

MUTTETUWEGAMA v. PILAPITIYA AND OTHERS

COURT OF APPEAL

ABDUL CADER, J.

ELECTION PETITION 5/77 KALAWANA

NOVEMBER 27, 28, 29, 30 and DECEMBER 13, 14 and 17, 1979

Election Petition – Ceylon Parliamentary Elections Order in Council 1946 (as amended) sections 58(1)(d); 77(c); 58(A); 80A(1); 80B(d) – Election challenged on the ground of commission of corrupt practices of making or publishing false statements in relation to the personal character or conduct of the petitioner – Agency – Burden of proof.

The second respondent was the principal campaigner for the first respondent candidate, living in the first respondent's house, looking after all his office work, organising all his political work and speaking at meetings. He admitted that he was the organising secretary. The offensive articles were all published and some of them personally distributed by the second respondent. The first respondent failed to give evidence in rebuttal.

Held:

Agency must be proved beyond reasonable doubt. When an agent is guilty of a corrupt practice it affects the candidate without regard to the consent of the candidate. “. . . the substance of the principle of agency is that if a man is employed at an election to get you votes, or if, without being employed, he is authorized to get you votes, or although neither employed nor authorized, he does to your knowledge get you votes, and you accept what he has done an adopt it, then he becomes a person for whose acts you are responsible in the sense that, if his acts have been of an illegal character, you cannot retain the benefit which those illegal acts have helped to procure for you.”

Cases referred to:

- (1) *Premasinghe v. Bandara* 69 NLR 160.
- (2) *Jayasena v. Illangaratne* 73 NLR 35 at 40.
- (3) *Great Yarmouth Case* 5 O'M & H 178.
- (4) *Bolton Case* 2 O'M & H 141.
- (5) *Bewdley Case* 1 O'M & H 18.
- (6) *Mohan Singh v. Bhanwarlal* AIR (1964) 1370.

Election Petition.

H. L. de Silva with K. Shanmugalingam, Sidath Sri Nandalochana, Peter Jayasekera and M. B. de Silva instructed by *R. N. J. Attanayake* for the petitioner.

A. C. Gooneratne, Q.C. with P. Navaratnarajah, Q.C., Daya Pelpola, Ikram Mohamed, Mrs. S. Jayalath, Miss C. Caderamanpulle and Miss T. Wimalasekera instructed by *T. D. M. Samson de Silva* for the first respondent.

Siva Rajaratnam with Daya Pelpola instructed by *Palitha Wanatunga* for the second respondent.

M. H. Amit with P. Karalasingham instructed by W. Malawana for the third respondent.

Cur vult adv.

28th January, 1980.

ABDUL CADER, J.

The petitioner was a candidate at the General Election for the electorate district of Kalawana held on 21st July, 1977. The 1st respondent and two others contested him and the 1st respondent was successful by a majority of 1662 votes over the petitioner. The petitioner has now petitioned this Court that the election of the 1st respondent as a member was null and void on the ground of the commission of corrupt practices of making or publishing before the said election and for the purpose of affecting the return of the petitioner, false statements of fact in relation to the personal character or conduct of the petitioner and thereby the 1st respondent had committed an offence within the meaning of section 58(1)(d) read with section 77(c) of the Ceylon Parliamentary Election Order in Council 1946 as amended. The alleged false statements are found in P6, P18 and P19, and are set out fully in paragraphs 3, 4 and 5 of the petition. It is not necessary to reproduce these statements here for the reason that it is not denied that these statements are found in the three papers which have been produced and because the falsity of these statements has not been denied.

In respect of charge 1, the petitioner has urged (1) that the article in P6 was written by the 3rd respondent as an agent of the 1st respondent or with the knowledge and/or consent of the 1st respondent; (2) and was published by the 2nd respondent and (3) as an agent of the 1st respondent or with the knowledge and/or consent of the 1st respondent. In respect of the 2nd charge, the petitioner has submitted that the statement was published (1) by the 2nd respondent and (2) as an agent of the 1st respondent or with the knowledge and/or consent of the 1st respondent. In respect of the 3rd charge, the petitioner has urged that (a) the 2nd respondent published that false statement and (b) as an agent of the 1st respondent or with the knowledge and/or consent of the 1st respondent. There is a fourth charge in paragraph 6 of the petition. It is based on the 3rd charge (a) that the facts and circumstances set out in paragraph 5 constitute an illegal practice and false reports in newspapers within the meaning of section 58(A) of the Ceylon Parliamentary Election Order in Council 1946 as amended and (b) that the 2nd respondent committed this offence as an agent of the 1st respondent or with his knowledge and, therefore, the election

is null and void in terms of section 58(A) read with section 77(c) of the said Order in Council.

As regards the allegation against the 3rd respondent that he was the author of the article complained of in charge 1 appearing in paragraph 4 of the petition, the printer has not been called to say whether the Walter Jayawardena in P6 was, in fact, the 3rd respondent. There was no witness on the petitioner's side to link up this Walter Jayawardena with the 3rd respondent. The 2nd respondent who gave evidence denied any knowledge as regards whether the 3rd respondent was the author of the said article. In fact, though the article was purported to have been written by one Walter Jayawardena, there is not even evidence that, in fact, it was a Walter Jayawardena, not to speak of the 3rd respondent, who wrote the article. Therefore, the case against the 3rd respondent fails and is dismissed with taxed costs payable by the petitioner.

Mr. de Silva then urged that the 1st respondent is guilty (even without regard to the principle of agency through the 2nd respondent) for the reason that these 3 papers were in circulation along with P7, P16, P17 and P20 to P22; these papers contained only material beneficial to the 1st respondent and injurious to the petitioner; they carried the symbol of the U.N.P. with pictures of the 1st respondent and they carried information of election meetings, speakers and messages from well-wishers. There is no doubt whatsoever that these papers purported to be party papers published to benefit the 1st respondent. In fact, in P6, the paper "Jana Awiya" of 29.4.77, it claims to be an official organ of the central organisation of the U.N.P. in the Kalawana electorate. The 2nd respondent's evidence is an admission of the evidence given by the petitioner and his witnesses that "Jana Awiya" and "Kalawana Janatha" were in circulation during the time of the election in the Kalawana electorate. Mr. de Silva submitted that if it had been an isolated and an anonymous publication, it cannot be said that the 1st respondent had knowledge or consented to that publication, but, in this case, there has been an open claim to be a party paper with a certain regularity of publication and the name of the publisher has been given in some of these papers as the 2nd respondent. In addition, the only bill of election expenses submitted by the 1st respondent P3A had been printed in the same press in which P6 has been printed. There is further evidence that in the motorcade that passed the petitioner's office on 20th July, 1977, the 1st respondent was in it and when the petitioner followed that motorcade and the petitioner was met by several persons who had said that they had received P19 from the motorcade. He has, therefore, urged that there is a presumption that the 1st respondent was aware of the circulation

of these papers and there was a burden on the part of the 1st respondent to have disclaimed these false allegations during the election or made a complaint to the police or any person in authority about these false statements contained in the papers which purports to be the official publication of his if, in fact, he was not responsible. He further submitted that inasmuch as the 1st respondent has failed to give evidence disclaiming knowledge and/or responsibility, the Court should hold that the 1st respondent failed to do so for the reason that he could not contradict what these papers purport to be, namely, that they were, in fact, his party papers and that he had knowledge of the contents of these papers, especially the false statements made against the petitioner.

There is no direct evidence whatsoever that the 1st respondent had knowledge of these papers. Weragama and Gunaratne stated that the 1st respondent was in the motorcade, but the petitioner did not say so. I, therefore, give the benefit of the doubt and hold that it has not been proved that the 1st respondent was in that motorcade. There is, therefore, no link between P19 and the 1st respondent. The 2nd respondent denied that he ever brought to the notice of the 1st respondent the existence of these papers during the election. Therefore, the only evidence available against the 1st respondent is circumstantial evidence, namely, that these papers purported to be party papers and they contained election literature to assist the 1st respondent. I am unable to come to the conclusion from these circumstances that the 1st respondent, in fact, had knowledge of the existence of these papers. It is quite possible that he had knowledge and even probable that he had such knowledge, but I find it difficult to take the next step and hold it proved beyond reasonable doubt that he, in fact, had knowledge. It can well be that a party well-wisher can keep on publishing a series of papers eulogizing a candidate. He may publish the programme at election meetings, messages carrying pictures of the candidate and his bio-data, but all of these will not establish knowledge on the part of the candidate. The failure of the 1st respondent to give evidence may at best be considered an additional circumstance in the chain of circumstantial evidence against the 1st respondent unless the circumstantial evidence leads to the only one possible conclusion, namely, that the 1st respondent did, in fact, have knowledge. It is only thereafter that I can draw an adverse conclusion against the 1st respondent for his failure to give evidence.

Silva, J. stated in the case of *Premasinghe v. Bandara* ⁽¹⁾ as follows:—

“From all these decisions, barring that of Nagalingam, J. with which I have disagreed, it is reasonable to draw the following conclusions:—

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' 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."

With respect, I agree and hold that the duty is cast on the petitioner to prove beyond reasonable doubt knowledge or consent on the part of the 1st respondent and the petitioner has failed to do so.

I have not taken into consideration the message which purports to be that of the 1st respondent in P7 for the reasons:-

1. there is no proof that it was the 1st respondent who wrote that article.
2. there is no proof that 1st respondent saw that article, and
3. P7 was produced only to prove circulation and not for the proof of its contents.

Coming to the charges against the 2nd respondent, there is a vast mass of evidence against the 2nd respondent seeking to prove that he was responsible not only for the printing of these papers, but he had also published the papers in the sense of distributing the papers in the electorate. As regards oral evidence against the 2nd respondent, the most important witness for the petitioner was C. B. Senanayake. He stated that he had received from the hands of the 2nd respondent all the 3 papers that contained the offending articles, P6 of 29th April, 1977, on 30th April, 1977, at the Manana office; P18 from the same office from the 2nd respondent and P19 from the 2nd respondent on the road opposite the U.N.P. office at Manana. This witness was a counting agent for the petitioner. He addressed meetings for the petitioner. He made a complaint to the police when, according to him, the three respondents, along with others, had abused the complainant in front of his house on the night of 19.6.77.

His fortunes fluctuated with the change of Government, working in Manana or close to Manana when the petitioner was the member for the area and shunted to Welimada after the 1st respondent won the 1965 election. On the one hand, he was an ardent supporter of the petitioner and, on the other, he had reasons for a substantial grievance against the 1st respondent. His evidence was not trustworthy, not merely for the above reasons, but also because he was not honest in respect of several matters. He first stated that he made no complaint to the police. When he was confronted with the date, he said he could not remember. Then, he said there was no need for him to complain against the 1st respondent. When asked whether there was some incident opposite his house in 1977, he came out with the answer that he could not remember the date. He then gave no answer to what his age was in 1977. When he was confronted with his signature in the Information Book, for the first time, he admitted that he made a complaint against the 1, 2 and 3 respondents (pages 80 to 82). Strangely, his complaint was against even the 1st respondent who was alleged to have gone opposite his house and shouted: "ticket hora", "diary hora" and "harak hora", a most unlikely thing to be done by a candidate. According to him, he thought that these names, "diary hora", "ticket hora" and "harak hora" applied to the petitioner, and denied the suggestion of the 1st respondent's counsel that these referred to him for various acts that he had done during the course of the election campaign. Then, there are contradictions in his evidence. The witness stated that he collected P6 from the 1st respondent on 30th April, 1977, and thereafter handed over to the petitioner, whereas the petitioner stated that it was on the 29th morning that the witness gave the paper to him. The witness stated that he took P18 to the petitioner to the Katalana meeting and handed over to the petitioner at about 1:30 p.m. before the meeting started, and that he left the meeting before the meeting was concluded, whereas the petitioner stated that it was at the end of the meeting that the paper was given to him by the witness after he had spoken. In fact, the witness stated that he did not wait till the petitioner made his speech (page 92). I do not believe this witness.

I then have the evidence of witness John Singho. His evidence falls into a different category. He was a supporter of the Communist Party and had worked for that party. He says that he was dissatisfied with the petitioner because the petitioner did not assist him to have a friend of his, Davith Singho released from police custody. He had told the people in the neighbourhood that he would not work for the petitioner in the 1977 election; whereupon the 2nd respondent who was in the U.N.P. office at Watarawa called him and asked him to join the U.N.P. and work for that party. Thereafter, the 2nd respondent met

him in his house and told him that he would be given a job as a conductor when the U.N.P. came into power and at the 2nd respondent's request he went to Bentarakade and there the 2nd respondent asked him to make a statement to be published in his newspaper to the effect that he had joined the U.N.P. He was tempted by the offer of a conductor's job and he signed a statement dictated by the 2nd respondent on his own behalf written by another person. Sometime later he met Subaneris who told him about his article appearing in P6 and being distressed that though he gave a statement for publication, he was not given a copy of that paper, contacted the 2nd respondent at the Manana office and received a paper from him. He says that in addition, on a later date, he received a copy of P18 from the 2nd respondent at the Manana office although by that time the 2nd respondent knew that this witness had abandoned the U.N.P. and rejoined the Communist Party. This latter story is an utterly impossible story to be believed. The witness stated that his change of front took place for the reason that he discovered that there was no likelihood of his becoming a conductor with which he had upbraided the 2nd respondent. The evidence of this witness has the virtue of corroboration from P6 where his article appears. Had he not added the story of delivery of a copy of P18 to him by the 2nd respondent, I would have been inclined to consider his evidence, that the 2nd respondent collected from him the article in P6, favourably. But the subsequent story makes his evidence even as regards P6 suspicious. He is a man who had changed sides not once but twice, and he changed first because the petitioner would not do a wrong thing. I cannot place any reliance on his evidence implicating the 2nd respondent in this transaction. I, therefore, reject his evidence. It is also to be noted that Mr. de Silva stated that he was not depending on the evidence of this witness to prove the charge, but was merely leading the evidence as part of the transaction (page 140).

I have not considered so far the question whether there was, in fact, a U.N.P. election office at Manana. While the petitioner insisted that there was one, the 2nd respondent denied. A decision on this matter would have been necessary if I were to accept Senanayake's evidence, but I have held that his evidence is not worthy of credit. I have no hesitation in holding that there was, in fact, an election office at Manana. The petitioner stated that he saw a large board in the garden of Karunawathie to the effect: "U.N.P. ELECTION OFFICE." There is the admission of the 2nd respondent that Manana is the most important village in the entire Kalawana electorate and, in fact, forms the centre of that electorate. Not only the petitioner, but even the S.L.F.P. candidate had an election office at Manana. Above all, there is the evidence in P9 to P12A wherein the 2nd respondent

himself had informed the police that his address for the purpose of issuing a loudspeaker license was the U.N.P. Election Office, Manana.

As against all this evidence, the 2nd respondent stated that because the previous land owner had been penalised by acquisition of his land for the reason that he had given his land for an election office in 1970, people were frightened from giving their lands for the purpose of an election office in 1977. I am not impressed with this explanation. The 2nd respondent admitted that the U. N. P. workers were in the habit of meeting in the house of Liyanaratne in Manana whenever they had to discuss any matters. If Liyanaratne was not frightened to make his house available for party discussions, I am unable to understand this story of supporters being frightened of possible acquisition. Nor did it deter Karunawathie from working very hard for the 1st respondent as the president of the Kantha Samithi, so much so that she was rewarded with a J. Pship after the General Election. Nor did this deter others in other villages like Watarawa and Sinhalagoda from giving their lands for election offices and election meetings.

Yet another circumstance put forward by the 1st respondent was that Karunawathie's house was too small with a large number of residents, including a young woman and with two houses in close proximity to her house within the same garden, both of which were occupied by Communist Party sympathisers, so that it was not a likely place for a U.N.P. election office. I do not think that these circumstances could have proved an obstacle.

The 2nd respondent did give an explanation why he gave a false address that there was an election office at Manana, but I am not convinced that he is speaking the truth on this matter. It is difficult to believe that the central election office of the 1st respondent functioned at Delwala which was outside the Kalawana electorate and about 12 miles from Manana by road. Besides, if Delwala was the election office, I cannot see how there could be any difficulty for the police to communicate with the 2nd respondent at Delwala or to issue a permit to the Delwala address. I hold that there was a U.N.P election office at Manana.

I now proceed to the other evidence available against the 2nd respondent. There is the evidence of the petitioner that he saw a motorcade passing Manana at about 8 a.m. on 20.7.77 with the 2nd respondent in the leading jeep. When he followed that motorcade, he was stopped by various persons at various places who told him about the distribution of P19 and questioned him about it. The 2nd respondent stated that there was no motorcade of that sort but, in fact, he was at Delwala with the 1st respondent and several other

party supporters during the whole of that day. Karunawathie, too, supported the 2nd respondent. The 2nd respondent contradicted himself when he first stated that the first party left the 1st respondent's house after deliberation at about 6 p.m. but when he was questioned as regards the distances of the various polling booths which were scattered over a distance of 72 miles and that some of these villages were not accessible by motor vehicles, the witness turned round to say that people started leaving in batches after lunch. I do not think that in an electorate of this size any candidate would have taken the risk of summoning his polling agent miles away from the polling booths on the day before the election to give last minute instructions. I should think that instructions would have been given earlier and if there were any further instructions to be given, a messenger would have been sent for that purpose. It is, therefore, most likely that the 2nd respondent went to these various villages in the motorcade, that the petitioner spoke of, to make sure about the arrangements and to give further instructions. As between the petitioner and the 2nd respondent, I have no hesitation in believing the petitioner. The petitioner was careful to speak to only what he saw and heard personally and did not attempt to pad it with falsehoods. Thus, he spoke of a name board at Manana and nothing more. He spoke of the 2nd respondent in the motorcade, but not of the 1st respondent, even though the other witnesses spoke about it. His evidence was given with restraint and with due regard to the truth. On the other hand, the 2nd respondent evaded many questions with the formula 'I do not know', so much so that he answered questions which were well within his knowledge with the same formula. For example, as regards whether the party had a propaganda section; whether Nepo Singho drove the 1st respondent's car and so on, the answer was 'I do not know'. He contradicted his evidence on several matters and denied many things which he should be presumed to have known as the chief election agent of the 1st respondent. He was a witness of no mean intelligence, but floundered because he was trying to shield himself against the truth which he tried so hard to conceal. He did not impress me as a truthful witness. Therefore, I believe the petitioner's evidence that there was a motorcade on this day and that the 2nd respondent was in that motorcade. This motorcade is important because there is the petitioner's evidence that when he followed the motorcade, his supporters told him about the distribution of P19 and questioned him about it. I accept the evidence of the petitioner that Weragama and Gunaratne among others told him about the distribution of P19. It is not unreasonable to infer, therefore that P19 was distributed by some person from within the motorcade and whoever the distributor was, the 2nd respondent had knowledge of that distribution.

Weragama and Gunaratne are two witnesses who gave evidence on charge 3. Their evidence was that they received P19 at Pimbura and Sinhalagoda, not directly from the 2nd respondent, but from others to whom the 2nd respondent had handed over a heap of papers. Both admitted that they were members of the Communist Party. The evidence of Weragama is contradicted by the petitioner in that Weragama stated that he received this paper at 7.30 a.m. at Pimbura which is 7 miles away from Manana, whereas the petitioner stated that he saw the motorcade passing Manana at about 8 a.m. Weragama stated that he handed over to the petitioner the paper when the petitioner got down from his car in front of the office. Later, he said that he did not give the paper to him, but told him about it and that was on the verandah of the office. Both versions were contradicted by the petitioner when he stated that his car was stopped at Pimbura and he was shown the paper.

Gunaratne stated that the petitioner stopped the car on the road and he went up and spoke to him, whereas the petitioner stated that the witness stopped his car and showed him the paper. Mr. de Silva characterized these contradictions as minor. As they were party supporters, I took the view that these contradictions would affect the credit of these witnesses. However, on further consideration, I have decided to accept their evidence for the reason that there is corroboration of their evidence by the petitioner when he says that these two witnesses told him about the distribution of P19 when he followed the motorcade. As I have said earlier I find the petitioner a truthful witness. If Weragama and Gunaratne told the petitioner about the receipt of these papers, it is reasonable to infer that they received and read the papers before they spoke to the petitioner about it. They both stated that they saw the 2nd respondent hand over a bundle of this paper to some unknown person. On this matter, there is obviously no corroboration by the petitioner, but once again it is not unreasonable to infer that it was the 2nd respondent who was seen by the petitioner in the motorcade who handed over the papers to two unknown persons in these two villages for the purpose of distribution because the 2nd respondent was playing an important part in this election and, according to the imprint on P19, he was the publisher. I, therefore, hold that the evidence of these two witnesses that the 2nd respondent handed over a heap of P19 to two unknown persons is true.

Objection was taken to the admission of this evidence for the reason that these two names were not given in the summary of witnesses filed in accord with my order. Counsel for the petitioner stated that since the 2nd respondent did not hand over P19 to these two witnesses, "unknown persons" have been specified in the

summary because it was sought to prove that the distribution by the 2nd respondent was to unknown persons and that would satisfy the requirement of section 80B (d). I agree with the petitioner and admit this evidence. I hold it proved that the 2nd respondent distributed P19 at Pimbura and Sinhalagoda on 20th July, 1977.

P6, P18 and P19 bear the imprint that the publisher of those papers was Nimal Chandrasiri. It is the petitioner's case that Nimal Chandrasiri is the 2nd respondent which the 2nd respondent stoutly denied. The 2nd respondent contended that the information contained in the imprint is by itself no proof that it was he who published these papers in the absence of any evidence from the printer. I am in agreement with this submission, but I find that there is ample circumstantial evidence which go to establish beyond reasonable doubt that Nimal Chandrasiri referred to in the imprint is the 2nd respondent.

The 2nd respondent admitted that he saw the two copies of "Jana Awiya" but stated that he saw only the headlines. His explanation for his failure to read the rest is that he was hard pressed for time. This, I find difficult to believe; for, as the chief worker for the 1st respondent, it was his business to do everything possible to help the 1st respondent to succeed in the election. It was, therefore, his business to find time to read everything that would support his candidate. These papers are, after all, not very large but merely a matter of one or two sheets, and to say that he contented himself with reading the headlines and his curiosity did not extend to the contents of the paper is utterly incredible. In my view, it should have been his business to read the entire paper which, I am certain, he has done.

P7 is the paper which he admitted seeing the headlines. P7 contains a contribution by the 2nd respondent. It is thus difficult to imagine that he would not have read his own article, appearing in P7.

Counsel for the respondent submitted that no one ever cares to read the imprint in a newspaper. This is true, but election literature do not come within the category of daily newspapers. As the chief election agent, the 2nd respondent would have been concerned to know who this benefactor was, who did so much propaganda on behalf of his candidate, and when he did look into the paper to note the name of this benefactor, he would have been confronted with his own name. He admits that there was no other person by this name in Manana except for little boys whose names he would not know. If he was not the publisher, he would have been concerned that his name has been falsely given and one would expect him to rush to the 1st respondent with this information and, together with the 1st respondent,

one would expect the 2nd respondent to have taken all the necessary steps to disown this publication. In addition, I have held earlier, he was aware personally of the publication at least of P19 which, too, bears the imprint that he is the publisher.

As regards the "Kalawana Janatha", the 2nd respondent denied that he ever saw that paper, but there was one important admission made by him which once again goes to show that he is not speaking the truth. He admitted that some youth leaguers told him that "Kalawana Janatha" was being distributed in that area and that one of these papers contained information that several communist party sympathisers were joining the U.N.P. Yet, this chief organiser for the 1st respondent's campaign wants me to believe that he was not interested in going through the papers to find out who these persons were who were crossing over into his party. Since some of these persons who crossed over could be important people who could carry a substantial weight in the election, the 2nd respondent could not but be interested to know the names of such supporters. He stated that he was satisfied with the information that he could obtain from the U.N.P. youth leaguers, but that should have been no bar to go through the paper itself. P6 is the paper that carried this information. According to the imprint on P6, the publisher's name was Nimal Chandrasiri. I believe the 2nd respondent saw not only P6, but even other copies of the "Janatha." After all, it was his business to look for all literature that was published for and against the 1st respondent, to study them carefully and to do what he could to foster the campaign for the 1st respondent. The petitioner stated that when Senanayake came and told him about the "Kalawana Janatha", he told him to carefully collect all the literature published by the 1st respondent's supporters and to bring them to him. This is what any candidate and his important supporters would do. I imagine the 2nd respondent as an intelligent, young man in whom the 1st respondent reposed sufficient confidence to make him his chief election organizer would have done what any normal, reasonably prudent man would have done even as the petitioner did. All reasons lead only to one conclusion, that the 2nd respondent did have knowledge and that he was, in fact, the publisher of the papers P6, P17, P18, P19, P21 and P22.

Yet another matter that affects his credibility is his assertion that he never saw "Kalawana Tharuwa", the paper of the Communist Party. But, nevertheless, he admitted that it would have been necessary to find out false propaganda against his candidate, so that it could be refuted. I cannot understand how he could have refuted false propaganda if he did not make it a point to get hold of every single "Kalawana Tharuwa" that was published and assiduously study

every single content therein. He admitted that he knew this paper was in circulation within the electorate.

Yet another circumstance affecting his credibility would be the possible circumstance that the 2nd respondent appears to have earlier decided to father the publication of these papers on one Nimal Chandrasiri Attanayake. The first witness on his list P23 is the manager of the Sasthrodaya Press, Ratnapura, to produce all manuscripts submitted in respect of the publication of "Jana Awiya" and "Kalawana Janatha". The 2nd witness is the proprietor of Dodangoda Press to give evidence in respect of the printing of "Jana Awiya" and the 5th witness is Nimal Chandrasiri Attanayake. None of these witnesses was called by the respondent. When the 2nd respondent was questioned whether he gave instructions to cite these witnesses, he denied any knowledge. After some difficulty, he admitted that he knew Nimal Chandrasiri Attanayake, but he stated that he was a man from Wennappuwa. Although he met him after this action was filed, he said he did not even speak to him though his name appears on the list as a witness. He could not give any explanation why these names of persons appeared on his list. I think that Mr. de Silva's submission that originally the respondent had decided to place evidence that it was this Chandrasiri Attanayake who was the publisher of these papers and later abandoned that decision probably because he could not establish it is quite plausible.

A person is said to publish when, *inter alia*, he puts anything into print for purposes of circulation. There is evidence that these papers were distributed in the electorate at election meetings and otherwise. The 2nd respondent himself admitted that youth leaguers told him of the circulation of this paper in different villages. Whoever the distributor be, the 2nd respondent himself as the publisher of the paper was guilty of publication of all material contained in the papers that he published, of which we are only concerned with P6, P18 and P19 which contained the three offensive articles. In addition I have accepted evidence that the 2nd respondent personally distributed P9 at Pimbura and Sinhalagoda.

These three articles had been described by the petitioner as false and malicious and in addition to his evidence, there is the evidence of Dr. Colvin R. de Silva who expressly denied the truth of the article appearing in P19. No attempt was made to prove the truth of any of these articles. There is not doubt that all these 3 articles were false to the knowledge of the 2nd respondent.

These articles were published obviously for the purpose of influencing the voters of that electorate against the petitioner. The

petitioners gave evidence to what extent that he and his supporters were concerned when P19 was distributed just a day before the election, because he would not be in a position to reject that false allegation in writing. Even the articles in P6 and P18 were damaging and that must be the reason why they were published. It is not possible to access to what degree these articles influenced the voters, but the very fact that they were published would support the contention that they were intended to influence the electors and that they did, in fact, influence the electors.

I find that the 2nd respondent committed corrupt practice of publishing false statements of fact in relation to the personal character of the petitioner within the meaning of section 58(1) (d) read with section 77 (c) of the Ceylon (Parliamentary Elections) Order in council, 1946, as amended on charges 1 to 3.

In respect of charge 4 based under section 58A, now that I held the 2nd respondent was responsible for the publication of the statement contained in charge 3, I am of the opinion that he is guilty of illegal practice under section 58A.

Mr. Gooneratne contended that this section should be read with section 80A (1) of the Order in council and all persons mentioned in this section, namely, "the proprietor, the manager, the editor, the publisher or other similar officer" should also have been made parties.

I do not agree with this contention. I find the 2nd respondent guilty on charge 4, too.

The 2nd respondent admittedly was the principal campaigner for the 1st respondent, living in 1st respondent's own house, looking after all his office work and organising all his political work and speaking at meetings. In fact, he admitted that he was the organising secretary. The 1st respondent has not chosen to give evidence in rebuttal of this evidence.

In the case of *Jayasena v. Illangaratne*⁽²⁾ Sirimane, J. stated as follows:—

"The law relating to agency in election matters is clearly set out in the oft quoted passage in the judgment of Channell, J. in the *Great Yarmouth case*⁽³⁾ "The law of agency in election matters has been very fully brought before us, and one thing which is quite clear – not only upon this question of agency but upon some of the other questions with which we have to deal – is that

the ablest Judges have always said that you cannot lay down definite rules applicable to all cases. But there are principles, and the substance of the principle of agency is that if a man is employed at an election to get you votes, or if, without being employed, he is authorised to get you votes, or if, although neither employed nor authorised, he does to your knowledge get you votes, and you accept what he has done and adopt it, then he becomes a person for whose acts you are responsible in the sense that, if his acts have been of an illegal character, you cannot retain the benefit which those illegal acts have helped to procure for you."

These principles must be applied to the facts of each case, and these facts have to be ascertained by the trial Judge.

One has also to remember that agency in election law has to be proved beyond reasonable doubt. As Meller, J. observed in the *Bolton case*⁽⁴⁾, "There is nothing more difficult or more delicate than the question of agency, but if there be evidence which might satisfy a Judge, and if he be conscientiously satisfied that the man was employed to canvass, then it must be held that his acts bind his principal."

Dealing with the evidence relating to agency Blackburn, J. in the *Bewdley case*⁽⁵⁾ said, "I take it that in each case the Judge must bring common sense to bear upon it, and satisfy himself whether it is sufficient or not. I do not think that such a question as that would turn upon minute particulars as to what particular words were used or what particular thing was done, but upon the common sense broad view of it."

Adopting the standard of proof set down above, namely, proof beyond reasonable doubt, I am satisfied that the 2nd respondent functioned as the agent of the 1st respondent.

In the case of *Mohan Singh v. Bhanwarlal*⁽⁶⁾ Shah, J. stated as follows:-

"The next question to be considered is whether the publication of the leaflets amounts to commission of a corrupt practice within the terms of S. 123(4) of the Representation of the People Act, 1951. Section 123 sets out what the diverse corrupt practices recognised by the Act are. Clause (4) defines a corrupt practice by publication of false statements calculated to prejudice the prospects of a candidate's election. To bring a corrupt practice within the purview of cl. (4) there must be a publication by a candidate or his agent or by another person

with the consent of the candidate or his election agent: the publication must contain a statement of fact which is false and which the candidate or his agent believe to be false or does not believe to be true; the statement must be in relation to the personal character or conduct of the candidate; and it must be reasonably calculated to prejudice the prospects of the candidate's election. The expression "statement of fact" in S. 123(4) includes not only an express imputation but also an innuendo if one such may reasonably be raised from the language in which it is couched, and the manner of its publication."

Examining the case against the 1st respondent without regard to agency, I dismissed the case against the 1st respondent. The judgment quoted above makes it clear that when an agent is guilty of a corrupt practice, it affects the candidate without regard to the consent of the candidate.

Section 77 reads as follows:-

"The election of a candidate as a Member shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the Election Judge, namely:-

- (c) that a corrupt practice.....was committed in connection with the election.....by any agent of the candidate;"

I declare the election of the 1st respondent as a Member of the Kalawana seat to be void in law and that the 1st respondent was not duly elected to the said seat.

The 1st and 2nd respondents will pay taxed costs to the petitioner.

The petitioner will pay taxed costs to the 3rd respondent.

The Registrar will prepare the certificate required under section 81 to the effect that this election is void and the certificate required under section 82 that acts of corrupt practice as set out in the charges have been proved to have been committed and that the 2nd respondent committed these acts of corrupt practice.

Election declared void.