mind on the evidence as a whole, whether there was a substantial compliance with the law as to the election or whether the act or omission affected the result. *Lord Denning M.R.* in *Morgan v. Simpson*<sup>(9)</sup> having considered the

decisions in *Gill v. Read and Holmes*<sup>(10)</sup> ; *Woodward v. Sarsons*<sup>(11)</sup>; *Medhurst v. Lough and Gasquet*<sup>(12)</sup> ; *Gunn v. Sharpe*<sup>(13)</sup> suggested that the law should be stated in these propositions:-

- (1) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated irrespective of whether the result was affected or not. (in *Gill (supra)* 2 out of 19 polling stations were closed all day and 5,000 voters were unable to vote).
- (2) If the election was so conducted that it was substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or mistake at the polls and it did affect the result then the election is vitiated, (As in *Gunn (supra)* where the mistake in not stamping 102 ballot papers did affect the result. In *Morgan (supra)* 44 ballot papers were not marked with the official stamp by mistake of the officials. If the 31 votes of the 44 cast in favour of Morgan were counted with the 10,329 valid votes in favour of Morgan and the 13 votes for Simpson were counted with the 10,340 valid votes cast in his favour, it is Morgan and not Simpson who would have won by a majority of 7 votes).

It is interesting to note that the English cases dealt with non-compliance with the law exclusively by elections officials, and support the view expressed by **Fernando, C.J.** in *Martin Perera (supra)* that section 69 is unconcerned with matters which influence the motive of voters. The propositions stated by **Lord Denning** above, have been adopted much earlier by **Nagalingam, J.** in *Munasinghe v. Corea*<sup>(14)</sup> when he observed "Every non-compliance with the provisions of the Order in Council does not afford a ground for declaring an election void, but it must further be established (apart from any other requirement) that the non-compliance with the provisions was of such a kind or character that it could be said that the election had not been conducted in accordance with the principles underlying those provisions . . . The non-compliance should be of such a degree and magnitude that it could reasonably be said that as a result of such non-compliance the electorate had not been given a fair opportunity of electing the candidate of its choice".

### Is Certiorari the proper remedy?

From the decisions cited above, it is clear the petitioner had a heavy burden to discharge in establishing the three limbs of section 69. By its very nature an application for a Writ of Certiorari is dealt with on affidavits and other documentary evidence. No proper proceeding at which witnesses are tendered for cross-examination, as in the case of an inquiry into an election petition, takes place. Thus, except in the rare instances where the allegations in the petition are admitted by the respondent elections officers, the petitioners will be faced with the well nigh impossible task of proving beyond a reasonable doubt, (as in Premasinghe, Pilapitiya, Rajapaksa (*supra*) or at a high degree of probability *de Silva* (*supra*) the allegations in the petition, solely on supporting affidavits and documents. Therefore, seeking relief by way of Certiorari on the basis of section 69 would generally be futile. Certainly it is not the ideal remedy.

### Conclusion

Most incidents referred to in paragraph 19 of the petitioner's affidavit have been admitted by the 1st respondent. However, none of the alleged unlawful acts was committed by the Elections Officers. On the other hand, those officers have thwarted any attempts, by the alleged P.A supporters to falsify the true will of the voters in stuffing ballots into the ballot boxes, by invalidating those votes at the count. As seen, the incidents at each polling station took place over a short period of time, leaving the officials no time to call for extra protection. There is no allegation that the officials on duty deliberately permitted the incidents to take place within the polling stations or were guilty of dereliction of duty. In the circumstances, this Court is constrained to hold that the petitioner has failed to establish that the 1st respondent or his officers failed to comply with the provisions of the Ordinance. It follows therefrom that there was no breach of the principles underlying those provisions. The argument of learned Counsel for the petitioner that the said incidents prevented voters from casting their votes is unsupported by any evidence. The petition is bereft of any pleading on how the result of the election was affected. Learned Counsel submitted that the incidents referred to may have prevented the supporters of the U.N.P from casting their votes. Apart from the speculative nature of the submission there is absolutely no evidence to establish that the majority of 534 votes in favour of the P.A over

the U.N.P would have been the other way round, even if the elections officers were able to prevent the incidents that took place at the polling stations. In the result, the application has to fail. The application is dismissed without costs.

*Application dismissed.*

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